

# U.S. ARMY CORPS OF ENGINEERS

## *The Regulatory Program*

### **JURISDICTIONAL WATERS, PERMITS, WETLAND DELINEATION, AND COMPENSATORY MITIGATION**

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**Middle Rio Grande Endangered Species  
Collaborative Program**



*"The views, opinions and findings contained in this report are those of the authors(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation."*



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# REGULATORY PROGRAM AUTHORITIES

## Construction and dredging Section 10 Rivers and Harbors Act



## Discharge of dredged and fill material Section 404 Clean Water Act



## Transport and discharge of Dredged material Section 103 Ocean Dumping Act



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# CLEAN WATER ACT SECTION 404

The Corps regulates the “...discharge of dredged or fill material into the navigable waters at specified disposal sites.”

- Fill material – replaces a water with dry land or raises the bottom elevation of a waterbody
- Discharge of dredged material – any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, waters of the United States



Navigable waters = “waters of the United States”



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# WATERS OF THE UNITED STATES (WOTUS)

The term "waters of the United States means: To encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters.

(33 CFR 328.3 (a))



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# WOTUS

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.

# ORDINARY HIGH WATER MARK (OHWM)

Definition in 33 CFR 328.3 (e):

*“...that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”*



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# JURISDICTIONAL DETERMINATIONS (JDS)

## Two Types of JDs:

Preliminary: Written indications that there may be Waters of the U.S. present. Preliminary JDs are “advisory” in nature and are not appealable. The preliminary JD process facilitates quick issuance of general permits.

Approved: The Corps documents whether or not a Water of the U.S. is present. Approved JDs are appealable actions. The approval process may be time consuming, and in many cases requires EPA approval.

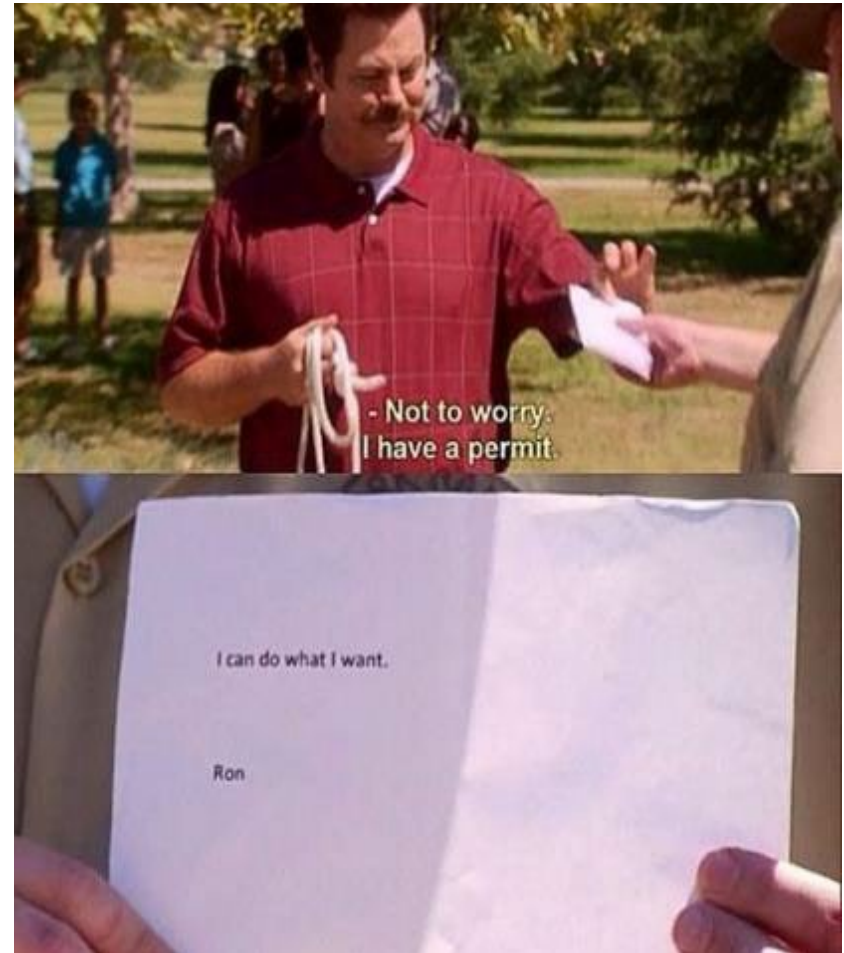
# TYPES OF PERMITS

## General Permits

- Nationwide Permits
- Regional General Permits

## Individual Permits (IP)

- Letters of Permission
- Standard IP
  - Project-specific evaluation and authorization
  - Public notice / comment
  - Public Interest Review Factors
  - Alternatives Analysis
  - Mitigation



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## OTHER ENVIRONMENTAL CONSIDERATIONS

The Corps federal action (i.e. permits) requires compliance with various environmental laws, including:

- National Environmental Policy Act (NEPA)
- National Historic Preservation Act (NHPA)
- Endangered Species Act (ESA)



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# WATER QUALITY CERTIFICATION

Section 401 of the Clean Water Act - certification of compliance with state or tribal water quality standards by the state/tribal water quality certifying authority is required for any discharge of dredged/fill material into water of the United States under Section 404 of the Act (see **33 CFR 325.2** [Individual Permits] and **33 CFR 330.4(c)** [Nationwide Permits]).

