

REGULATORY DIVISION BRIEFING TO: KENTUCKY INTERIM JOINT COMMITTEE ON NATURAL RESOURCES & ENERGY

Casey Ehorn
Chief, East Branch

Josh Frost
Chief, Technical Services Branch

Nashville District, Regulatory Division
Date: 20 August 2020



US Army Corps
of Engineers





NASHVILLE DISTRICT REGULATORY DIVISION WEBSITE

<http://www.lrn.usace.army.mil/Missions/Regulatory.aspx>

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NASHVILLE DISTRICT
US Army Corps of Engineers

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HOME MISSIONS REGULATORY

Operations Branches

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Regulatory Branch Links

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Regulatory Branch

The Department of the Army Regulatory Program is one of the oldest in the Federal Government. Initially it served a fairly simple, straightforward purpose: to protect and maintain the navigable capacity of the nation's waters. Time, changing public needs, evolving policy, case law, and new statutory mandates have changed the complexion of the program, adding to its breadth, complexity, and authority.

The Regulatory Program is committed to protecting the Nation's aquatic resources while allowing reasonable development through fair, flexible and balanced permit decisions. The Corps evaluates permit applications for essentially all work that occurs in "waters of the United States" that are regulated by the Corps pursuant to Section 40 of the Rivers and Harbors Act and Section 401 of the Clean Water Act. Some examples of areas that may be within the jurisdiction of the Corps include marshes, swamps, estuaries, creeks, rivers, ponds, lakes, seasonally saturated forested and non-forested wetlands.

All regulated activities occurring within jurisdictional areas require a permit from the Corps. Some examples activities occurring within jurisdictional areas that require a permit include dredging of waterways, bank stabilization, recreational ponds and lakes, as well as the construction of fixed docks/boat slips, floating docks/boat slips, marinas, floating areas, boat ramps, roads, transportation crossings, residential and commercial developments, utility lines, and mining activities.

In order to determine whether your proposed activity requires a permit, or whether any "waters of the U.S." are located on your property or within your project area, please explore our website or contact us for further guidance. Please note that the Nashville District Corps of Engineers will make the final determination of whether an area is a jurisdictional "water of the U.S." and whether the activity requires a permit.

The Nashville District covers portions of Alabama, Kentucky, Mississippi, Tennessee and Virginia. We are dedicated to providing strong protection of the Nation's aquatic resources, including wetlands, to enhance the efficiency of the Corps regulatory program, and ensure that the Corps provides fair, reasonable, and timely decisions to our customers.

Click Here for the Federal Register Notice Announcing the Clean Water Rule: Definition of Waters of the United States. The effective date for the Clean Water Rule will be 28 Aug 2015.

