

# USACE Regulatory 101: Overview of the Regulatory Program and Interaction Between WCA & DNR

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Senior Ecologist

St. Paul District

October 27, 2011/BWSR Academy



US Army Corps of Engineers  
**BUILDING STRONG**<sup>®</sup>



# DISCLAIMER

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The views contained in this presentation and handouts are the personal views of the presenters and do not necessarily reflect the views of the United States Army Corps of Engineers, the Department of Defense, or the United States of America.

DoD Joint Ethics Regulation, ¶ 2-207



# Regulatory Program Overview



One of the most visible and controversial Corps programs

Charged with balancing environmental protection with sustainable development



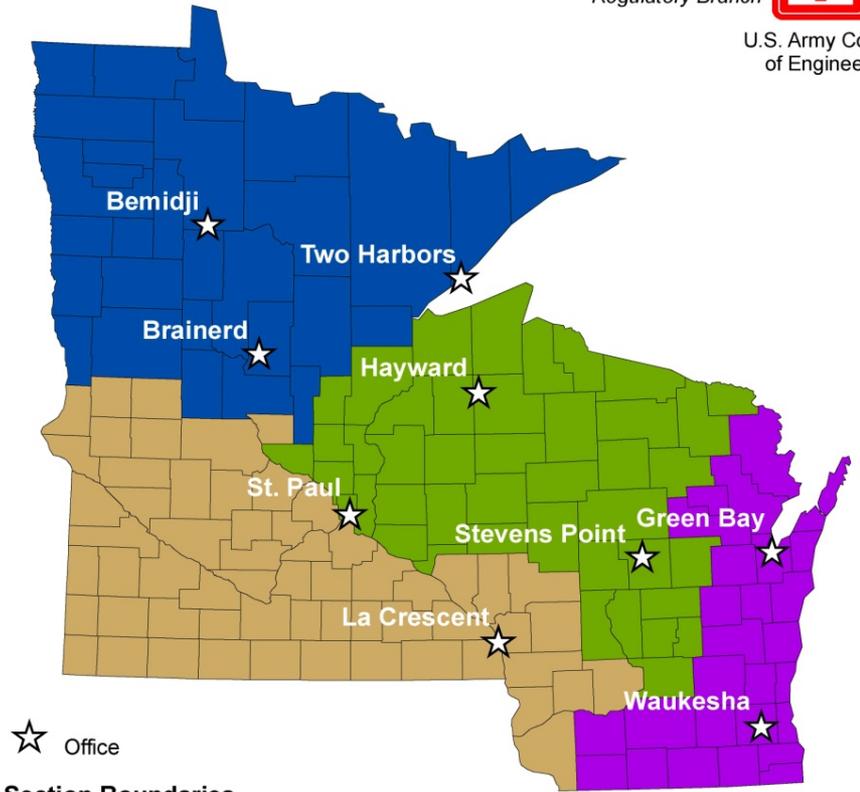
Decisions based on best available science & professional judgment

# St. Paul District Regulatory Section Boundaries

St. Paul District  
Regulatory Branch



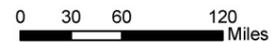
U.S. Army Corps  
of Engineers



☆ Office

### Section Boundaries

- Northwest Section, Chief - Kelly Urbanek
- Northeast Section, Chief - Jeff Olson
- Southeast Section, Chief - Todd Vesperman
- Southwest Section, Chief - Marita Valencia

