

HDR



# U.S. Army Corps of Engineers Regulatory Permitting & Application Process

Presented by:  
Amber Robinson, PWS



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# Overview

- 01 Regulatory Overview / Background
- 02 Definitions of Navigable Waters & Waters of the U.S.
- 03 Section 404/10 Permitting
- 04 Risk Reduction Permitting Strategies





01

# Regulatory Overview & Background

# USACE Regulatory Program Overview

- Sections 9 & 10 – Rivers & Harbors Act (1899)
  - Established USACE jurisdiction over navigable waters
- Section 103 of the Marine Protection, Research and Sanctuaries Act (1972) - Dredge material regulations
- Clean Water Act (1972) – Restore and maintain the physical, chemical and biological integrity of the Nation's waters (Waters of the U.S.)
  - Section 401 – Water Quality Certification (States, EPA, tribes)
  - Section 402 – Pollutant Discharge Elimination (EPA & States)
  - Section 404 – Dredge and Fill Activities (USACE & EPA)
- Litigation and Executive actions continue to shape policy



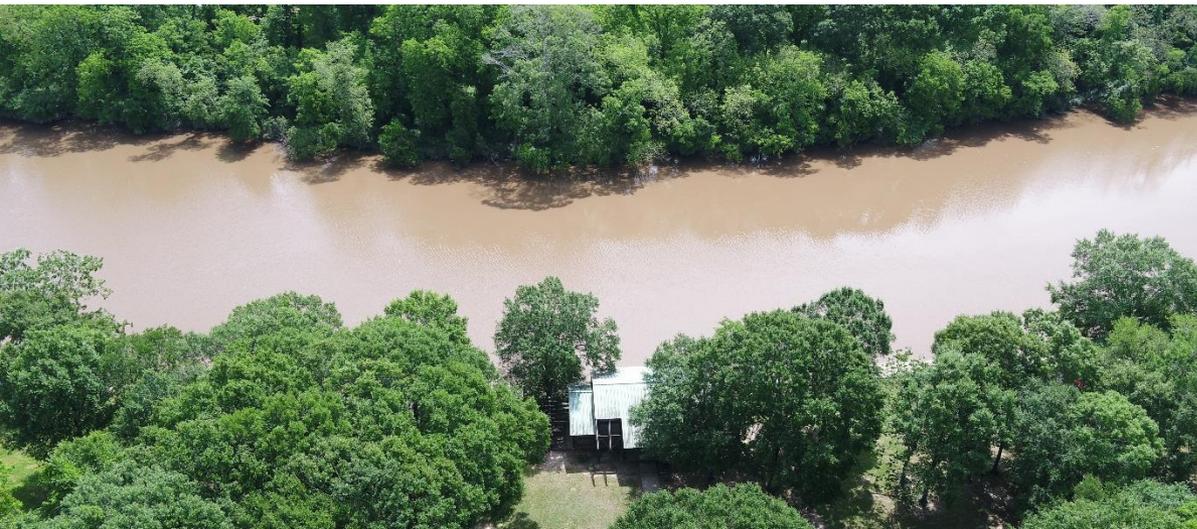


02

## Definitions of Navigable Waters & Waters of the U.S.

# Definitions: Waters of the U.S. [33 CFR 328.3(a)]

- Territorial seas
- All tidal, navigable in fact, traditional navigable waters (Section 9 & 10), and interstate waters
- All other waters (intrastate lakes, rivers, streams, mudflats, wetlands, sloughs, wet meadows, playa lakes, etc.) the use, degradation, destruction of which could affect interstate or foreign commerce
- Impoundments and tributaries of waters of the U.S.
- Wetlands **adjacent** to waters identified above.



# Post-Rapanos Guidance on Jurisdiction (pre-2015)

## Waters of the U.S.

- Traditional Navigable Waters
- Relatively Permanent Waters
- Impoundments of waters (i.e. ponds)
- Wetlands abutting / adjacent to streams
- Some drainage channels / ephemeral streams / isolated wetlands\*

*\*Require evaluation of “Significant Nexus” to a TNW*



# Wetlands

- CWA Section 404 regulations extended protection of “waters of the U.S.” to wetlands
- Affects more landowners & projects
- Wetlands are not static
  - May be difficult to define based on variability
- Delineation requires evaluation of hydrology, plants, and soils
- Not all wetlands are Waters of the U.S.
  - Status may change based on legal decisions and agency policy



