

The Corps Regulatory Program

Elizabeth Shelton and Kristy Farmer

Regulatory Specialists

TxDOT Environmental Conference

17 September 2014

Breakout Session 1 - Overview of Section 10
and 404 Requirements

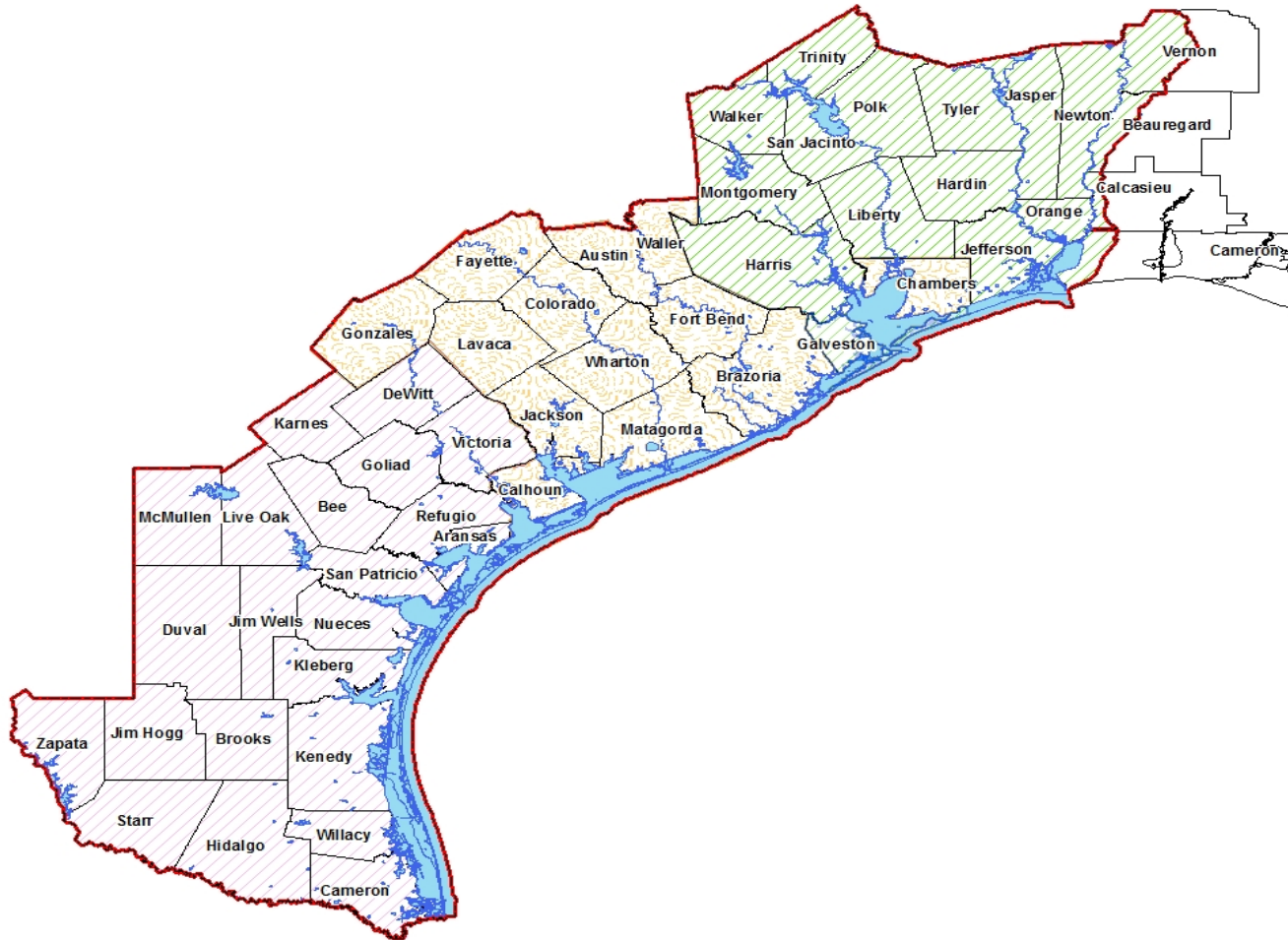


Outline of Topics

- Jurisdiction
- Wetlands and Waters of the U.S.
- What we regulate
- Mitigation for General Permits
- Permit Process for General Permits
- Application Submittal/Example Plans



Map of Galveston District



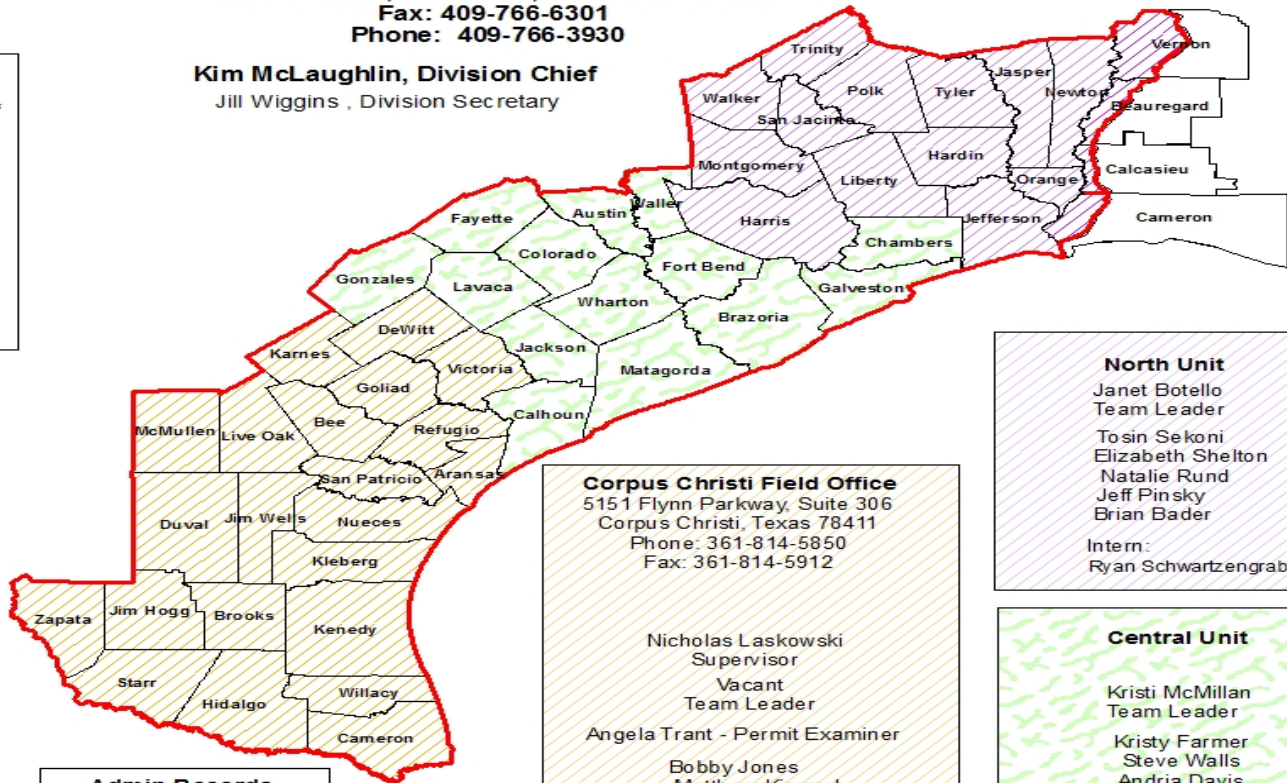
Galveston District Unit and Field Office Geographic Limits



GALVESTON DISTRICT'S REGULATORY DIVISION AREAS OF RESPONSIBILITY

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 2000 Fort Point Road, Galveston, Texas 77550
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Kristi McMillan
 Team Leader
 Kristy Farmer
 Steve Walls
 Andria Davis
 Anne Logwood
 Mark Garza

Regulatory Goals and Purpose

Goals

- Protect the Nation's overall aquatic environment
- Make fair and reasonable decisions for the regulated public
- Continually enhance the efficiency of the program

Purpose

- Protect Navigation
- Restore and maintain the physical, chemical and biological integrity of the Nation's waters



Regulatory Topics

Informational Videos

- Mitigation
- Regulatory 101
- Cumulative Impacts
- Cultural Resources
- Public Interest Review Factors
- Regulatory Process
- Alternative Analysis
- Section 404(b)(1) guidelines
- Wetland Delineation
- USACE HQ Civil Works Regulatory Program and Permits
- Regulatory Program Links
- Click on Video Library