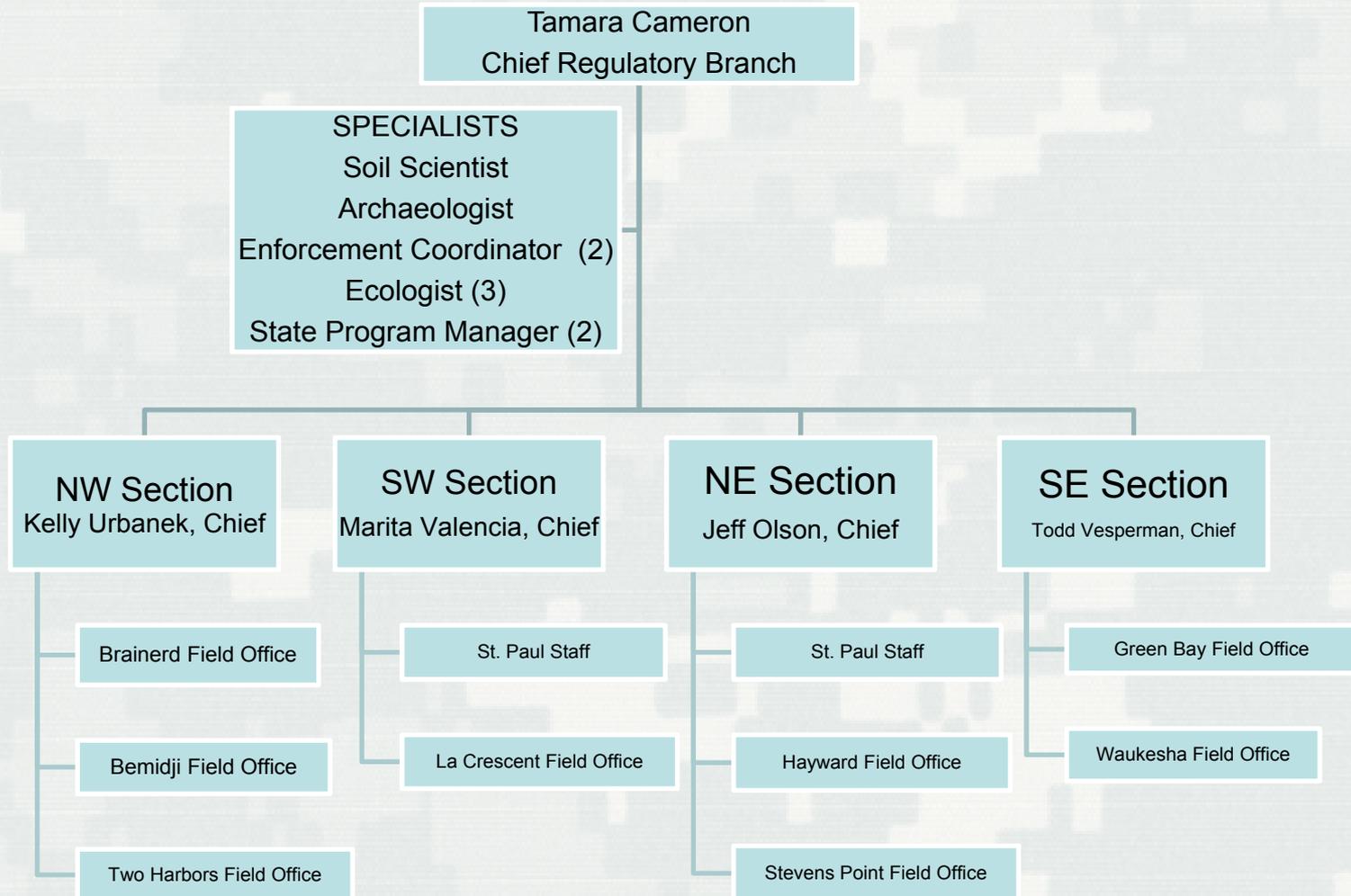


### Section Chief Contact Information:

Kelly Urbanek	Bemidji Office	(218) 444-6381	Kelly.J.Urbanek@usace.army.mil
Jeff Olson	St. Paul Office	(651) 290-5311	Jeffrey.M.Olson@usace.army.mil
Todd Vesperman	Green Bay Office	(920) 448-2824	Todd.M.Vesperman@usace.army.mil
Marita Valencia	St. Paul Office	(651) 290-5364	Maria.T.Valencia@usace.army.mil



# St. Paul District Regulatory Branch Organization





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- ### Projects & Studies
- » [PolyMet Mining, Inc., NorthMet Mine and Ore Processing Facilities, Hoyt Lakes, Minnesota](#)

## Regulatory

### Wetlands and Permit Hotline

651-290-5525  
800-290-5847 ext. 5525  
[mvp-reg-inquiry@usace.army.mil](mailto:mvp-reg-inquiry@usace.army.mil)

### Overview of the Corps' Permit Programs

The mission of the Corps of Engineers' Regulatory Program is to protect the nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions. The Corps evaluates permit applications for essentially all construction activities that occur in the nation's waters, including wetlands.

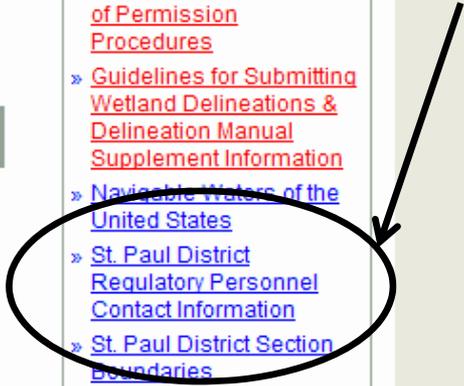
The Corps' Regulatory Programs include Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The St. Paul District's regulatory jurisdiction covers the states of Minnesota and Wisconsin.