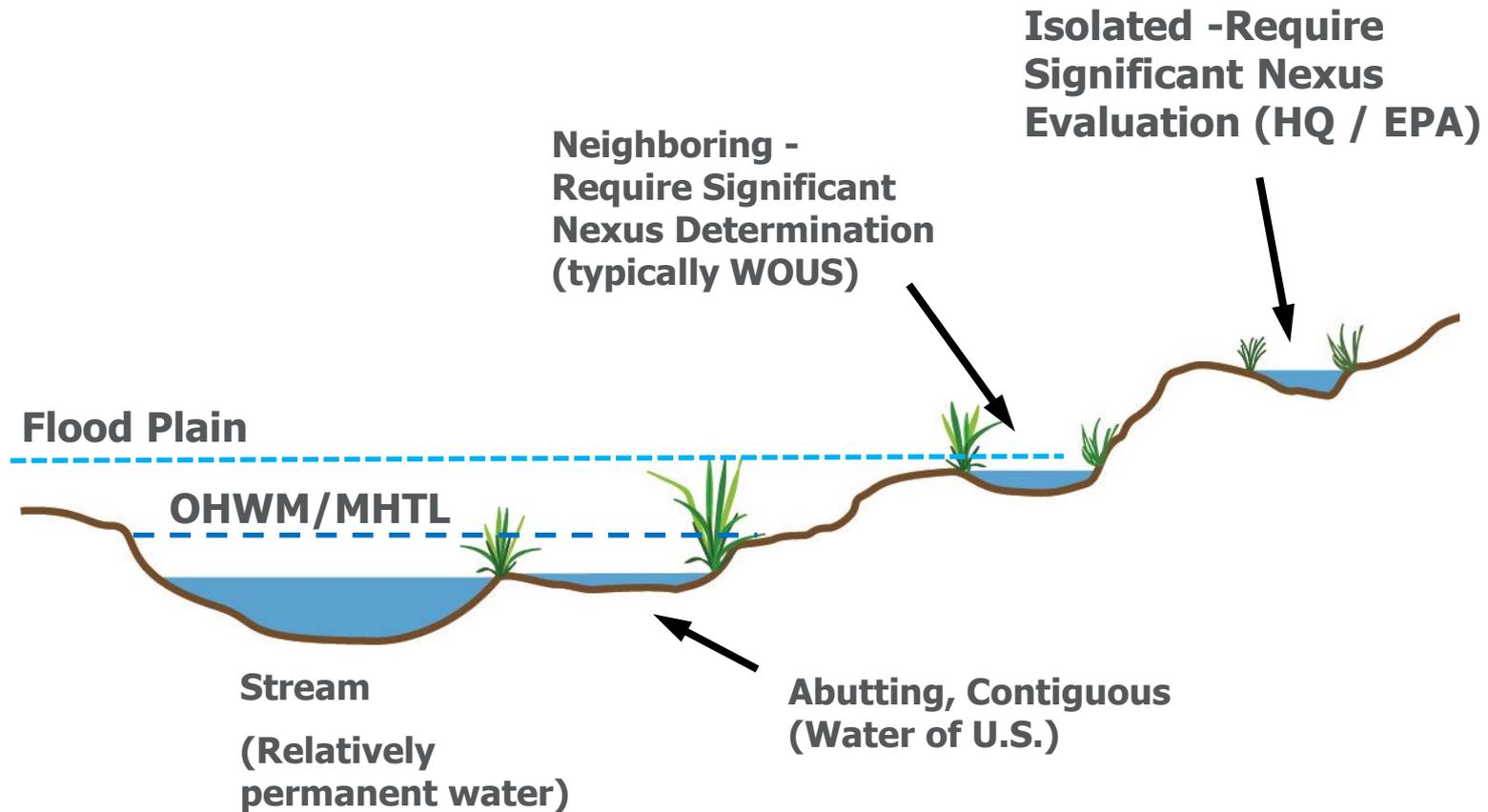
# Identification of Water of the U.S. 33 CFR 328.4

Limits defined by  
**specific physical**  
features

- High tide line in open tidal waters
- Presence of ordinary high-water mark in non-tidal waters
- Presence of appropriate hydrology, soils, and vegetation in wetlands

# Wetlands Jurisdictional Determinations

(based on pre-2015 Post-Rapanos Guidance)



# When are Wetlands Waters of the U.S.?

“Adjacent, contiguous, or neighboring”

- Emergent marshes
- Forested wetlands
- Floodplain depressions
- Fringe habitats



# Additional Guidance

**“Pre-2015” (December 2008) – Revised Rapanos Guidance (USACE & EPA) - three general criteria for defining adjacency:**

Unbroken surface or shallow sub-surface connection to a water of the U.S.