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>



Jurisdiction

Regulations and Definitions

Section 10 – Rivers and Harbors Act of 1899

- all navigable waters of the U.S.
 - subject to ebb and flow of tide shoreward to the mean high water mark
 - presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce
- extends seaward to include all ocean waters within a zone three nautical miles from the coast line (the "territorial seas")

Section 404 – Clean Water Act of 1972

- "Waters of the United States, including the territorial seas" plus...
- Waters of the United States in 33 CFR 328.3(a)

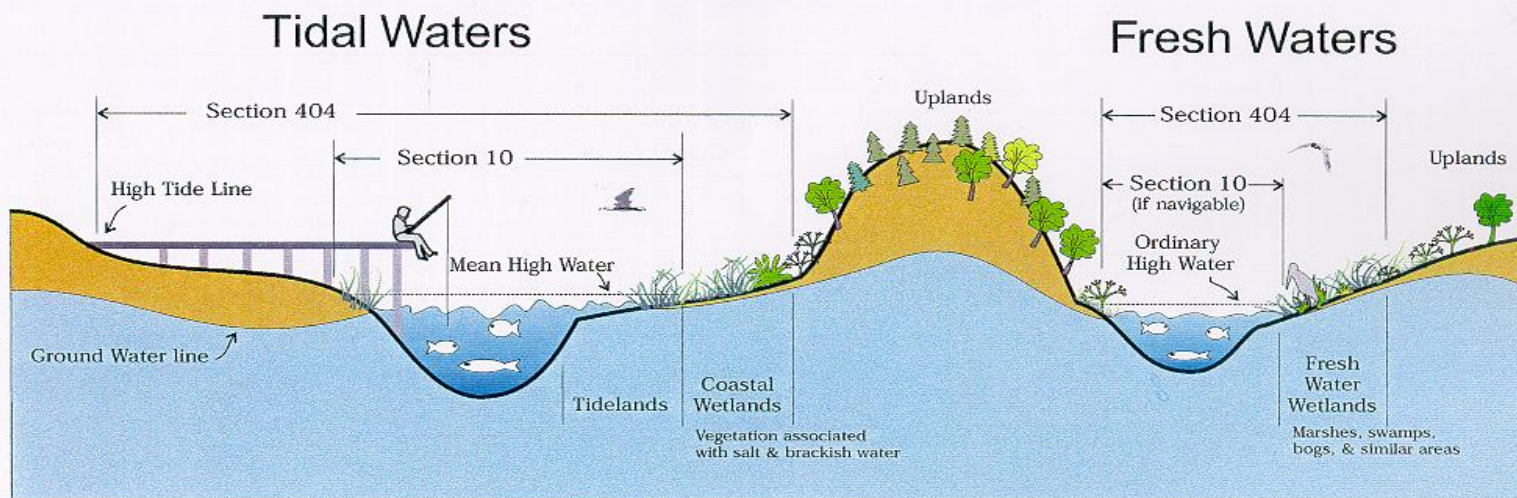


Jurisdiction (JD)

Section 10 – Rivers and Harbors Act of 1899

Section 404 – Clean Water Act of 1972

CORPS OF ENGINEERS REGULATORY JURISDICTION



Section 103
Ocean Discharge of Dredged Material
Typical examples of regulated activities
Ocean discharges of dredged material

Section 404
Disposal of Dredged or Fill Material (all waters of the U.S.)
All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

Section 10
All Structures and Work
Dredging, marinas, piers, wharves, floats, intake / outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.



Documenting Jurisdiction

(Section 10, 404, or both)

Approved Jurisdictional Determinations (AJD)

- Form used to document the amount and type of aquatic resources within the defined project boundaries that are subject to our regulations (Section 10, 404, or 10/404)
- May require coordination with EPA and Corps HQ
- Approved for 5 years
- Can be appealed through the appeal process as outlined in 33 CFR Part 331



Documenting Jurisdiction

(Section 10, 404, or both)

Preliminary Jurisdictional Determinations (PJD)

- Form that documents **ALL** aquatic resources that **APPEAR** within the defined project boundaries
- **ALL** aquatic resources will be considered to be jurisdictional for the purposes of permitting **and** mitigation
- Approved for 5 years

The Preliminary JD is not appealable, however an Approved JD can be requested at any time.



Waters of the U.S.

as defined in 33 CFR 328.3 and 40 CFR 230

Waters of the U.S.:

- 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: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Special Aquatic Sites:

- Sanctuaries and Refuges, Wetlands, Mud Flats, Vegetated Shallows (ex: Seagrass Meadows), Coral Reefs (ex: Oyster Reefs), Riffle and Pool Complexes



What is a Stream?

as defined in 33 CFR 328.3

- **Biological**

A body of water with a current, confined within a bed and stream banks

- **Regulatory**

A water of the U.S. including surface water tributary systems (including intermittent streams, and associated water bodies)





San Jacinto River at I-10 near
Baytown, Texas

What is a Wetland?

as defined in 33 CFR 328.3

- **Biology**

Hydrology = Water

Hydrophytic Plants = Plants Adapted for Wet Conditions

Hydric Soils = Soils Adapted for Wet Conditions

- **Regulatory**

A water of the U.S. defined as “those 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 generally include swamps, marshes, bogs, and similar areas.



Examples of Wetlands

Bottomland Hardwood Forested Wetlands



Freshwater Wetlands



Examples of Wetlands

Fringe Wetlands in a Riverine System



Salt Marsh



Galveston District Stream Assessment Tool

- Level 1
 - All Ephemeral and Intermittent Streams and for Impacts Less than 500 Linear feet to Intermittent Streams with Perennial Pools, Perennial Stream and Wadeable Rivers
- Level 2 - Interim
 - Assessment for Impacts Greater than 500 Linear Feet to Intermittent Streams with Perennial Pools, Perennial Stream and Wadeable Rivers



When do you use the Stream Assessment Tool?

- Anytime there is an impact to a stream
- Examples:
 - Concrete apron beneath bridges that traverse down the east bank, into the bed of the stream, and then up the west bank
 - Contouring of the banks of the stream to create a 3:1 or 2:1 slope profile
- Use the forms to establish the pre-construction condition of the stream and the post-construction condition of the stream
- Usually modification of one or more of the project components can avoid and reduce impacts to the stream



Wetland Identification and Delineation

- A tool that identifies the presence/absence, amount, and type of aquatic resources within the defined project boundaries
- The 1987 Wetland Delineation Manual maintains the technical guidance and procedures
- The regional supplements contain wetland indicators, delineation guidance, and other information specific to the particular region



What do we regulate?

Work, Structures, Fill

Rivers and Harbors Act of 1899

**Clean Water Act (CWA)
of 1972**

Section 10 – Requires permit from the Corps for **structures or work** in, or affecting, the course, location, or condition of a navigable water of the United States

Section 404 – Requires authorization from the U.S. Army Corps of Engineers to discharge dredged or **fill** material into waters of the United States



What is Fill Material?

as defined in 33 CFR 323

Any material placed in waters of the U.S.
where the material **has the effect** of
replacing any portion of a water of the U.S.
with dry land or **changing the bottom
elevation of any portion of a water**



Rivers and Harbors Act of 1899

Section 10

Structures



Work



Examples of Regulated Activities



Clean Water Act of 1972

Section 404



Examples of Regulated Activities



Examples of Regulated Activities



I-10 and I-45 interchange northwest of downtown Houston.



Examples of Regulated Activities



Anzalduas Bridge Construction, McAllen, Texas

PHOTO: Texas Comptroller of Public Accounts, Barbara Schlieff



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Mitigation

33 CFR 332

- Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs
- The Clean Water Act (CWA) Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands



How much Mitigation is Required?

- Sufficient to replace lost aquatic resource functions
- An appropriate functional or condition assessment method or other suitable metric that is available can be used for determination of the amount of compensatory mitigation required



How much Mitigation is Required?