Under Section 10, a Corps permit is required to do any work in, over or under a 'Navigable Water of the U.S.' Waterbodies have been designated as 'Navigable Waters of the U.S.' based on their past, present or potential use for transportation for interstate commerce.

Under Section 404, a Corps permit is required for the discharge of dredged or fill material into waters of the U.S. Many waterbodies and wetlands in the nation are waters of the U.S. and are subject to the Corps' Section 404 regulatory authority.

[\[Printable Copy\]](#)

- ### Other
- » [Corps Permit FAQ - St. Paul District](#)
  - » [General Permits & Letter of Permission Procedures](#)
  - » [Guidelines for Submitting Wetland Delineations & Delineation Manual Supplement Information](#)
  - » [Navigable Waters of the United States](#)
  - » [St. Paul District Regulatory Personnel Contact Information](#)
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  - » [Wetland Consultants List](#)





Regulatory >

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## St. Paul District Regulatory Personnel Contact Information

### Corps Regulatory Staff County and Contact List:

For the Regulatory Section point of contacts and County Assignments, open one of the below tabs.

[Minnesota County Assignments \(Table\)](#)

[Wisconsin County Assignments \(Table\)](#)

### Sections and County Assignments

For the Regulatory Section point of contacts and County Assignments, open one of the following maps then click on the county you want information for.

[Minnesota Sections and County Assignments \(State Map\)](#)

[Wisconsin Sections and County Assignments \(State Map\)](#)

### Regulatory Staff Email Addresses

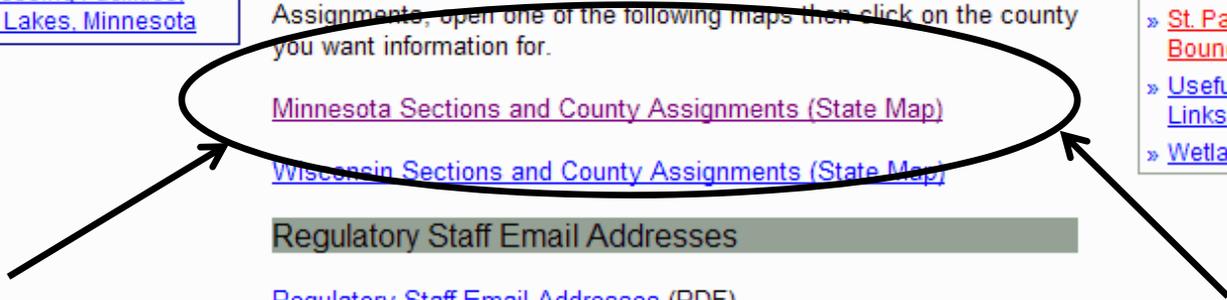
[Regulatory Staff Email Addresses \(PDF\)](#)

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## Minnesota County Assignments

Click on the county name you want to view.

http://www.mvp.usace.army.mil/docs/regulatory/county\_assignments/Crow%20Wing.pdf - Windows Internet Exp...

http://www.mvp.usace.army.mil/docs/regulatory/county\_assignments/Crow%20Wing.pdf

File Edit Go To Favorites Help Convert Select

http://www.mvp.usace.army.mil/docs/regulatory/county\_assignments/Crow%20Wing.pdf

1 / 1 79.6% Sign Find

**County: Crow Wing**  
 Project Manager: Leo Grabowski  
 Contact: (218) 829-8402  
 e-mail: [leonard.a.grabowski@usace.army.mil](mailto:leonard.a.grabowski@usace.army.mil)

Mailing address and location:  
 Army Corps of Engineers  
 Brainerd Field Office  
 10867 East Gull Lake Drive NW  
 Brainerd, Minnesota 56401

Supervisor: Kelly Urbaneck  
 Contact: (218) 444-6381  
 e-mail: [kelly.i.urbaneck@usace.army.mil](mailto:kelly.i.urbaneck@usace.army.mil)

Unknown Zone



# Regulatory Mission

To protect the Nation's aquatic resources, while allowing reasonable development through fair and balanced decisions.