A physical separation from a water of the U.S. by man-made dikes, barriers, natural river berms, beach dunes, and the like

**Proximity** to a water of the U.S. is **reasonably close**, supporting the science-based inference of an ecological interconnection

# "What's in a 'ditch'?"

- Rapanos Guidance:
  - Ditches excavated wholly in and draining only uplands that do not carry a relatively permanent flow - generally not WOTUS
- Interpretation varies by USACE District
  - Relocation of natural tributary typically qualifies as jurisdictional
  - Ditch excavated below the OHWM of a WOTUS
  - Groundwater flow may cause ditch to be jurisdictional
  - Ditches through jurisdictional wetlands
  - Wetlands within upland ditch subject to USACE interpretation
  - Absence of regular maintenance often used in asserting jurisdiction over ditches with wetlands



# Recent Legal Decisions, Policy, & Guidance

June 2006	Rapanos & Carabell cases
June 2007	Rapanos guidance memorandum
April 2008	EPA / USACE Joint Mitigation Rule
June 2008	Regulatory Guidance Letter for Jurisdictional Determinations (JDs)
Dec 2008	Revised Rapanos guidance
2011 - 2015	2015 Clean Water Rule (WOTUS)
July 2015	Federal Court Stay on 2015 Clean Water Rule
Feb 2017	Executive Order to Revise Clean Water Rule
Dec 2018	EPA and USACE Propose WOTUS Definitions
Oct 2019	Agencies repeal WOTUS 2015
Jun 2020	<b>Navigable Waters Protection Rule (NPWR) Effective</b>
Jan 2021	12 NWRPs re-issued and 4 new NWRPs issued (effective March 15, 2021)
Aug 2021	<b>NWPR vacatur</b>

# Delineation VS. Jurisdiction Determination

- Delineations may be conducted by anyone (training helps)
- Delineations submitted to USACE as “Proposed Jurisdictional Determination”
- USACE verifies to provide a “Jurisdictional Determination” (Preliminary or Approved)