- Through the NWP process **any** amount of impacts can require compensatory mitigation
- Any impacts above $1/10^{\text{th}}$ of an acre **will generally** require compensatory mitigation



Type of Mitigation

- Mitigation Banks
 - Regulatory In lieu Fee and Bank Information Tracking System (RIBITS)
<http://geo.usace.army.mil/ribits/index.html>
- In-Lieu Fee
- Permittee-Responsible Mitigation
 - Under a Watershed Approach
 - On-site and In-kind
 - Off-site and/or Out-of-Kind
- Watershed Approach (Preservation, Restoration, and/or Enhancement)



Types of Permits

General Permits (GP)

- For activities having minor impacts

Nationwide General Permits (NWP)

- Subject to Section 10 and Section 404 for specific activities)
- These permits are developed by USACE Headquarters
- Already issued to the nation and have been pre-coordinated with other agencies for water quality impacts, endangered species concerns, etc.
- Some permits require notification to the Corps = *Pre-Construction Notification (PCN)*
- Also has Regional Conditions for the Galveston District

Regional General Permits (RGP)

- Subject to Section 10 (for specific activities)
- These permits are developed by the USACE districts

Standard Permits (SP)

- For activities having **more** than minor impacts

Letters of Permission (LOP)

- Subject to Section 10 only
- These permits require a 15 Day Interagency Coordination
- Do not require Section 401 CWA Certification

Individual Permits (SP)

- Subject to Section 10 and Section 404
- The permits include a 15/30 Day Public Notice
- Requires all other elements of permit evaluation



Commonly used NWP's

NWP 3	Maintenance
NWP 7	Outfall Structures
NWP 12	Utility Line Activities (pipelines, power lines)
NWP 13	Bank Stabilization (bulkheads, riprap)
NWP 14	Linear Transportation Projects (roads, railways)
NWP 15	U.S. Coast Guard Approved Bridges
NWP 18	Minor Discharges (fill material)
NWP 19	Minor Dredging
NWP 25	Structural Discharges
NWP 33	Temporary Construction Access and Dewatering
NWP 35	Maintenance Dredging

Each project is unique, not all projects qualify for a NWP



NWP 14

Linear Transportation Projects

Authorizes the activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g. roads, highways, railways, trails, airport runways, and taxiways) and temporary structures, fills, and work necessary to construct the linear transportation project in waters of the U.S.

(Sections 10 and 404)



NWP 15

U.S. Coast Guard Approved Bridges

Authorizes discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Section 404)



NWP 33

Temporary Construction Access and Dewatering

Authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a section 10 permit if located in navigable waters of the United States.



NWP PCN Agency Coordination

General Condition 31(d)

Required for:

- All NWP activities that require PCN and result in loss of greater than ½ acre of waters of the U.S.
- NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed
- All NWP 48 activities that require pre-construction notification

Regional Conditions requiring agency coordination:

- Discharges proposed for authorization under NWP 3, 6, **7**, 12, **14**, **18**, 19, 25, 27, 29, 39, 40, 41, 42, 43, 44, 51, and 52 into Pitcher Plant Bogs and Bald Cypress-Tupelo Swamps.
- Discharges and work proposed in **tidal waters under NWP 14** and 18 require pre-construction notification. The Corps will coordinate these with NMFS.



Corps Permit Process



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Summary of the NWP process

- Assigned to Project Manager
- Jurisdictional Determination
- Review of project plans and determination of completeness
- Corps determines whether additional information or coordination is needed
- Determination if project meets the terms of the General Permit
- Internal Review
- Coordination of any outstanding issues
- Decision document and Verification Letter written



Summary of the SP process

- Assigned to Project Manager
- Jurisdictional Determination
- Review of project plans and determination of completeness
- Corps determines whether additional information and what type of coordination is needed
- Internal Review
- External Coordination/Public Notice
- Comments collected and forwarded to applicant
- Applicant responds
- Corps evaluates response and determines if additional information or coordination is needed
- Corps renders decision and issues permit authorization



Tips on Working with Corps

- Contact the Corps **EARLY** in project planning
- Attend pre-application meetings OR Joint Evaluation Meetings
- Be aware that heavy Regulatory Program workload may delay Corps decisions



Electronic Pre-application Permit Screening

- Corps will provide comments regarding the information provided usually in the form of an additional information request
- Can submit copies of your application through the electronic pre-application process
 - Response from Corps will only be a determination if your application is complete
 - Clock for NWP PCN will **NOT** be initiated
- NO pre-application jurisdictional verifications will be accepted electronically
- Application and attached documents must not exceed 5 MB.
- Documents must have sufficient resolution to show project details

To submit your request, please email
preapplication_swg@usace.army.mil



Joint Evaluation Meeting (JEM) Process

- Held 2nd Wednesday of each month from 9:30 am to 4 pm
- Participation is requested by Applicants
- Forum to meet with State and Federal Resource Agencies to discuss planned/proposed projects (pre- or post-application) i.e. EPA, NMFS, USFWS, TPWD, TGLO
- Topics include proposed impacts, pros/cons of proposed designs, suggestions to minimize environmental impact of projects, alternative project sites, potential compensation options (if required)



Special Conditions for TxDOT projects

- The permittee shall not initiate activities in the permit area associated with this permit, which **have not** previously been evaluated by the US Army Corps of Engineers (USACE) as part of the permit review for this project, until such work has been submitted to and approved by the USACE. Such activities include, but are not limited to, haul roads, equipment staging areas, and borrow and disposal sites. The permit area includes all waters of the United States affected by activities associated with the project, as well as any additional area(s) of non-waters of the United States in the immediate vicinity of, directly associated with, and/or affected by, activities in waters of the United States. Special restrictions may be required for such work. The permittee shall develop procedures to ensure that contractors are aware of this condition and encourage contractors to coordinate their selection of these sites with the permittee as soon as possible to avoid construction delays. The permittee, or its designated agent/contractor, may coordinate with the USACE on compliance with this special condition.
- The permittee shall conduct a meeting with the construction contractor or contractors detailing the terms and conditions of this permit prior to commencing construction activities of the project. The permittee shall notify the Galveston District of the pre-construction meeting at least two weeks in advance of the scheduled meeting. Within two weeks following the meeting, the permittee will also provide written confirmation to the USACE that the meeting was held.



Corps Application



**CLICK TO FILL OUT
A CORPS PERMIT**



Items to Include with the application

- Site Vicinity Map
- Plan and cross sectional views reflecting:
 - Named waterbody and/or all aquatic resources within the project boundaries
 - Acreage/Linear feet of the aquatic resource
 - Acreage/Linear feet of the impact to the aquatic resource
 - Mean high water or ordinary high water mark



Items to Include with the application

- Plan and cross sectional views reflecting:
 - Cubic yards of fill material (if applicable)
 - Wetland Delineation (if applicable)
 - Dimensions and cubic yards of material removed during dredging (if applicable)



Tools to Improve Review Timeframe

- Common Problems:
 - Project Plans with incomplete information
 - Lack of clearly identifiable limits of an aquatic resource
 - Lack of clearly identifiable impacts to the aquatic resource



What is going on here?

Can YOU read this text?