BUILDING STRONG

ACCESSIBILITY LINKS LINKS AND CONTACTS JOIN US

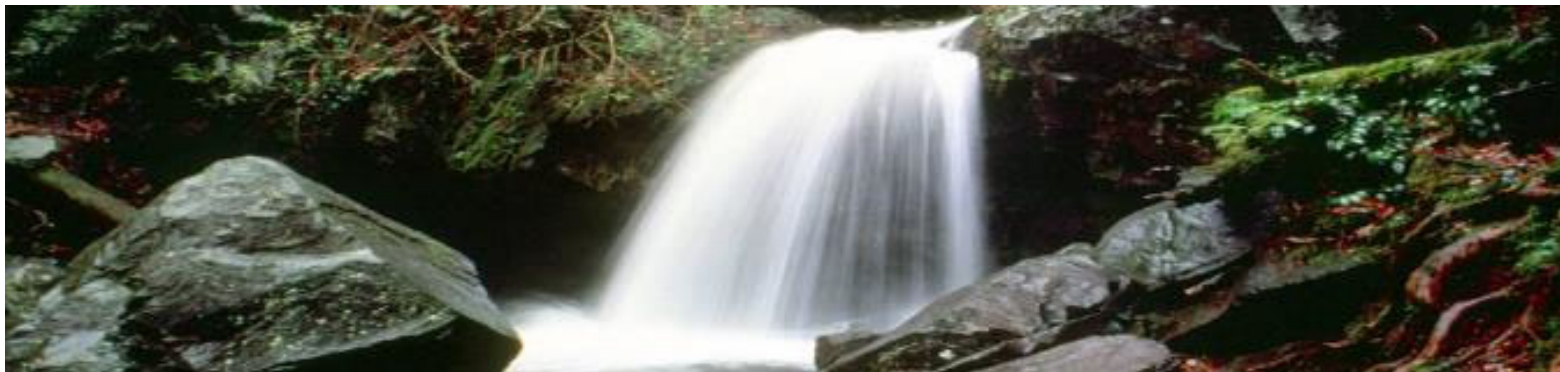


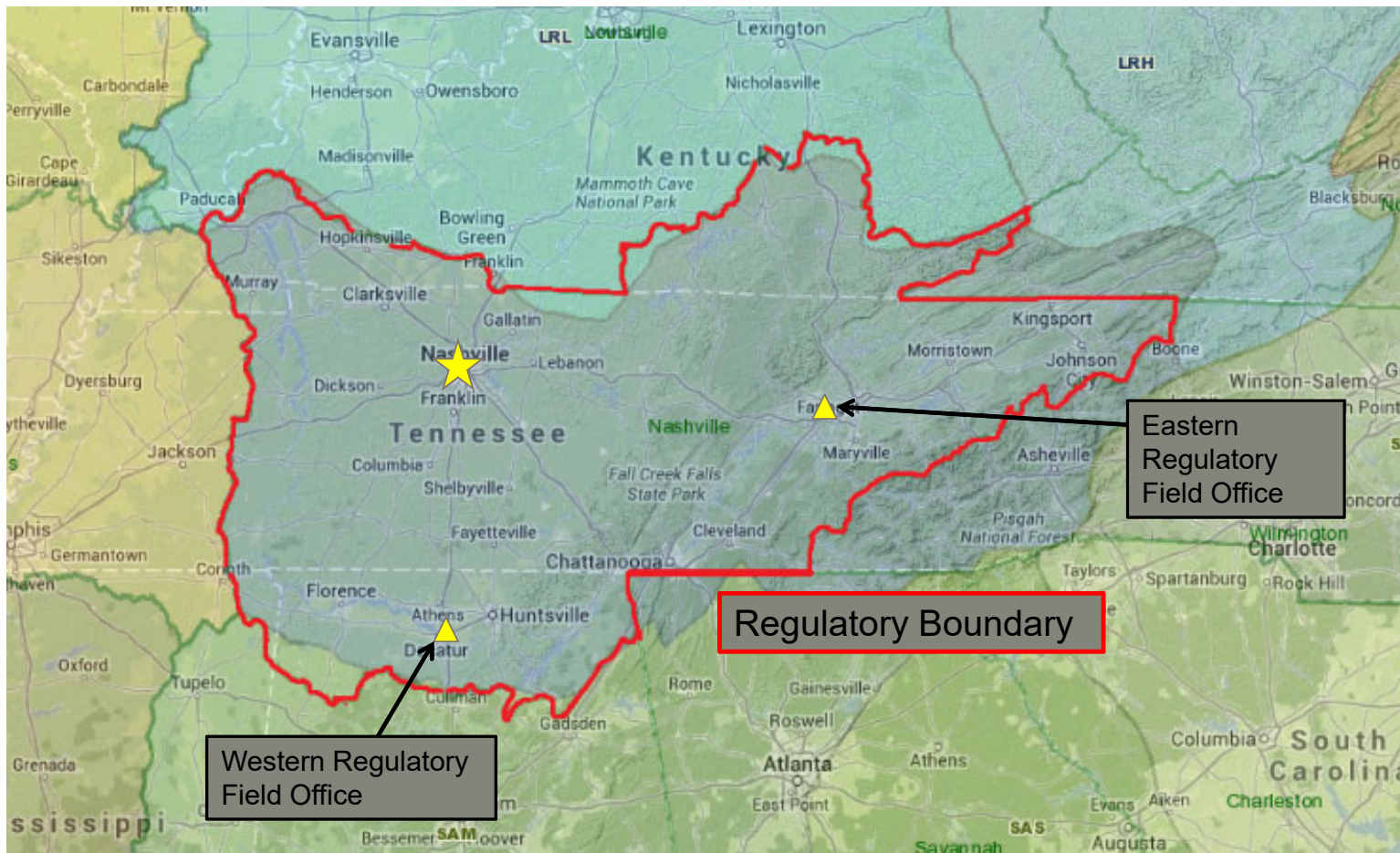
REGULATORY MISSION

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- 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 balanced decisions







GEOGRAPHIC AND ACTIVITY JURISDICTION

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- 1) Is this **area** regulated by the Corps?
- 2) Is this **activity** regulated by the Corps?