# Approved vs Preliminary Jurisdictional Determination (AJD / PJD)

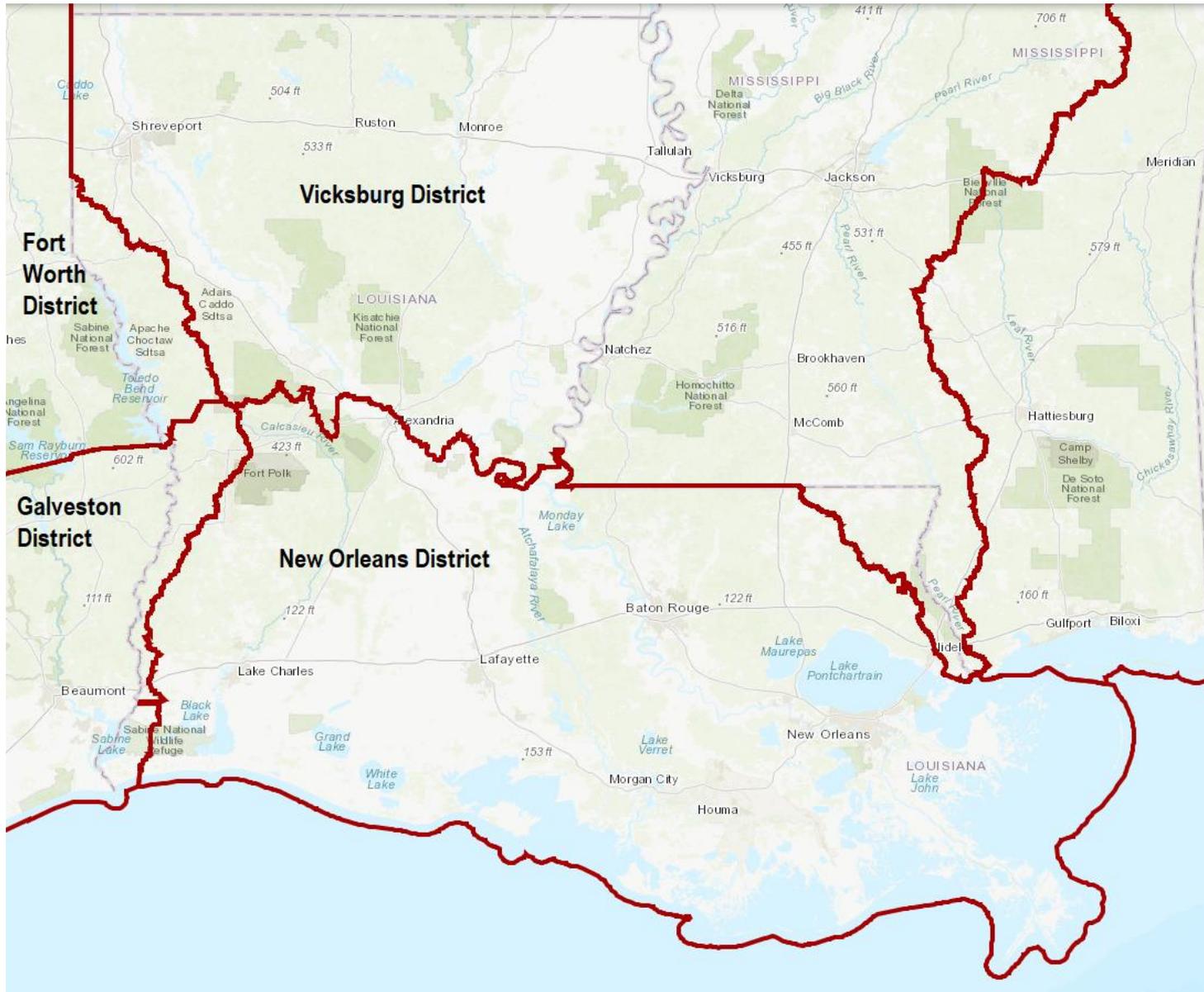
- Strategy for permitting will determine which determination used
- Approved JD is an official determination by USACE of what is and what is not a water of the U.S.
  - Default request/authorizes property access to USACE
  - Valid for five years
  - Appealable
  - May take a longer time based on complexity and USACE workload
  - Requires signed request with supporting information (report, forms, maps, etc)
- Preliminary JD is a determination that there “**may**” be waters of the U.S. at a site, so any aquatic features are considered potentially jurisdictional
  - Per applicant request only
  - Presence/extent only
  - No specified timeframe and not appealable
  - Shorter timeframe may allow permitting to move forward but require more mitigation



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## Section 404/10 Permitting

# USACE District Boundaries in Louisiana

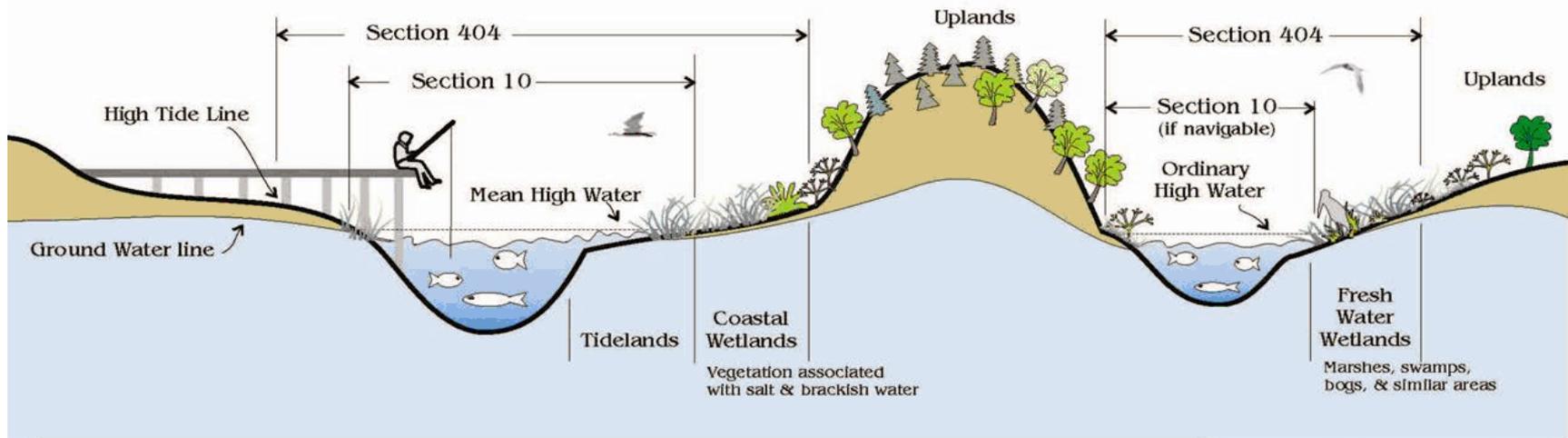


# When is an Activity Regulated?

## CORPS OF ENGINEERS REGULATORY JURISDICTION

### Tidal Waters

### Fresh Waters



#### Section 103

Ocean Disposal of Dredged Material

Ocean discharges of dredged material

Typical examples of regulated activities

#### Section 404

Discharge 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 (navigable waters)

Dredging, marinas, piers, wharves, floats, intake / outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.