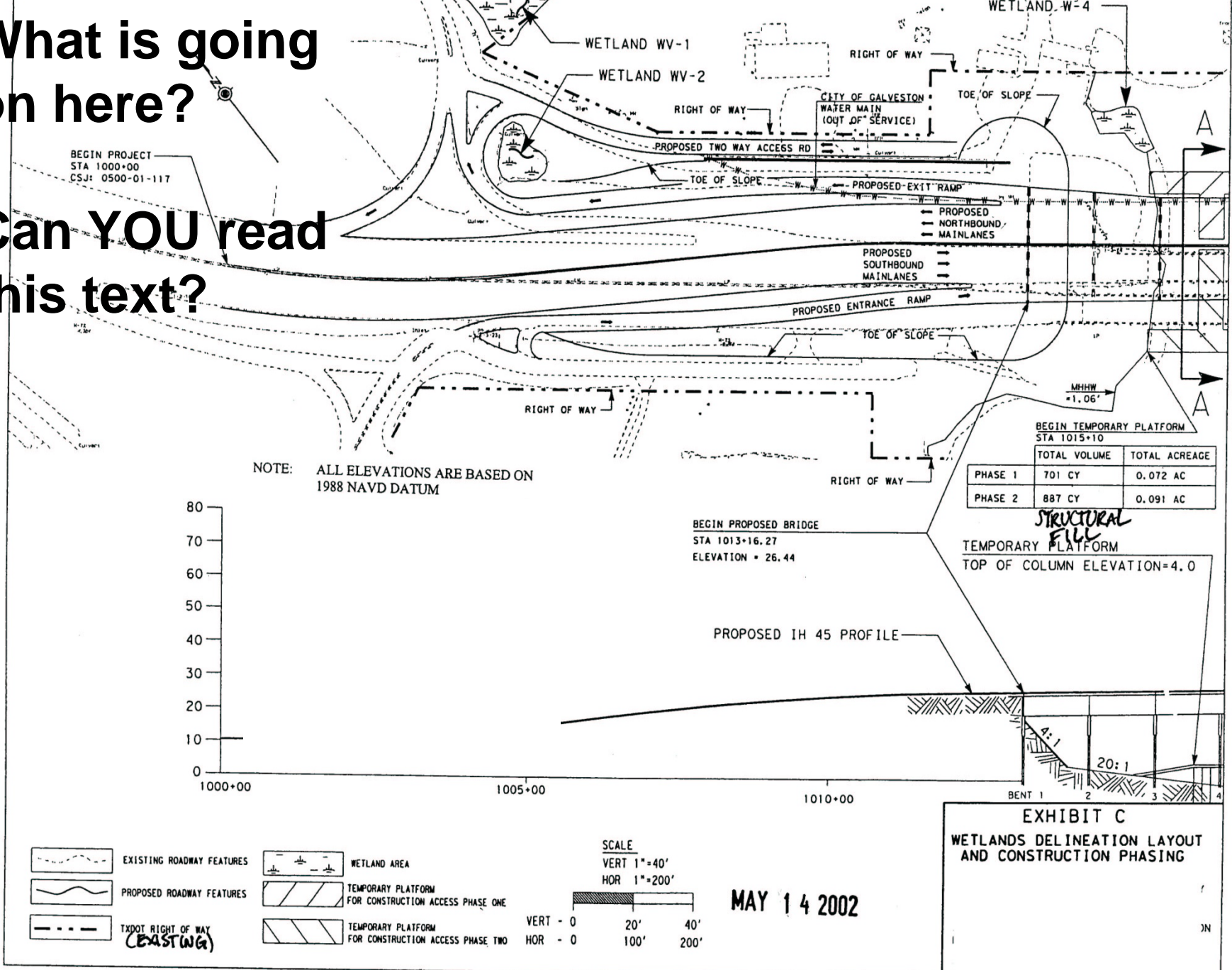
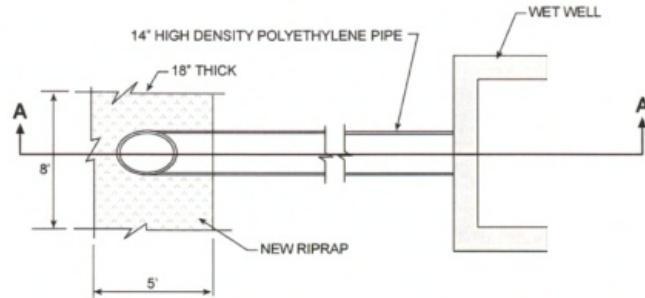
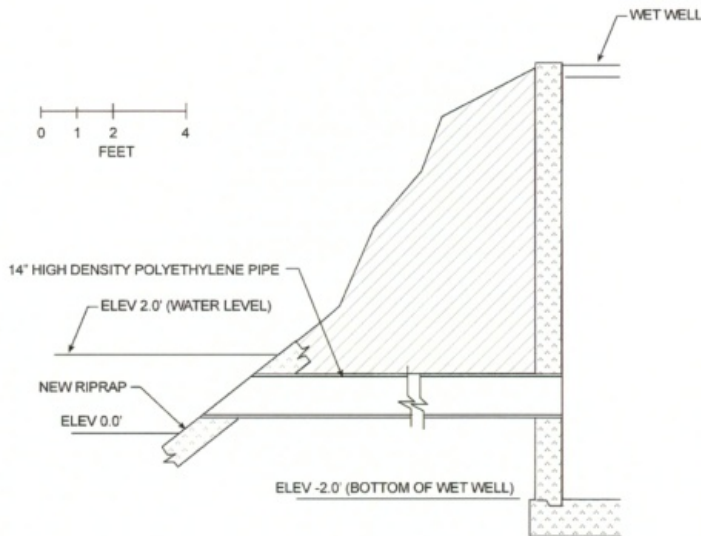


EXHIBIT C
WETLANDS DELINEATION LAYOUT AND CONSTRUCTION PHASING



TIRRELL FALLS WET WELL - TOP VIEW



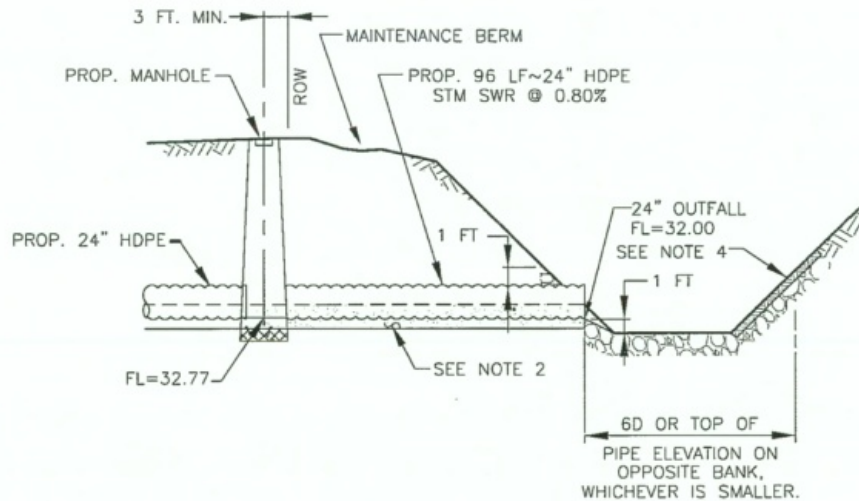
SECTION A - A

What kind of rip rap?

What size and cubic yards of rip rap?

The water level needs a reference datum. Our regulations lists MHW or OHWM.





STORM SEWER OUTFALL NOTES:

1. STORM SEWER OUTFALL PIPES WITHIN THE HCFCD RIGHT-OF-WAY SHALL BE CMP OR HDPE IN ACCORDANCE WITH SPECIFICATION SECTION 02642-CORRUGATED METAL PIPE, HIGH DENSITY POLYETHYLENE PIPE (HDPE) IN ACCORDANCE WITH SPECIFICATION SECTION 02505-HIGH DENSITY POLYETHYLENE PIPE, OR APPROVED EQUAL. USE TABLE BELOW FOR CORRUGATED GALVANIZED STEEL PIPE.
2. PROVIDE AND PLACE CEMENT STABILIZED SAND IN ACCORDANCE WITH SPECIFICATION SECTION NO. 02321-CEMENT STABILIZED SAND.
3. STORM SEWER OUTFALLS SHALL BE IN ACCORDANCE WITH SPECIFICATION SECTION 02316-STRUCTURAL EXCAVATING AND BACKFILLING.
4. RIPRAP SHALL BE PLACED IN ACCORDANCE WITH SPECIFICATION SECTION 02378-RIPRAP AND GRANULAR FILL. FILL RIPRAP VOIDS AND BURY RIPRAP A MINIMUM OF 6 INCHES WITH TOPSOIL ON SIDE SLOPE AS DIRECTED BY THE ENGINEER.