REGULATORY PROGRAM AUTHORITIES

"WATERS OF THE UNITED STATES"

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Section 10 - Rivers and Harbors Act of 1899.
Construction and dredging



Section 404 – Clean Water Act.
Discharge of dredged and fill material



Section 103 – Marine Protection, Research, and Sanctuaries Act of 1972.
Regulate transport of dredged material for purpose of ocean disposal





SECTION 10 RIVERS & HARBORS ACT OF 1899

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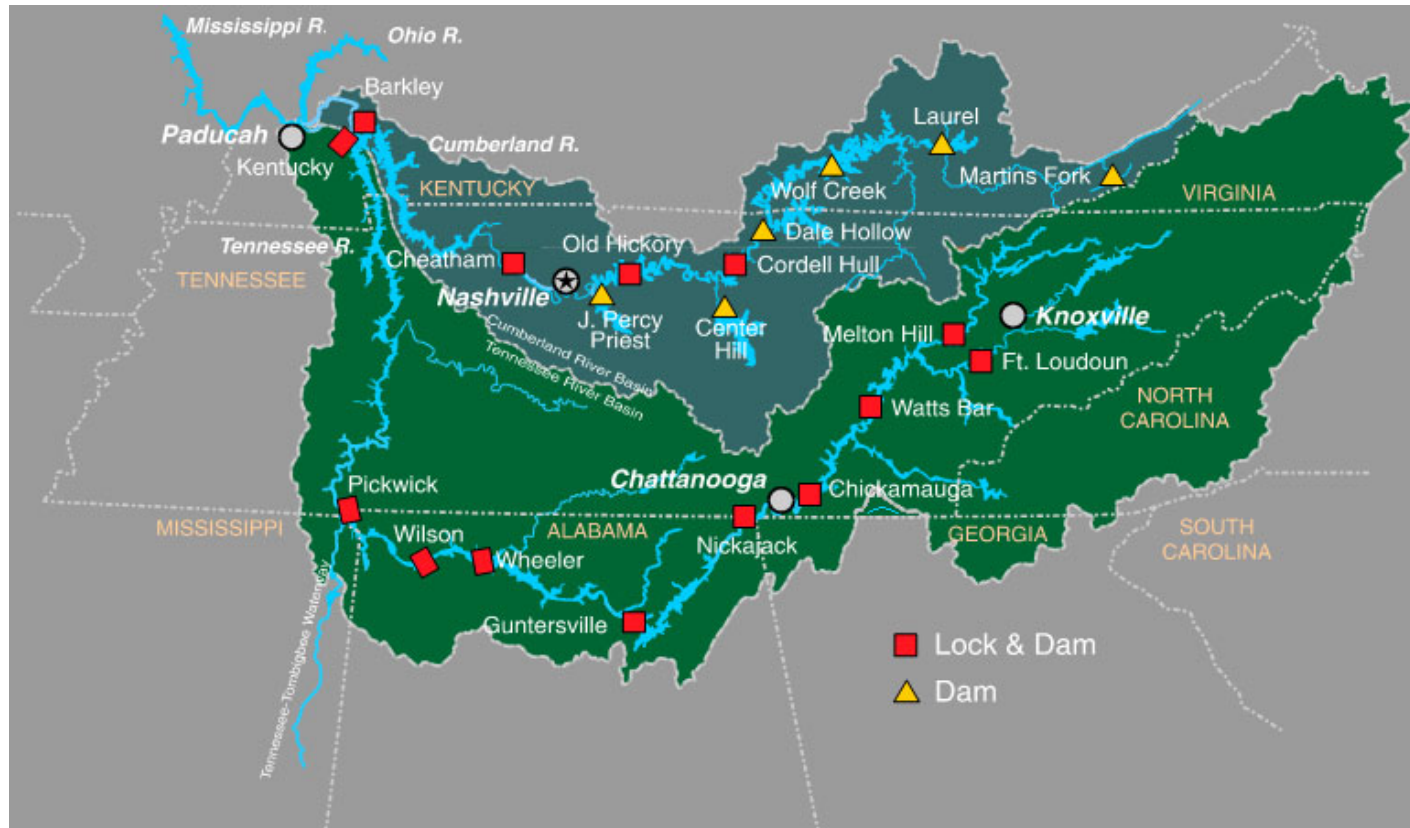
Regulates **all structures or work** in, over, or under **navigable waters of the U.S.**

Navigable waters of the U.S. are all waters that are subject to the ebb and flow of the tide and/or are presently used, or which have been used, or may be susceptible to use for transport of interstate or foreign commerce **as defined at 33 CFR 329.4.**





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

*For illustrative purposes only – refer to Navigable waters for full list: <https://www.lrn.usace.army.mil/Missions/Regulatory/Navigable-Waters-List/>



SECTION 404 OF THE CLEAN WATER ACT

Regulates the discharge of dredged and fill material into a water of the U.S.