# Regulations



June 1969

# Clean Water Act Jurisdiction

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- A short history
  - ▶ 1972 Enacted
  - ▶ 1974 Regulation
  - ▶ 1975 NRDC vs. Calloway -- Interim regulations
  - ▶ 1977 Regulation & Congressional Amendments
  - ▶ 1979 Civiletti opinion on CWA authority
  - ▶ 1985 Riverside Bayview Homes  
EPA's Migratory Bird Memo
  - ▶ 1986 Preamble on "Migratory Bird Rule"
  - ▶ 2001 Supreme Court decision in SWANCC v. USACE
  - ▶ 2006 Rapanos & Carabell U.S. Supreme Court cases



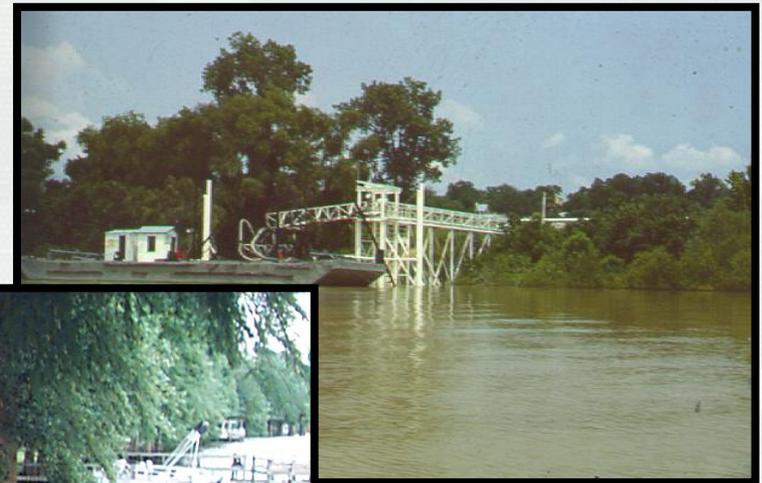


# Waters of the United States (WOUS)



# Regulatory Authority

## Section 10 - Rivers and Harbors Act of 1899



# Regulatory Authority

Section 404 Clean Water Act, 1972 & 1977



# Regulatory Authorities (Cont)

## Typically Encountered CWA Exemptions

- ▶ Normal farming practices (CWA)
- ▶ Ditch maintenance (CWA)
- ▶ Farm and Forestry roads (CWA)
- ▶ Maintenance of certain structures (CWA)