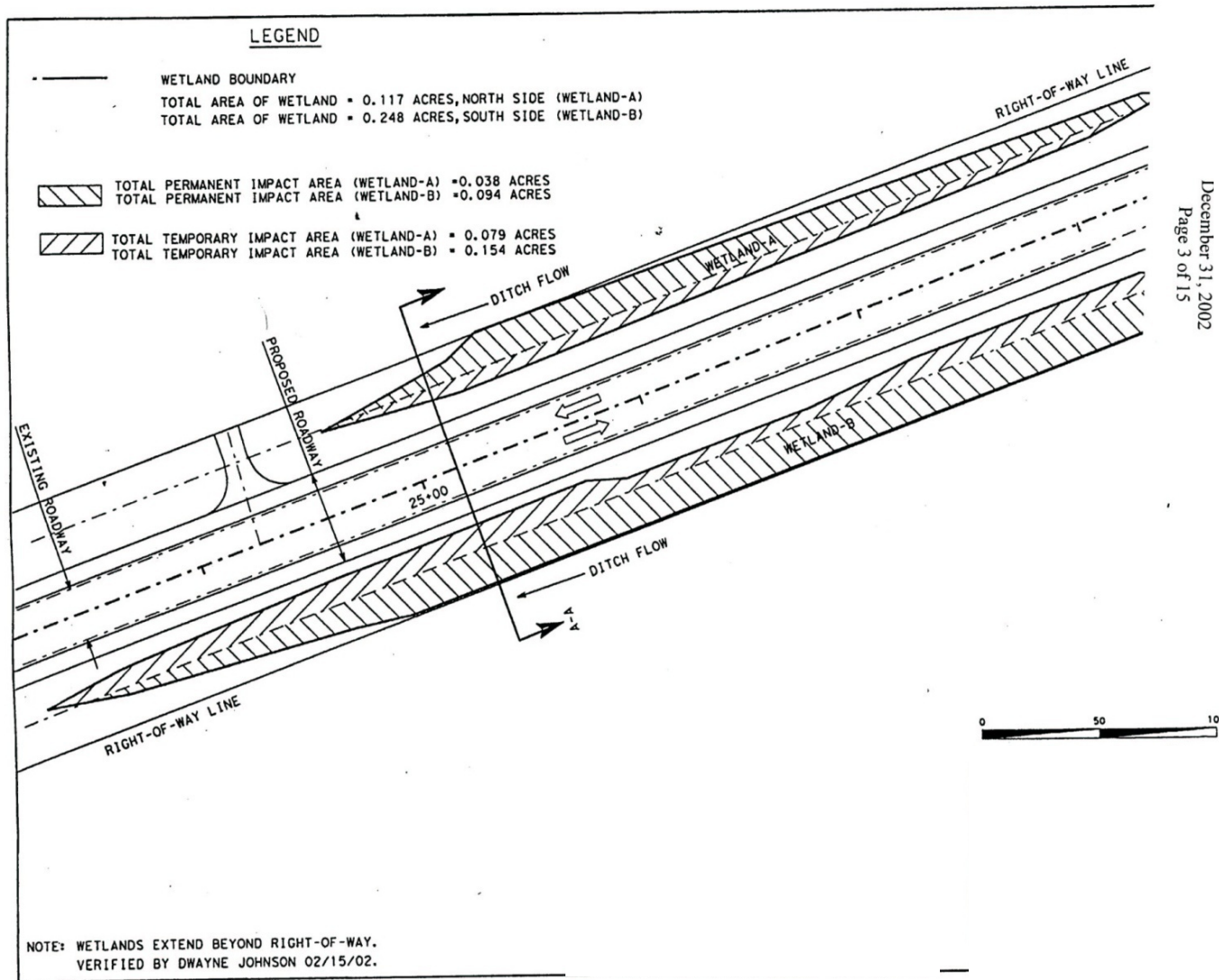
What is the name of the waterbody?

What is the water level – MHW/OHWM?

What is the size and cubic yards of the rip rap being placed for bank stabilization under the outfall?



Example Permitted Plans

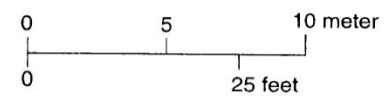
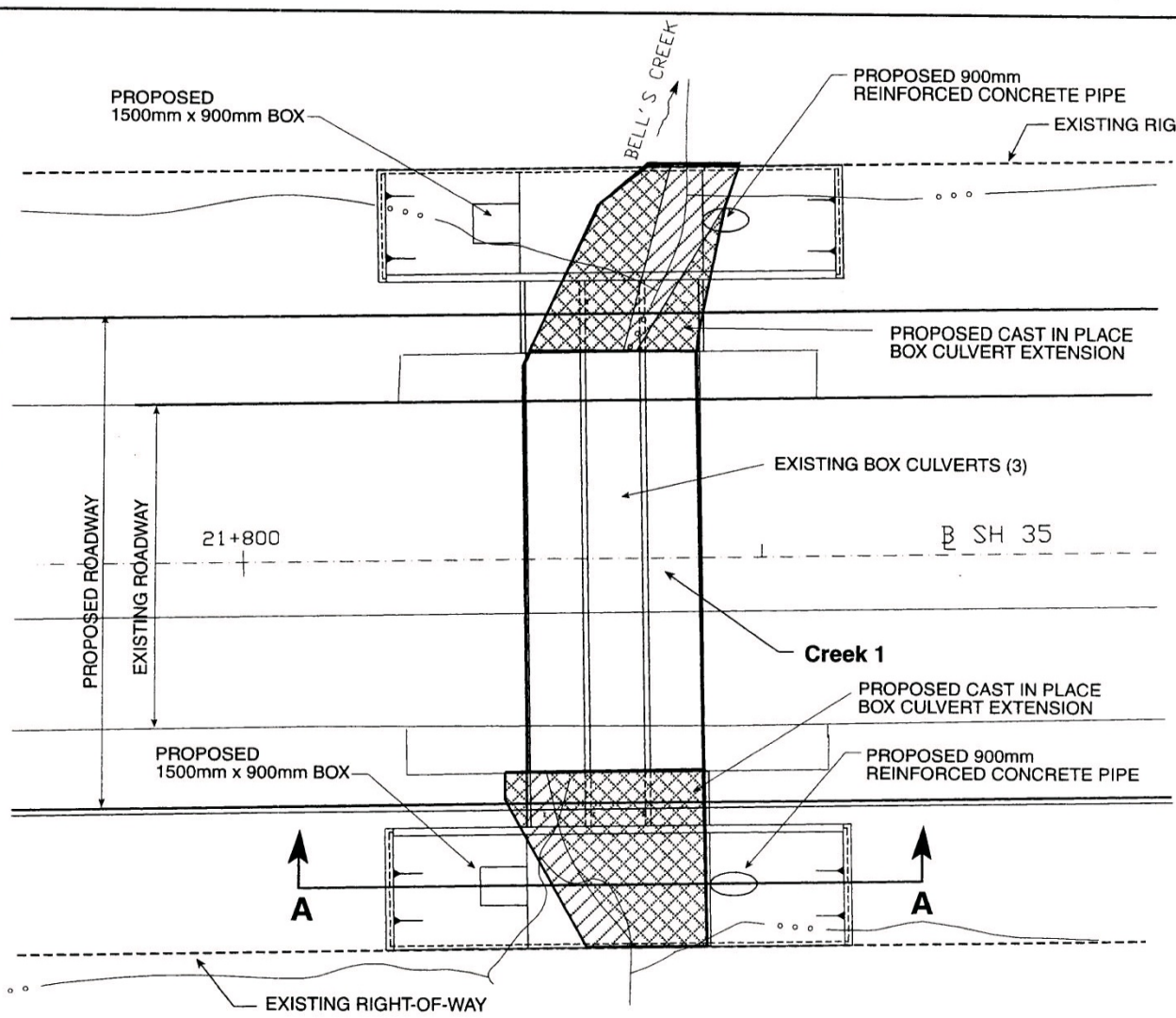


December 31, 2002
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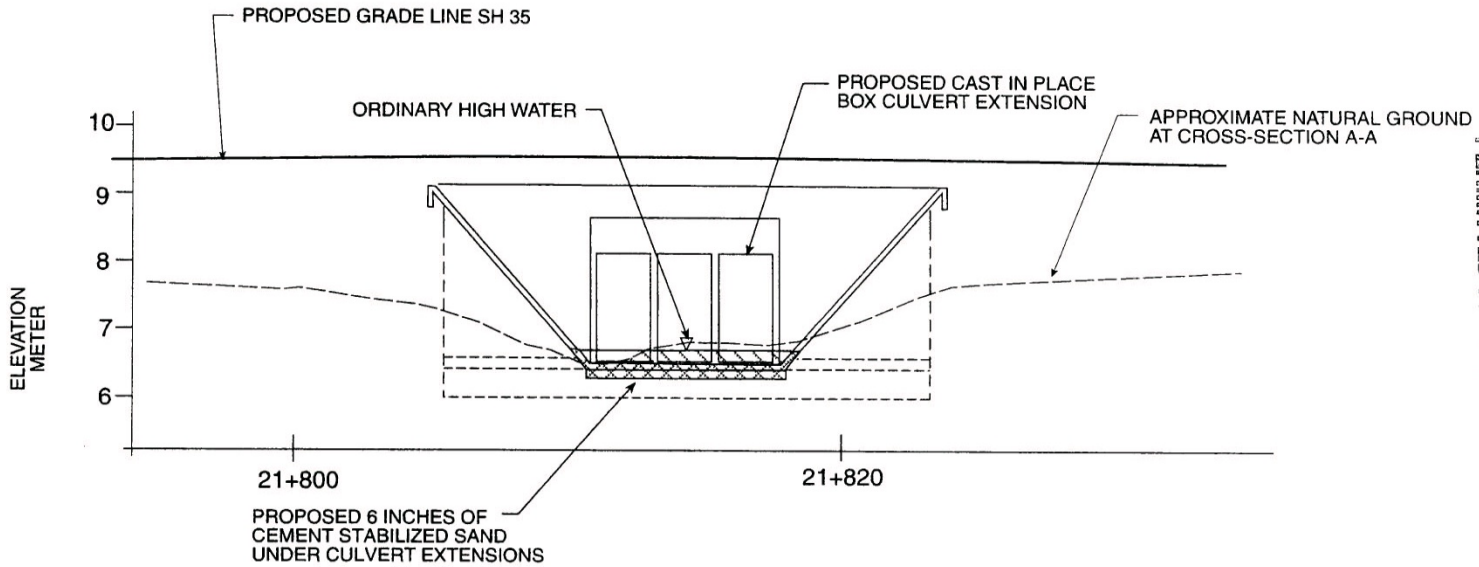
PERMITTED PLANS



- Legend**
- Excavation in Waters of the U.S.
 - Combined Excavation/Fill in Waters of the U.S.
 - Fill in Waters of the U.S.