NAVIGABLE WATERS PROTECTION RULE (2020)

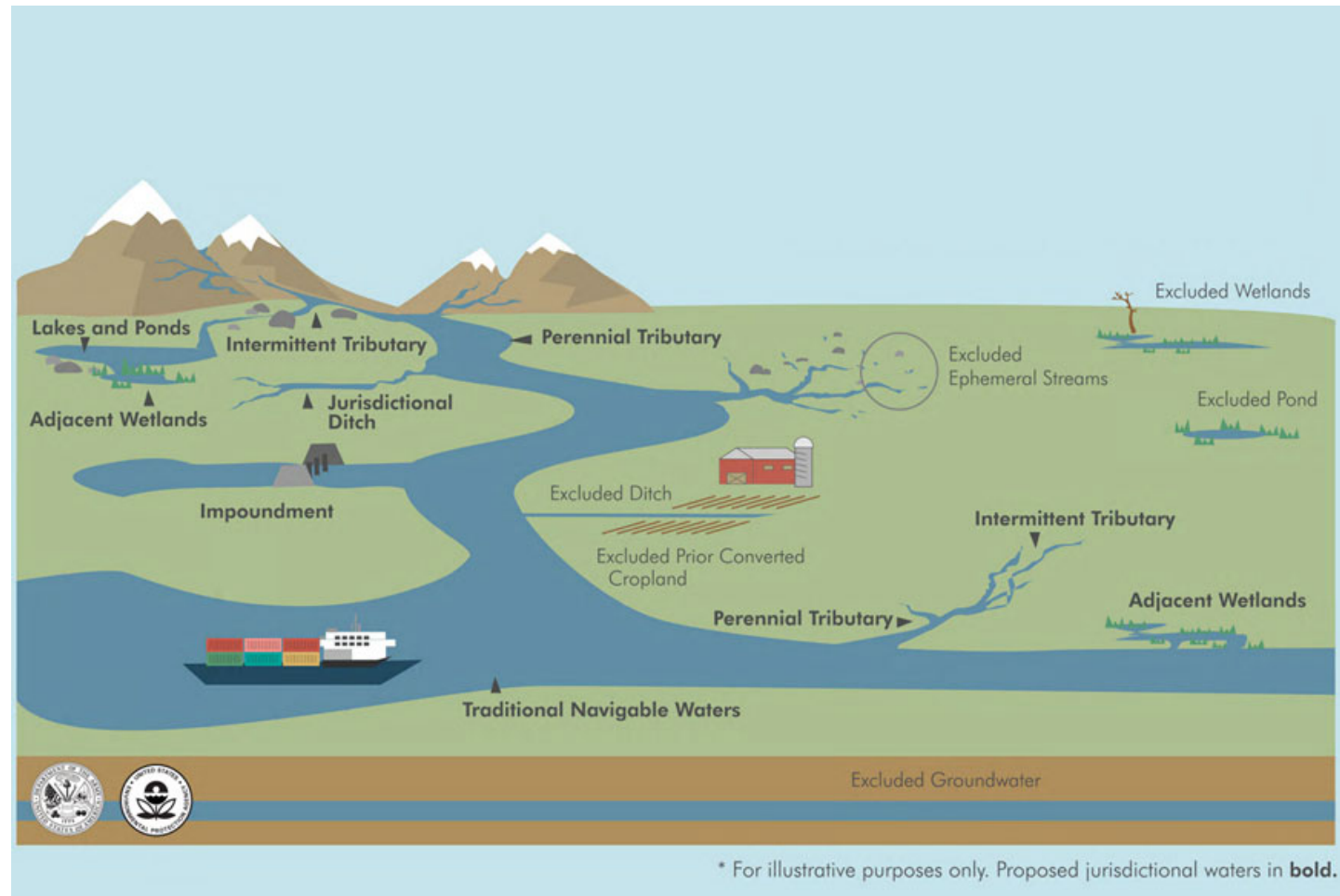
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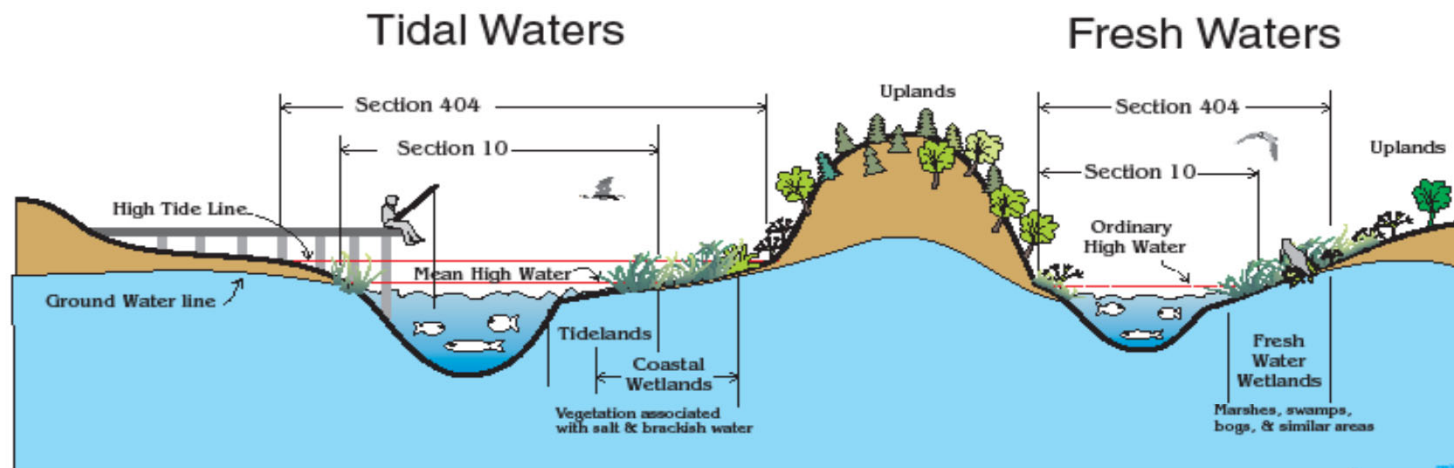
- Territorial seas and traditional navigable waters - (a)(1)
- Tributaries - (a)(2)
- Lakes and ponds, and impoundments of jurisdictional waters - (a)(3) •
- Adjacent wetlands - (a)(4)