# CWA – Section 10/404 Permit Types

Permit Type	Key Issues
<ul style="list-style-type: none"><li>• General Permits<ul style="list-style-type: none"><li>- Nationwide Permits (52)</li><li>- General Permit for State of Louisiana (15)*</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Minor impacts (&lt;0.5 ac)</li><li>• General conditions apply</li><li>• Shorter timeframe</li><li>• USACE coordination not always necessary</li><li>• Mitigation for &gt;0.1 ac</li></ul>
<ul style="list-style-type: none"><li>• Individual Permits</li><li>• Letter of Permission</li></ul>	<ul style="list-style-type: none"><li>• Greater impacts (&gt;0.5 ac)</li><li>• Detailed alternatives analysis (404[b]1)</li><li>• Longer timeframe</li><li>• Public or agency coordination required</li><li>• Mitigation required</li></ul>

\* RGPs often have greater impact thresholds versus NWP

# 2022 Nationwide Permits (Section 10 / 404)

## Example Impact & Notification Limits

- Variable Thresholds
- Complex compliance scenarios

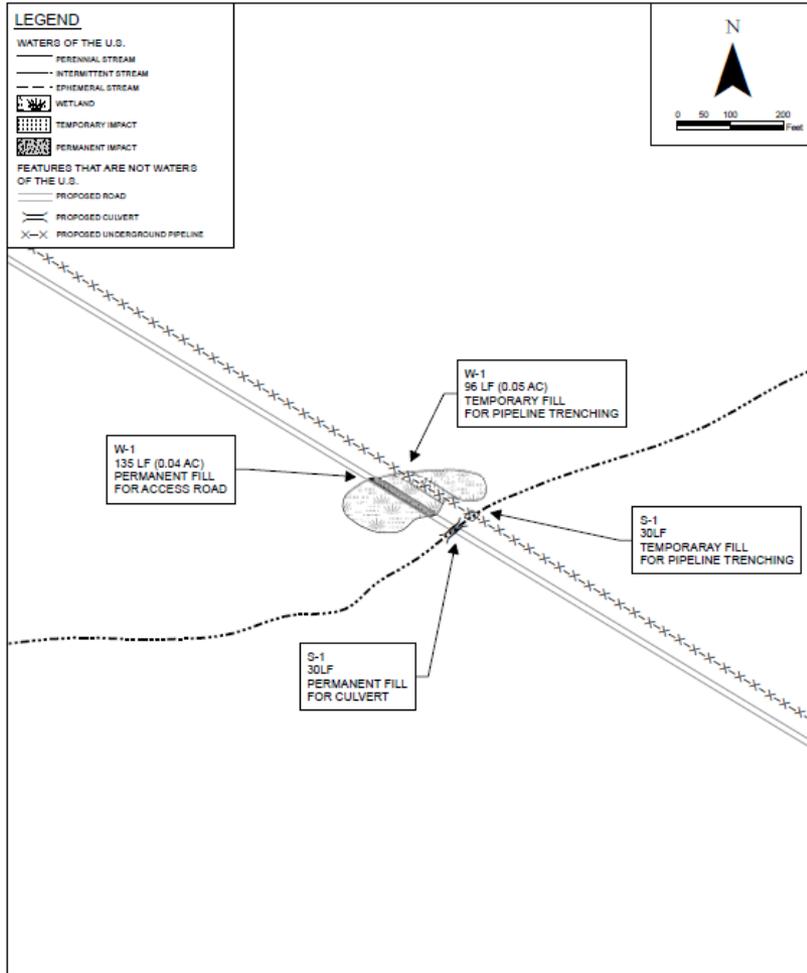
NWP	Impact Limit*	PCN Requirement
3 – Maintenance	<ul style="list-style-type: none"> <li>• 200 feet – sediment removal</li> <li>• No channelization</li> </ul>	<ul style="list-style-type: none"> <li>• Removal of sediment in vicinity or new riprap</li> </ul>
13 – Stream Stabilization Measures	<ul style="list-style-type: none"> <li>• &lt;500 LF, &lt;1 cu. yd / LF</li> <li>• No channelization</li> </ul>	<ul style="list-style-type: none"> <li>• Fill in special aquatic site</li> <li>• &gt;500 LF or &gt;1 cu. yd / LF</li> </ul>
14 – Linear Transportation Projects	<ul style="list-style-type: none"> <li>• &lt;1/2 ac non-tidal</li> <li>• &lt;1/3 ac tidal</li> <li>• Minimum channel modification necessary</li> </ul>	<ul style="list-style-type: none"> <li>• &gt;0.10 ac loss</li> <li>• Fill in special aquatic site</li> <li>• Fill in tidal waters (LA Condition)</li> <li>• 1 PCN crossing triggers full overview*</li> </ul>