JURISDICTIONAL AREA	EXCAVATION AREA	DIRT AND/OR STRUCTURAL FILL	JURISDICTIONAL AREA WITHIN ROW
Creek 1 (Bell's Creek)	0.02 Ac. (35 cy)	0.02 Ac. (14 cy)	0.05 Ac.

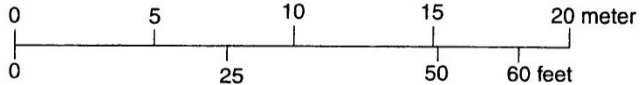
PERMITTED PLANS



SECTION A-A

Legend

-  Excavation in Waters of the U.S.
-  Combined Excavation/Fill in Waters of the U.S.
-  Fill in Waters of the U.S.



Tools to Improve Review Timeframe

- Better plans and maps
 - **8 ½ x 11 size** – no blueprint sizes in tubes
 - Reflect the impact to the jurisdictional water of the U.S.
- Participate in pre-application meetings to discuss the project and information that is needed for our review
- Participate in the JEM process to discuss the project with agencies



Summary

- Jurisdiction
- Wetlands and Waters of the U.S.
- Regulations (Section 10 and Section 404)
- Mitigation for General Permits
- Permit Process for General Permits
- Application Submittal/Example Plans



Questions ??

<http://www.swg.usace.army.mil/>



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ON TWITTER

www.twitter.com/USACEgalveston



ON YOUTUBE

www.YouTube.com/GalvestonDistrict



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ONLINE

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CONNECT WITH US!

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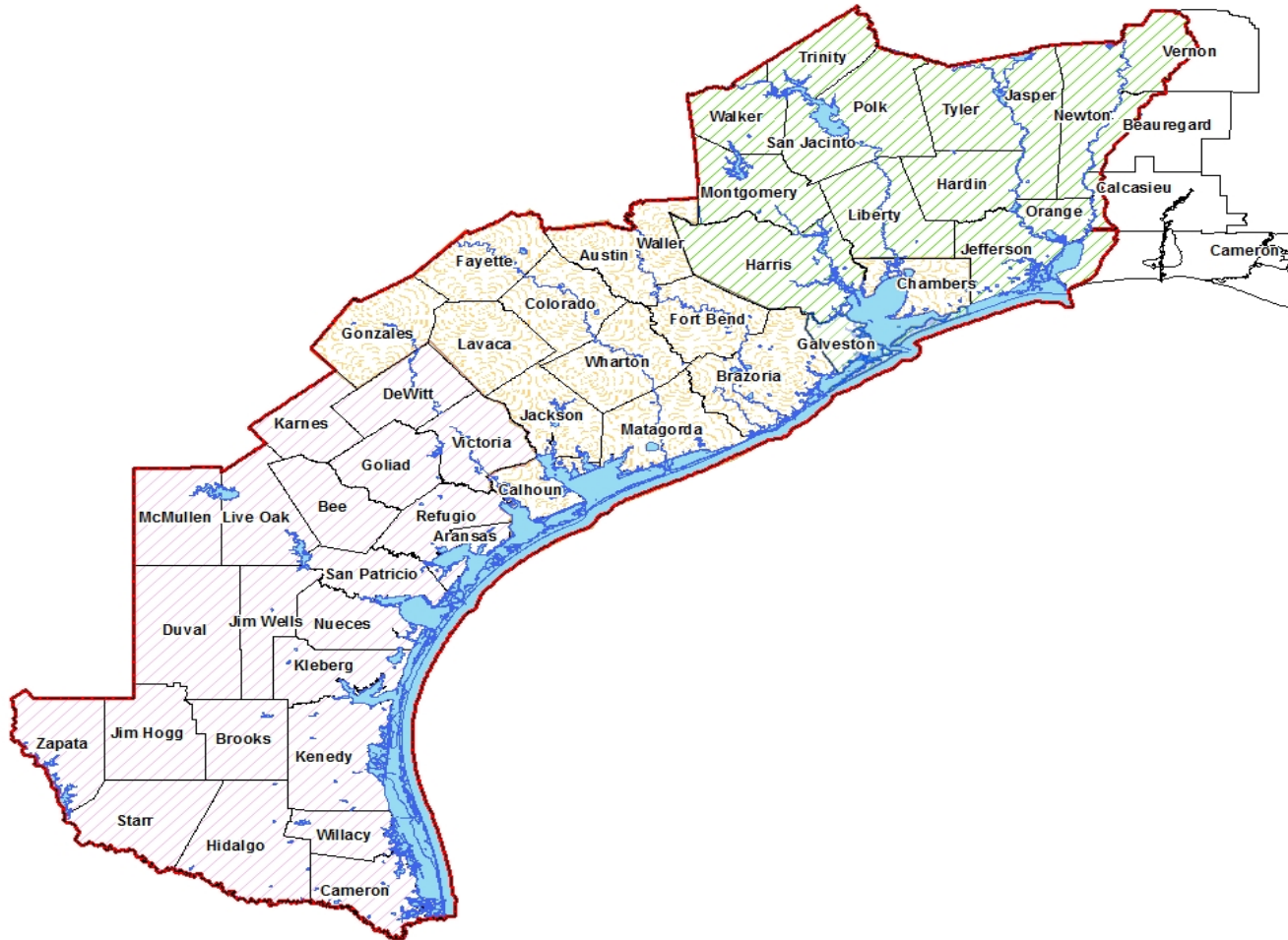


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- Jurisdiction
- Wetlands and Waters of the U.S.
- Galveston District Stream Tool
- What we regulate
- Permit Process for Standard (Individual) Permits (SP)
- Public Interest Review Factors
- Alternative Analysis
- Mitigation for SP
- EA/EIS and other NEPA Documentation



Map of Galveston District



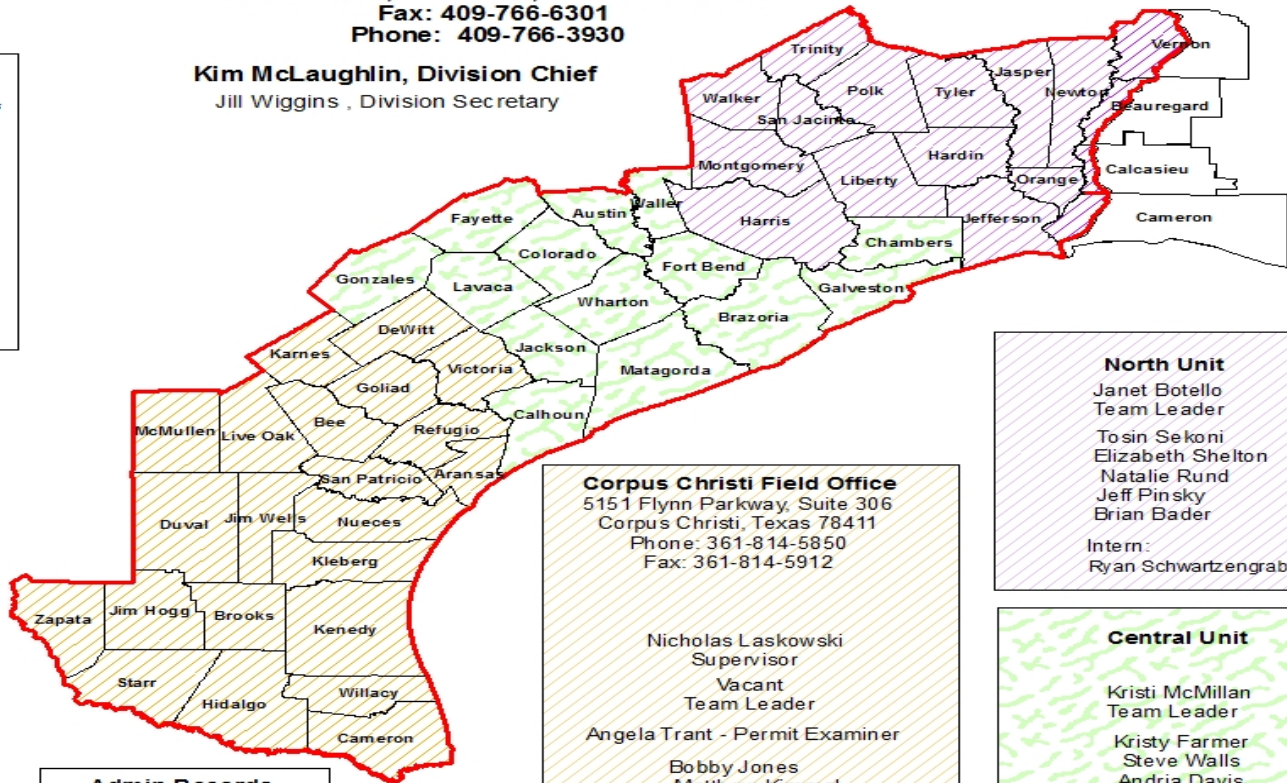
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- "Waters of the United States, including the territorial seas" plus...
- Waters of the United States in 33 CFR 328.3(a)