Complete definition of waters of the US can be found at 33 CFR 328

More information can be found at:
<https://www.epa.gov/nwpr>



CORPS OF ENGINEERS REGULATORY JURISDICTION



Section 103 Ocean Discharge of Dredged Material

*Typical examples
of regulated activities*

Ocean discharges of
dredged material

Section 404 Discharge of Dredged or Fill Material Regulated Waters Definition: 33 CFR 328.3(a)

All filling activities, utility lines, outfall structures,
road crossings, beach nourishment, riprap,
jetties, some excavation activities, etc.

Section 10 All Structures and Work Regulated Waters Definition: 33 CFR 329.4

Dredging, marinas, piers, wharves,
floats / docks, intake / withdrawal pipes,
pilings, bulkheads, ramps, fills, overhead
transmission lines, etc. that occur within,
over, under, or affecting the waterbody.



TYPES OF PERMITS



Individual Permits

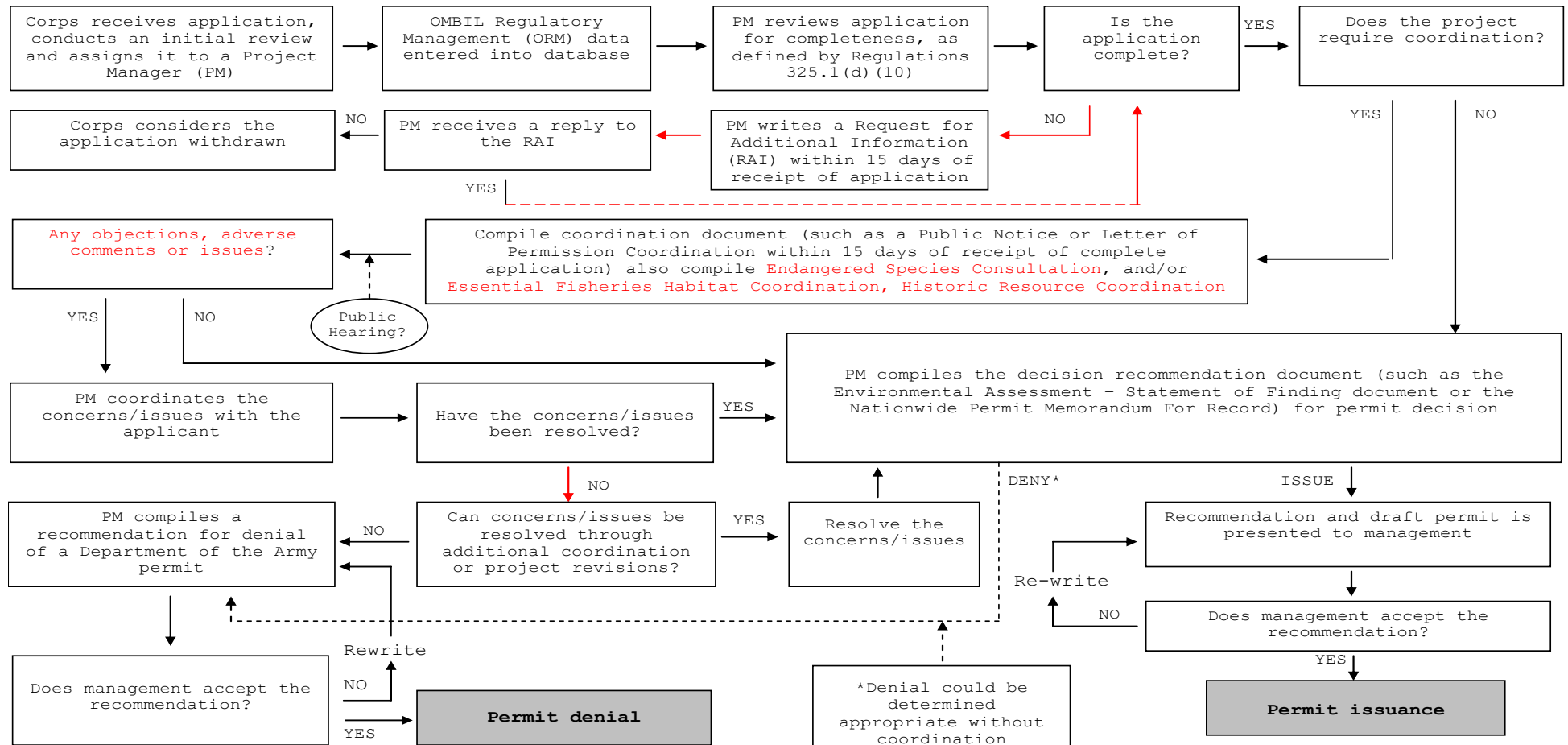
- **Standard Permits (SP)**
 - Project-specific evaluation and authorization
 - Process involves public notice, public comment period, hearings
- **Letters of Permission (LOP)**
 - Less controversial than SPs
 - Minor impacts, coordinate with agencies/neighbors (no public notice)

General Permits

- Nationwide Permits
- Regional General Permits
 - Similar activities resulting in minimal effects; valid for 5 years



REGULATORY INDIVIDUAL PERMIT PROCESS FLOW CHART



Note: this flowchart is a very basic representation of the process; and, the process is affected by several exterior factors (ESA, etc) that add to, or alter it