\*Partial summary data for illustration purposes only . See Federal Register for full text and conditions.

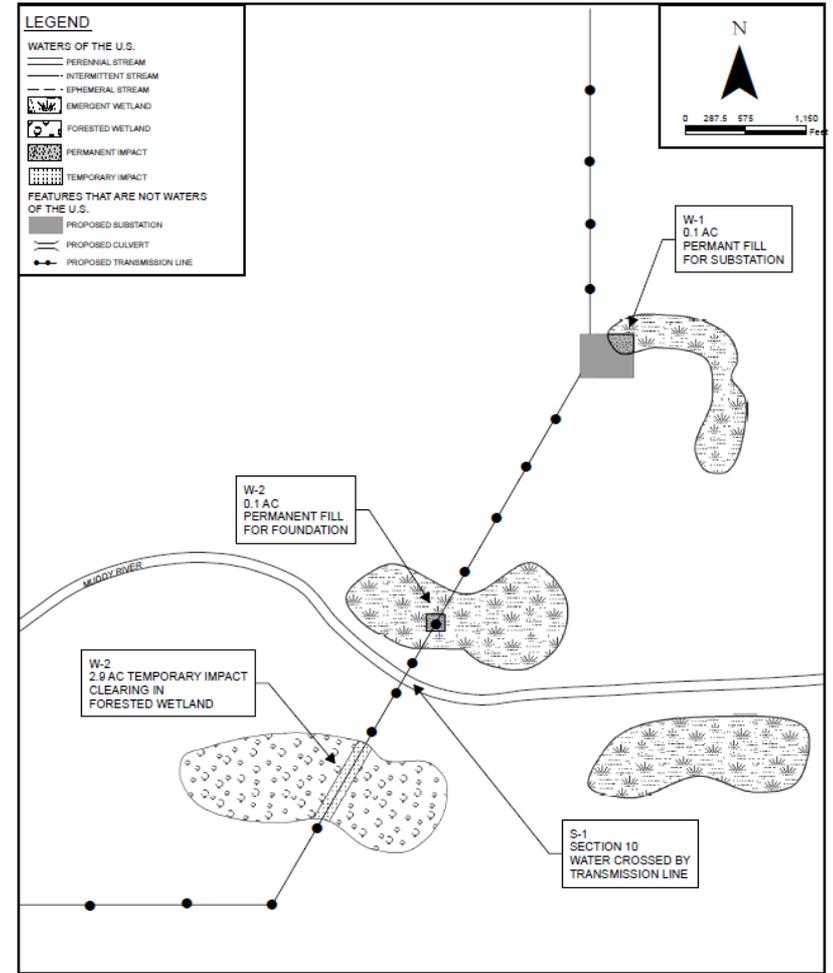
# Application and Pre-Construction Notification (PCN) Submittals

- Engineer Form 6082 and Permit Plats (i.e., vicinity, plan view and cross section)
- Applicant information / project background
- Delineation map & data sheets (sub-meter GPS standard) at minimum
  - Delineation Report maybe required for larger project areas
- Impact assessment and project exhibits ( $\geq 30\%$  design needed)
- Mitigation plan
- USACE has 45 days to approve/deny the NWP after receipt of complete application
- Develop PCN with NWP in mind and follow General and Regional Conditions when developing the application