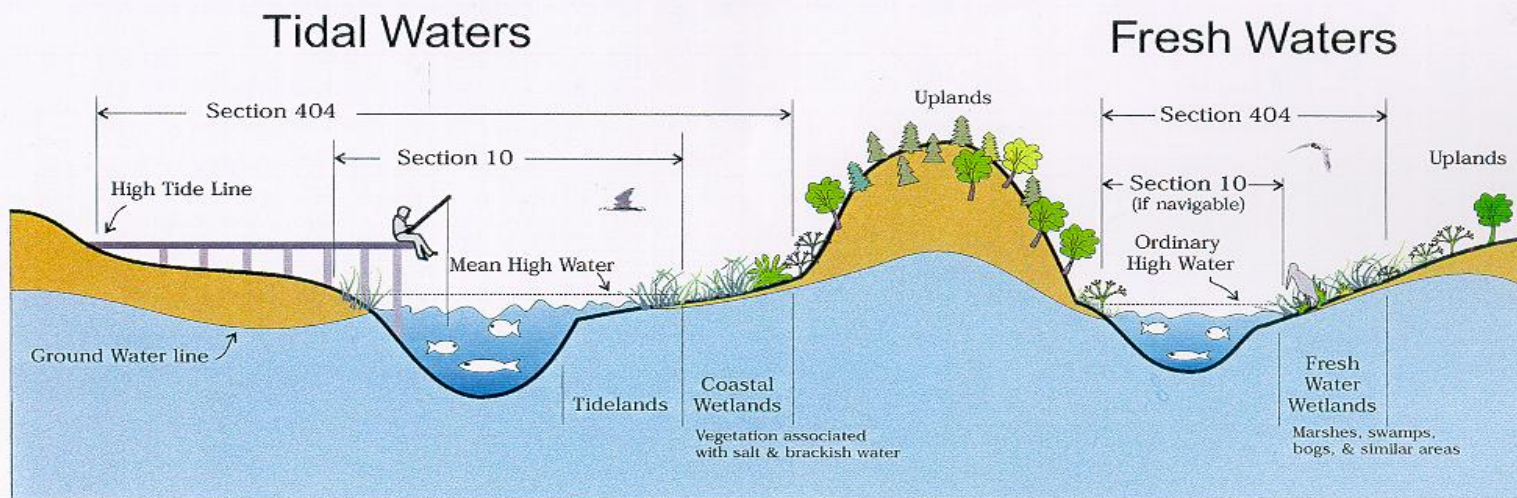


Jurisdiction (JD)

Section 10 – Rivers and Harbors Act of 1899

Section 404 – Clean Water Act of 1972

CORPS OF ENGINEERS REGULATORY JURISDICTION



Section 103
Ocean Discharge of Dredged Material
Typical examples of regulated activities
Ocean discharges of dredged material

Section 404
Disposal of Dredged or Fill Material (all waters of the U.S.)
All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

Section 10
All Structures and Work
Dredging, marinas, piers, wharves, floats, intake / outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.



Documenting Jurisdiction

(Section 10, 404, or both)

Approved Jurisdictional Determinations (AJD)

- Form used to document the amount and type of aquatic resources within the defined project boundaries that are subject to our regulations (Section 10, 404, or 10/404)
- May require coordination with EPA and Corps HQ
- Approved for 5 years
- Can be appealed through the appeal process as outlined in 33 CFR Part 331



Documenting Jurisdiction

(Section 10, 404, or both)

Preliminary Jurisdictional Determinations (PJD)

- Form that documents **ALL** aquatic resources that **APPEAR** within the defined project boundaries
- **ALL** aquatic resources will be considered to be jurisdictional for the purposes of permitting **and** mitigation
- Approved for 5 years

The Preliminary JD is not appealable, however an Approved JD can be requested at any time.



Waters of the U.S.

as defined in 33 CFR 328.3 and 40 CFR 230

Waters of the U.S.:

- 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: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

Special Aquatic Sites:

- Sanctuaries and Refuges, Wetlands, Mud Flats, Vegetated Shallows (ex: Seagrass Meadows), Coral Reefs (ex: Oyster Reefs), Riffle and Pool Complexes



What is a Stream?

as defined in 33 CFR 328.3

- **Biological**

A body of water with a current, confined within a bed and stream banks

- **Regulatory**

A water of the U.S. including surface water tributary systems (including intermittent streams, and associated water bodies)



What is a Wetland?

as defined in 33 CFR 328.3

- **Biology**

Hydrology = Water

Hydrophytic Plants = Plants Adapted for Wet Conditions

Hydric Soils = Soils Adapted for Wet Conditions

- **Regulatory**

A water of the U.S. defined as “those 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 generally include swamps, marshes, bogs, and similar areas.



Wetland Identification and Delineation

- A tool that identifies the presence/absence, amount, and type of aquatic resources within the defined project boundaries
- The 1987 Wetland Delineation Manual maintains the technical guidance and procedures
- The regional supplements contain wetland indicators, delineation guidance, and other information specific to the particular region



Galveston District Stream Assessment Tool

- Level 1
 - All Ephemeral and Intermittent Streams and for Impacts Less than 500 Linear feet to Intermittent Streams with Perennial Pools, Perennial Stream and Wadeable Rivers
- Level 2 - Interim
 - Assessment for Impacts Greater than 500 Linear Feet to Intermittent Streams with Perennial Pools, Perennial Stream and Wadeable Rivers



When do you use the Stream Assessment Tool?

- Any time there is an impact to a stream
- Examples:
 - Concrete apron beneath bridges that traverse down the east bank, into the bed of the stream, and then up the west bank
 - Contouring of the banks of the stream to create a 3:1 or 2:1 slope profile
- Use the forms to establish the pre-construction condition of the stream and the post-construction condition of the stream
- Usually modification of one or more of the project components can avoid and reduce impacts to the stream



What do we regulate?

Work, Structures, Fill

Rivers and Harbors Act of 1899

**Clean Water Act (CWA)
of 1972**

Section 10 – Requires permit from the Corps for **structures or work** in, or affecting, the course, location, or condition of a navigable water of the United States

Section 404 – Requires authorization from the U.S. Army Corps of Engineers to discharge dredged or **fill** material into waters of the United States



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What is Fill Material?

as defined in 33 CFR 323

Any material placed in waters of the U.S.
where the material **has the effect** of
replacing any portion of a water of the U.S.
with dry land or **changing the bottom
elevation of any portion of a water**



Summary of the SP process

- Assigned to Project Manager
- Jurisdictional Determination
- Review of project plans and determination of completeness
- Corps determines whether additional information and what type of coordination is needed
- Internal Review
- External Coordination/Public Notice
- Comments collected and forwarded to applicant
- Applicant responds
- Corps evaluates response and determines if additional information or coordination is needed
- Corps renders decision and issues permit authorization



Informational needs above NWP application

- Project purpose and need
- Information to answer public interest review factors
- Alternative analysis



Public Interest Review Factors

33 CFR 320.4 (a)(1)

- Conservation
- Economics
- Aesthetics
- General Environment
- Wetlands
- Cultural Values
- Fish & Wildlife Values
- Land Use
- Flood Hazards
- Property Ownership
- Flood Plain Values
- Navigation
- Recreation
- Shore Erosion & Accretion
- Water Supply / Quality
- Energy Needs
- Safety
- Mineral Needs
- Food & Fiber production
- Needs / Welfare of People



404(b)(1) Guidelines-Alternative Analysis

40 CFR 230

- Purpose is to restore and maintain the chemical, physical, and biological integrity of waters of the U.S. through the control of discharges of dredged or fill material.
- Fundamental is the precept that dredged or fill material should NOT be discharged into the aquatic ecosystem UNLESS it can be demonstrated that the discharge will not have an unacceptable adverse impact either individually or cumulatively.
- NO discharge of dredged or fill material shall be permitted if there is a PRACTICABLE ALTERNATIVE to the proposed discharge that would have LESS ADVERSE IMPACT upon aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences
- Therefore you must demonstrate out of all available alternatives your proposed project is the LEAST ENVIRONMENTALLY DAMAGING PRACTICABLE ALTERNATIVE.