REGULATORY DECISION CRITERIA



- **Project is NOT contrary to the Public Interest**
- Project complies with the CWA 404(b)(1) Guidelines, if applicable
- Project complies with the Mitigation Rule

PUBLIC INTEREST REVIEW FACTORS

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



REGULATORY DECISION CRITERIA

- Project is NOT contrary to the Public Interest
- Project complies with the CWA 404(b)(1) Guidelines, if applicable
- Project complies with the Mitigation Rule

CWA 404(B)(1) GUIDELINES

Substantive Environmental Criteria

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



REGULATORY DECISION CRITERIA

- Project is NOT contrary to the Public Interest
- Project complies with the CWA 404(b)(1) Guidelines, if applicable
- **Project complies with the Mitigation Rule**

What is Mitigation?

- Avoiding, minimizing, rectifying, reducing, or compensating for resource losses
- Compensatory mitigation:
 - I. Restore, establish, enhance, and/or preserve aquatic resources to offset unavoidable loss of waters and wetlands authorized by DA permits
- Applicant must first avoid and minimize to maximum extent practicable
- Permit applicants are responsible for proposing appropriate compensatory mitigation option
- Corps is decision-maker
 - I. A discretionary requirement
 - II. Compensatory mitigation not required for all permit actions

Why is Mitigation Required?