# Example Permit Plats (Plan View)



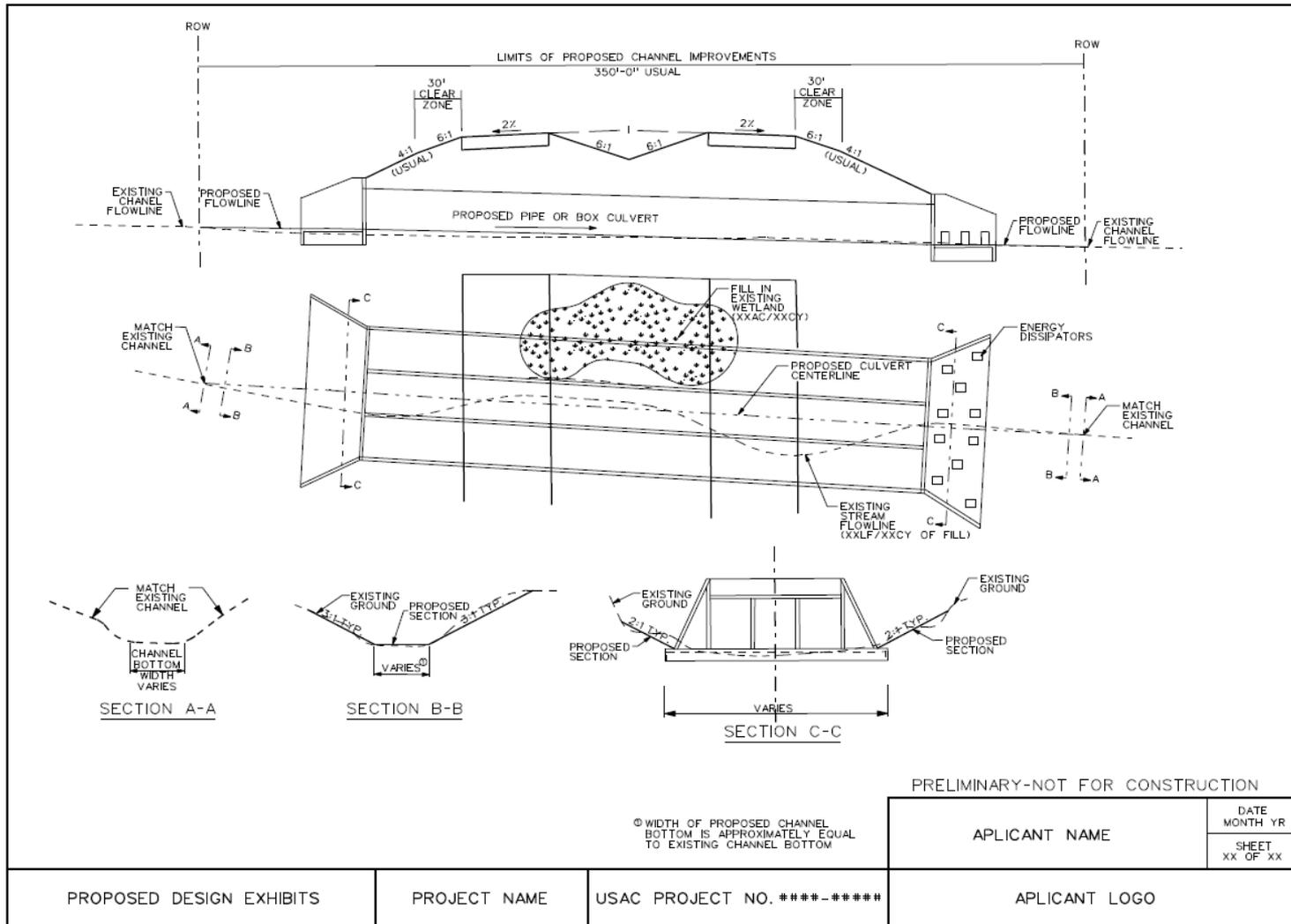
PROPOSED DESIGN EXHIBIT PROPOSED PROJECT NAME PROJECT LOCATION	USACE PROJECT NO.		APPLICANT NAME/LOGO
	DATE	SHEET X of X	



PROPOSED DESIGN EXHIBIT PROPOSED PROJECT NAME PROJECT LOCATION	USACE PROJECT NO.		APPLICANT NAME/LOGO
	DATE	SHEET X of X	

# Example Permit Plats

## Plan View and Typical Cross Section



# Do Your “Due Diligence”

1. What about No PCN NWP?
2. Not every project requires formal documentation (i.e. delineation report)
3. Use technical memo and provide a copy of NWP terms and conditions
4. Include supporting documentation in memo
5. Provide to Contractors/Field Staff as all permits received package