404(b)(1) Guidelines-Alternative Analysis

40 CFR 230

- If the activity associated with a discharge is proposed in a special aquatic site the activity **DOES NOT REQUIRE** access or proximity to or siting within the special aquatic site to fulfill its **BASIC PURPOSE** (i.e. not water dependent)
- It is assumed **PRACTICABLE ALTERNATIVES** are **AVAILABLE** unless clearly demonstrated otherwise
- It is also assumed all **PRACTICABLE ALTERNATIVES** that **DO NOT** involve a discharge into a special aquatic site are presumed to have a **LESS ADVERSE IMPACT** upon the aquatic ecosystem **UNLESS** clearly demonstrated otherwise
- For actions subject to NEPA, where the Corps is the permitting agency, the analysis of alternatives is required for NEPA environmental documents
- The NEPA document may address a broader range of alternatives than required to be considered under regulation



404(b)(1) Guidelines-Alternative Analysis

40 CFR 230

- Inherent assumption to guidelines is that a non water dependent project does NOT need to be built in a special aquatic site
 - i.e.: Roadway
 - basic purpose is vehicular transportation
 - it does not need to be built in waters of the U.S.
- It is assumed there are other practicable alternatives and locations that are available



404(b)(1) Guidelines-Alternative Analysis

40 CFR 230

- Permit can be NOT issued if it does not comply with the guidelines (33 CFR 320.4)
- Corps has final responsibility for determining compliance with the guidelines
- Must select “least environmentally damaging practicable alternative”
- Level of review commensurate to impact (RGL 93- 2)



404(b)(1) Guidelines-Alternative Analysis

40 CFR 230

- Corps Jacksonville District Source Book
Alternative Analysis Guidance
- [http://www.saj.usace.army.mil/Missions/
Regulatory/SourceBook.aspx](http://www.saj.usace.army.mil/Missions/Regulatory/SourceBook.aspx)



404(b)(1) Guidelines-Alternative Analysis

40 CFR 230

- Common problems:
 - The focus is not upon the LEAST ENVIRONMENTALLY DAMAGING PRACTICABLE ALTERNATIVE
 - The written documentation is more of a justification of your proposed project than an analysis of practicable alternatives
 - The alternative analysis cannot be reverse engineered
 - Cost is a factor in eliminating alternatives but cannot be the SOLE reason the alternative is eliminated
 - The perspective of FHWA EA/EIS alternatives is towards traffic flow, safety, cost, etc. NOT what alternative has the least environmental impact



Mitigation

33 CFR 332

- Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs
- The Clean Water Act (CWA) Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands



How much Mitigation is Required?

- Sufficient to replace lost aquatic resource functions
- An appropriate functional or condition assessment method or other suitable metric that is available can be used for determination of the amount of compensatory mitigation required



Type of Mitigation

- Mitigation Banks
 - Regulatory In lieu Fee and Bank Information Tracking System (RIBITS)
<http://geo.usace.army.mil/ribits/index.html>
- In-Lieu Fee
- Permittee-Responsible Mitigation
 - Under a Watershed Approach
 - On-site and In-kind
 - Off-site and/or Out-of-Kind
- Watershed Approach (Preservation, Restoration, and/or Enhancement)



Mitigation Banks

<u>Blue Elbow Swamp</u>	Single-Client	Approved
<u>Coastal Bottomlands</u>	Single-Client	Approved
<u>Daisetta Swamp</u>	Private Commercial	Approved
<u>Danza del Rio</u>	Private Commercial	Approved
<u>Gin City</u>	Private Commercial	Approved
<u>Greens Bayou</u>	Private Commercial	Approved
<u>Gulf Coastal Plains</u>	Private Commercial	Approved
<u>Katy Prairie Stream</u>	Private Commercial	Approved
<u>Lower Brazos River</u>	Private Commercial	Approved
<u>Mill Creek</u>	Private Commercial	Approved
<u>Pineywoods</u>	Private Commercial	Approved
<u>Spellbottom</u>	Private Commercial	Approved

RIBITS WEBSITE



<http://geo.usace.army.mil/ribits/index.html>

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Types of Mitigation

In-Lieu Fee Mitigation

- Payment to a trust fund in-lieu of, or in addition to, other forms of compensatory mitigation
- Sponsor must provide adequate assurances of success and timely implementation
- Permittee's mitigation obligation is fulfilled once the in-lieu fee has been paid. Operator assumes liability.



Types of Mitigation

Permittee-Responsible Mitigation

- Typically performed under a watershed approach
 - Considers landscape position and resource type in concert with determining the sustainability of the aquatic resource functions
- Includes protection and maintenance of terrestrial resources such as non-wetland riparian areas and uplands when those resources contribute and/or improve the overall ecological functioning of the aquatic resource in the watershed
- Preference for on-site and in-kind before off-site and/or out-of-kind



Types of Mitigation

Permittee-Responsible Mitigation

- Focus should be on the suite of functions provided by the affected aquatic resource
- DE may require riparian areas and/or buffers around aquatic resources where necessary to ensure viability of those resources. If buffers are required as part of the compensatory mitigation project, credit will be provided for those buffers.



Types of Mitigation

Preservation

- Protecting Environmentally Significant Land from being Impacted
 - Land should have similar habitat to the impacted site
 - Land should be in pristine condition
 - Use the appropriate quantitative assessment tools where available
- Determined by DE to be appropriate and practicable
- Preserved site will be permanently protected through an appropriate real estate or other legal instrument
- Preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities
- DE may require maintenance of riparian areas and/or buffers around aquatic resources where necessary
- Land should also have some risk of being developed or rare.
- Can't use land that already has some type of conservation easement, or is a protected park.



Types of Mitigation

Enhancement/Restoration

- Returning Impacted land back to higher quality habitat
 - Land should have similar habitat to impacted site
 - Land should be reasonably restorable

Environmental Easements

- Some Mitigation Areas Require Environmental Easements

Conservation Easement

- A third party holds the easement
- This third party must be a certified conservation easement holder

Deed Restriction

- Easement is filed with local County Court House
- This is usually used for private landowners with small mitigation



Corps NEPA Documentation

- The Corps generates an Environmental Assessment (EA) which evaluates and documents the environmental impacts and concludes with a “significance” determination if an EIS is or is not required
- If the project demonstrates compliance with the 404(b)(1) guidelines and also provides adequate compensatory mitigation then the conclusion of the EA is a mitigated Finding of No Significant Impact (FONSI)
- The EA takes the form of a decision document that concludes a decision to issue, issue w/conditions, or deny the permit application



FHWA EA/EIS and Corps Permitting

- Perspectives in NEPA Documentation from FHWA and Corps varies
 - FHWA – decisions made in best overall public interest based upon a balanced consideration of the need for safe and efficient transportation.....
 - Corps – which alternative is the least environmentally damaging practicable alternative
- History
 - Redbook (1992) – “Applying the Section 404 Permit Process to Federal-aid Highway Projects”
 - Executive Order 13274 (2002) – Environmental Stewardship and Transportation Infrastructure Reviews
 - Executive Order 13604 (2012)– Improving Performance of Federal Permitting and Review of Infrastructure Projects



Tools to Improve Review Timeframe

- Common Problems:
 - Project Plans with incomplete information
 - Lack of a researched and articulated alternative analysis
 - Lack of project purpose tied to alternative analysis
 - Lack of adequately considering and addressing public comments



Tools to Improve Review Timeframe

- Better plans and maps
 - **8 ½ x 11 size** – no blueprint sizes in tubes
 - Reflect the impact to the jurisdictional water of the U.S.
- Participate in pre-application meetings to discuss the project and information that is needed for our review
- Participate in the JEM process to discuss the project with agencies



Summary

- Jurisdiction
- Wetlands and Waters of the U.S.
- Galveston District Stream Tool
- What we regulate
- Permit Process for Standard (Individual) Permits (SP)
- Public Interest Review Factors
- Alternative Analysis
- Mitigation for SP
- EA/EIS and other NEPA Documentation



Questions ??

<http://www.swg.usace.army.mil/>



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