- Permitted activity is in the public interest
- Compliance with the 404(b)(1) Guidelines
- National Environmental Policy Act
 - I. Ensure impacts to human environment are not significant
- For general permits, ensure minimal adverse effects
- Contribute to national goal of “no overall net loss” of wetlands



PREFERENCE HIERARCHY FOR MITIGATION

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
- Consider what is “environmentally preferable”
 - Consider likelihood of success, risk, uncertainty, and temporal loss

*Don't forget sequencing:
Avoid, Minimize, Mitigate*

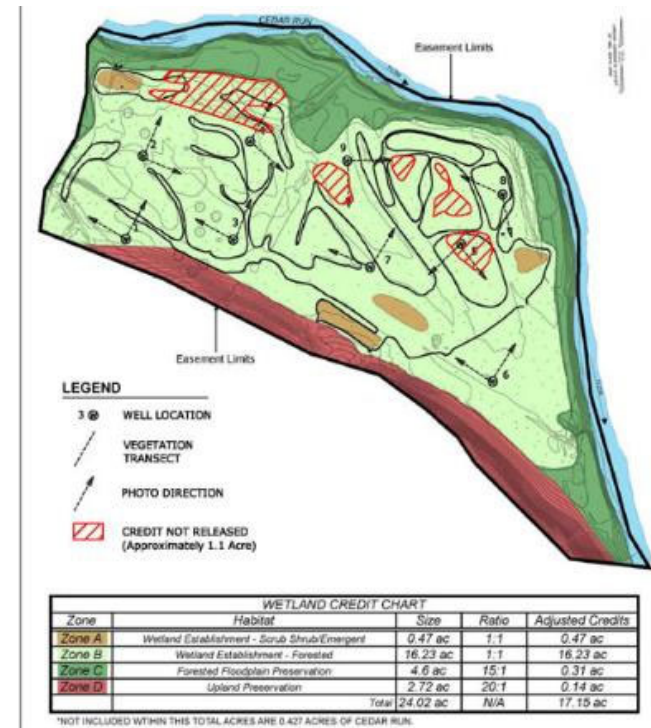




MITIGATION PLAN COMPONENTS

(33 CFR 332.4(C))

1. Objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information
5. Work plan
6. Maintenance plan
7. Performance standards
8. Monitoring requirements
9. Financial assurances
10. Credit determination
11. Long-term management plan
12. Adaptive management plan





Players & How they “Play”

Corps of Engineers	Regulate Waters of the U.S., fair, objective timely decisions
Congress	Enacted CWA, constituent interests represented
Courts	SWANCC, Rapanos, 402/404 cases, NEPA & Scope, sometimes
Regulated Community	Customer Service – Fair, Objective, Predictable Decisions
States	401, 402 & CZM, SMCRA
Interested Parties	Resource protection and restoration Facilitate development and use of resources
EPA	Jurisdiction (Civiletti Opinion), 404(q), 404(c) Veto
FWS, NMFS, ACHP	By law narrowly focused on resource protection
FHWA/DOT, USFS, BoR, FERC, NRC, BOEMRE	By law focused on specific authorities for construction, development, land management activities, etc



ENDANGERED SPECIES ACT

Consult with Fish & Wildlife Service and/or National Marine Fisheries Service on any regulated activity that may affect threatened or endangered species and/or critical habitat

The Corps may not issue a permit when the FWS or the NMFS has issued a Jeopardy Biological Opinion





HISTORIC PROPERTIES

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- Section 106 of National Historic Preservation Act of 1966 (amended 1992)
- Follow Appendix C - Procedures for the Protection of Historic Properties
- Coordinate with State Historic Preservation Officers
- Consultation with Native Americans – government to government
- Take into account the effects... of the undertakings on historic properties
- Historic properties also evaluated as public interest review factor
- Adverse effects on historic properties - Consider alternatives to avoid, minimize, and mitigate. Typically results in a MOU with SHPO/THPO





PERMIT ISSUANCE



- Project is NOT contrary to the public interest
- Project complies with the 404(b)(1) Guidelines, if applicable
 - No discharge shall be permitted if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 320.10)
 - LEDPA – Least Environmentally Damaging (to the aquatic environment) Practicable Alternative should be selected unless there other significant adverse effects associated with this alternative