# Individual Permits/Joint Permit Application

For projects with more than minimal impacts (typically >0.5 acre, > 300 LF) – In the Coastal Zone – Joint Permit Application

## Require:

- Engineer Form 4345
- Permit Plats (same as examples shown for PCN)
- Alternatives Analysis
- 30-day Public Notice
- Mitigation Plan
- Agency comment / resolution
- May require individual 401 Water Quality Certification from State(s)

# Individual Permits – Alternatives Analysis

- Based on Purpose and Need – **clear and concise**
- Identify alternatives – including no action, offsite, and onsite
- Describe and analyze practicability
  - Site information including waters of the U.S.
  - Practicability based on:
    - Availability
    - Logistics
    - Existing Technology
    - Cost\* - whether unreasonable is sometimes subjective to USACE
- Recommendation: Present alternatives matrix / summary table on practicability

# Individual Permits – Alternatives Analysis

- Section 404(b)(1) guidelines\*:
  - USACE may only permit discharges of dredged or fill material into waters of the U.S. that represent the **least environmentally damaging practicable alternative (LEDPA)**
- Prohibit discharges into waters of the U.S.:
  - where less environmentally damaging alternatives exist;
  - which result in violations of state or Federal water quality standards, Endangered Species Act;
  - which cause or contribute to significant degradation to waters and wetlands;
  - where all appropriate and practicable mitigation has not been taken

\* Water-dependent projects do not require 404(b)(1)

# Mitigation: Regulatory Background

## USACE / EPA 2008 Joint Mitigation Rule:

- Compensatory mitigation objectives
  - Offset adverse impacts to waters of the U.S.
  - Restoration, establishment, enhancement, or preservation of aquatic resources
- Mitigation for functions of waters of the U.S.
- Appropriate assessment method to determine how much mitigation required (33 CFR 332.3[f][1]) - LRAM in Louisiana



# Compensatory Mitigation

- Typically follow 2008 Rule sequence of:
  - Mitigation Bank – see RIBITS (<https://ribits.usace.army.mil/>)
  - In-Lieu Fee programs
  - Permittee-Responsible
    - Watershed Approach
    - On-site and in-kind
    - Off-site and/or out-of-kind
- Evaluation of project requirements, client preference, credit availability, cost, risk, and other factors
- Justify “ecological benefit” if out of sequence
- Review USACE district-specific guidelines/methods
- Prepare conceptual mitigation plan with required elements



# General Conditions Compliance with Other Federal Laws

- Clean Water Act (1972) – Protects “Waters of the U.S.”
  - Section 401 – Water Quality Certification (LDEQ)
  - Section 402 – Polluted Water Discharge (NPDES)
- Section 7 of the Endangered Species Act
- Section 106 - National Historic Preservation Act
- National Environmental Policy Act of 1969 (NEPA)
- FEMA – Floodplain development requirements



# Compliance / Enforcement: Be Aware, Not Scared

- 33 CFR 326.3 covers unauthorized activities (Section 404)
- Anyone can report alleged violations to the USACE
  - “Discharge of Dredged or Fill Material Into Waters of the United States From a Point source By any Person Without authorization or exemption.”
- USACE may require voluntary restoration, other corrective action, after-the-fact permit application, and/or referral to EPA and US Attorney for civil/criminal legal action (**willful, repeated, flagrant, or of substantial impact**)
- Penalties of up to \$50,000 per day and/or imprisonment for up to three years may be imposed for any person who knowingly violates the Clean Water Act.
- **Can also be out of compliance with the terms/conditions of an authorized permit**
- Create a Culture of Compliance



# 04

## **Risk Reduction Permitting Strategies and Techniques**

Through all the NOISE, USACE Permitting Risk Reduction requires **PEACE...**

**P**lan

**E**valuate

**A**rchive

**C**ommunicate/Coordinate

**E**xecute



# How to Evaluate Your Projects with USACE Permitting in Mind



Identify Project Footprint  
(linear vs. non-linear, acreage,  
etc.)



Identify Potential WOTUS  
(desktop review and drone  
surveys vs. field delineation)



Identify Activity Types  
(Temporary Vs. Permanent  
Impacts)



Quantify Impacts to  
WOTUS and Identify  
Permitting Required, if  
any

# ANY QUESTIONS?



**Amber Robinson, PWS, ENV SP**  
**HDR Lafayette**  
**[Amber.Robinson@hdrinc.com](mailto:Amber.Robinson@hdrinc.com)**  
**M: 337-962-0619**