The Environmental Protection Agency (EPA) administers Section 401 Water Quality Certification (WQC) for tribes that do not have water quality certifying authority.



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# NATIONWIDE PERMITS

Under Section 404(e) of the Clean Water Act, the Corps can issue general permits to authorize activities that have only minimal individual and cumulative adverse environmental effects. Nationwide permits (NWP) are general permits issued on a nationwide basis to streamline the authorization of these types of activities.



The NWPs authorize approximately 40,000 reported activities per year, as well as approximately 30,000 activities that do not require reporting to Corps districts.



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# NATIONWIDE PERMIT REISSUANCE

**2021 NWPs:** The reissuance of the NWPs in 2021 was completed in two phases, which is unprecedented in the Regulatory Program.

- In the January 2021 final rule, the Corps reissued and modified 12 existing NWPs and issued four new NWPs. These NWPs went into effect on March 15, 2021.
- In the December 2021 final rule, the Corps reissued 40 existing NWPs and issued one new NWP. These NWPs go into effect on February 25, 2022.
- All 57 of these NWPs expire in March of 2026.

# COMMONLY USED NWP<sub>s</sub>

- NWP 3 – Maintenance of Existing Structures
- NWP 12 – Utility Lines
- NWP 13 – Bank Stabilization
- NWP 14 – Linear Transportation Projects
- NWP 27 – Habitat Restoration and Enhancement
- NWP 43 – Stormwater Management Facilities



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# STANDARD INDIVIDUAL PERMITS

- When an activity cannot be authorized by a general permit an individual permit is required
- Evaluation process involves:
  - Pre-application Coordination/Consultation
  - Public Notice
  - Alternatives Analysis [404(b)(1) Guidelines]
  - Environmental Assessment
    - ▶ Aquatic resources
    - ▶ Endangered/Threatened Species (Endangered Species Act)
    - ▶ Cultural Resources (National Historic Preservation Act)
    - ▶ Other environmental factors (Public Interest Review, Fish & Wildlife Coordination Act, Migratory Bird Treaty Act, etc)
  - Mitigation = Avoidance > Minimization > Compensation
  - Decision



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# PUBLIC INTEREST REVIEW

- The decision whether to issue a permit will be based on an evaluation of the probable impacts of the proposed activity and its intended use on the public interest.
- 20 Public Interest Review Factors
- Balance benefits against detriments to public
- Corps will issue permit unless “contrary to the public interest”



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# PUBLIC INTEREST REVIEW FACTORS

- 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
- Property Ownership

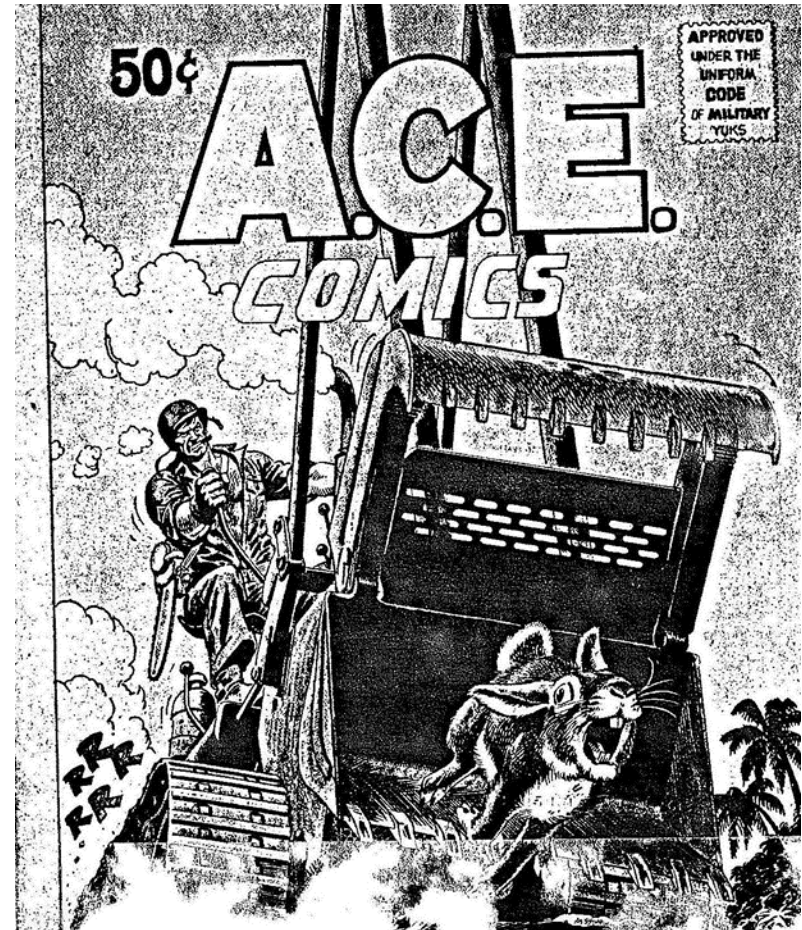


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# PERMIT DECISION CRITERIA

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



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## MITIGATION RULE (33 CFR 332)

- Applicants must avoid and minimize adverse impacts to the aquatic ecosystem to the maximum extent practicable.
- Applicants must compensate for remaining impacts that result in loss of aquatic ecosystem function and services.



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