PERMIT DENIAL



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



PERMIT STATISTICS: LRN AOR IN KENTUCKY

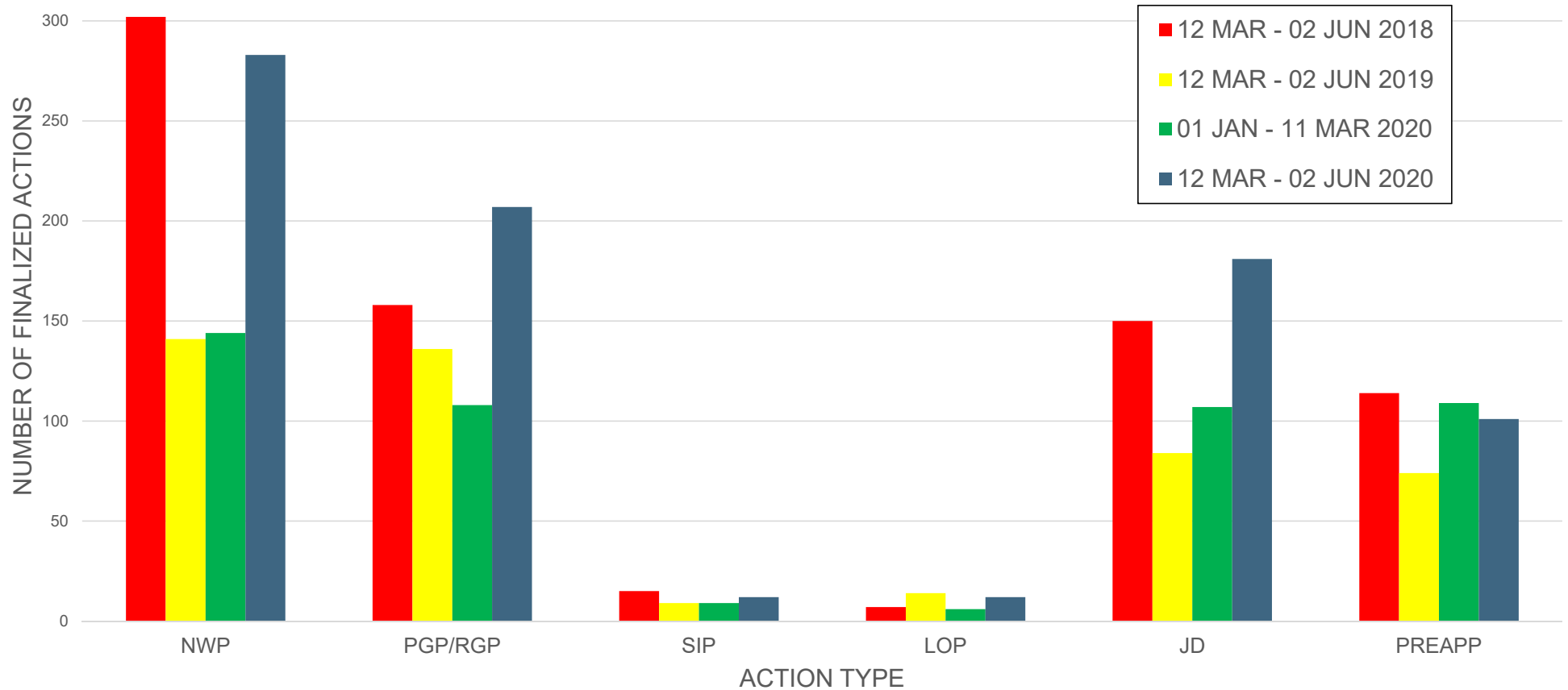
TOTAL FINAL & PENDING ACTION: LRN AOR in KY

	FY16	FY17	FY18	FY19	FY20*	Pending – FY20
Standard Permits	4	6	4	1	2	0
Letter of Permission	14	9	4	7	4	1
Nationwide Permits	69	64	152	78	76	4
PGP / RGP	29	38	28	31	17	6
No Permit Required	15	7	6	3	8	1
Total	131	124	194	120	107	12
*Source ORM2; Data Run 12 August 2020						

*Source ORM2; Data Run 12 August 2020



LRN COVID-19 Efficiency Analysis (TN/KY/MS/AL/NC)





QUESTIONS?



PERMIT STATISTICS: LRN AOR IN KENTUCKY FOCUS AREA - COAL

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	Issued/Verified							Pending
	2009-2014	2015	2016	2017	2018	2019	2020	2020 Pending
NWP 14	4	3		4	7	11	9	
NWP 21	5		1			1		
NWP 43		1	1		1			
NWP 49	9	3	3	7	5	4	1	2*
NWP 50	7							
Standard Individual Permit	5							1*
Total	30	7	5	11	13	16	10	3

*Currently withdrawn pending receipt of avoidance, minimization, and compensatory mitigation information.