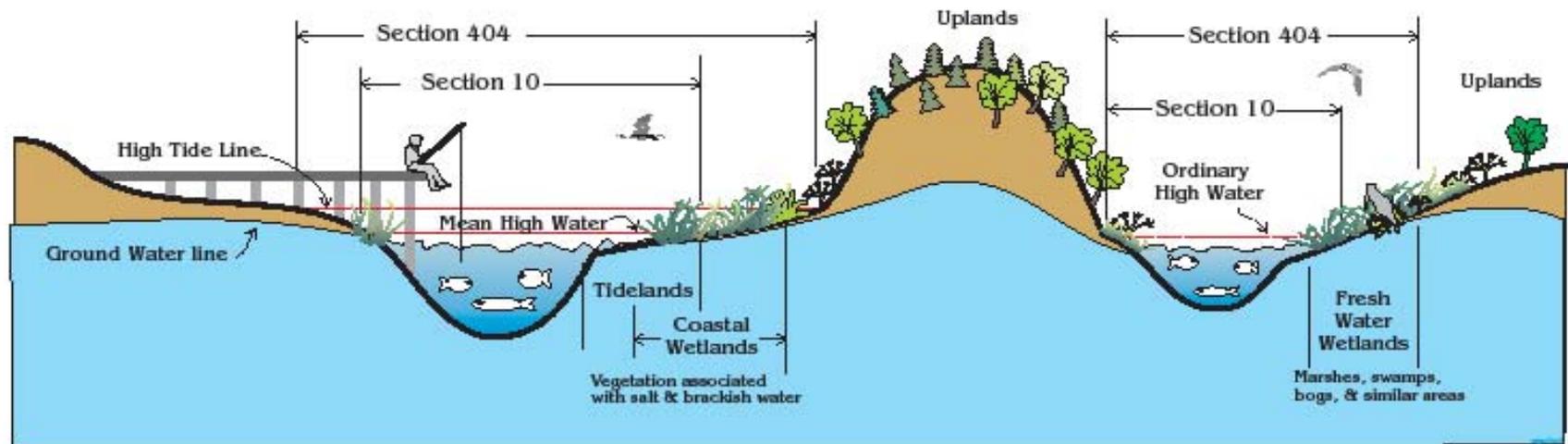
But..... there are recapture provisions



# CORPS OF ENGINEERS REGULATORY JURISDICTION

## Tidal Waters

## Fresh Waters



### 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)

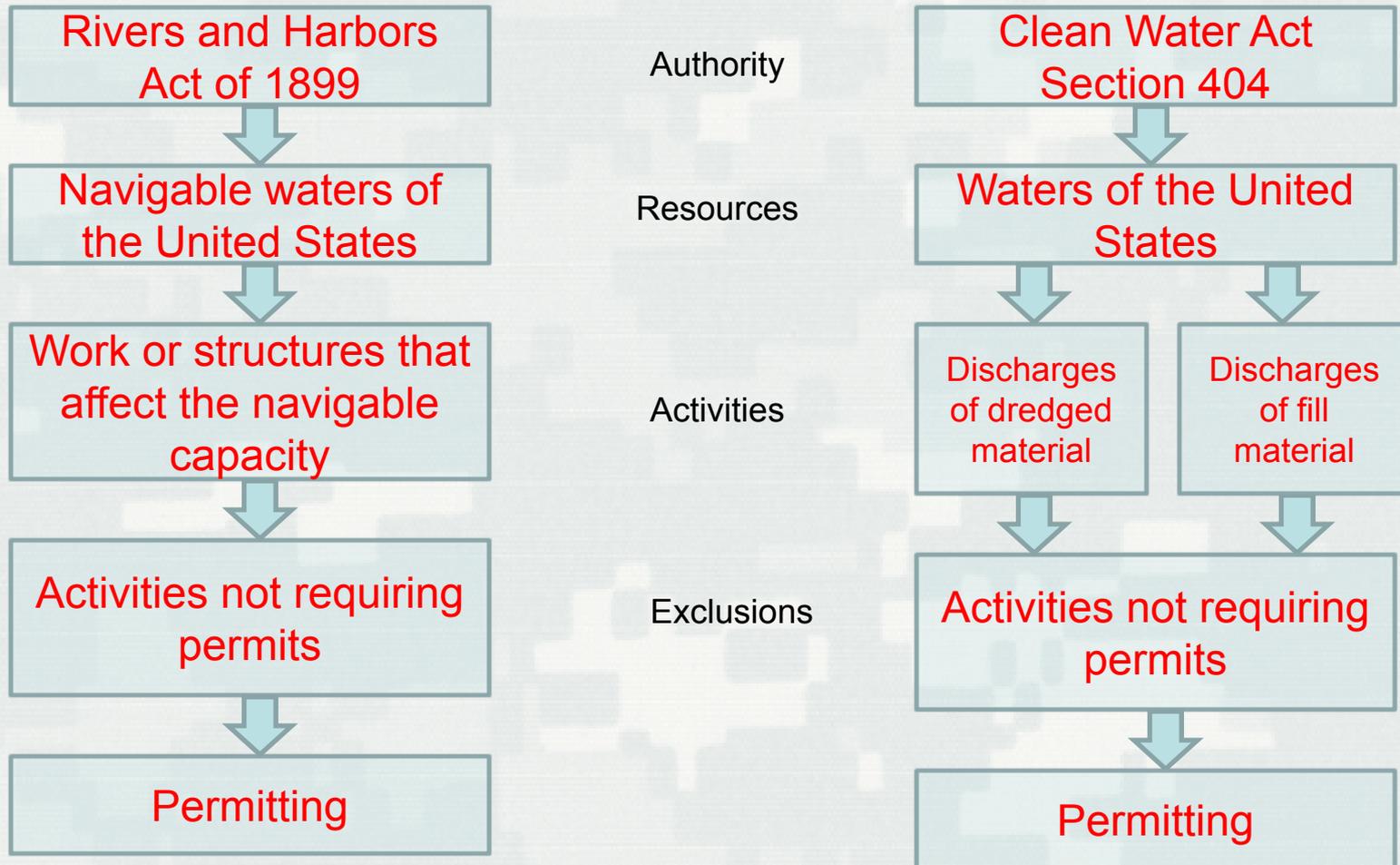
All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

### 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.

# The Program Pillars



# Clean Water Act Jurisdictional Determinations

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- What is a *Jurisdictional Determination*?

A *written Corps determination* that a *wetland and/or waterbody* is subject to regulatory jurisdiction under *Section 404 of the Clean Water Act*, *Section 9 of the Rivers and Harbors Act*, or *Section 10 of the Rivers and Harbors Act*. (33 CFR 331.2)

- Preliminary Jurisdictional Determination

- ▶ advisory in nature and not appealable.
- ▶ Very quick and straight-forward

- Approved Jurisdictional Determination

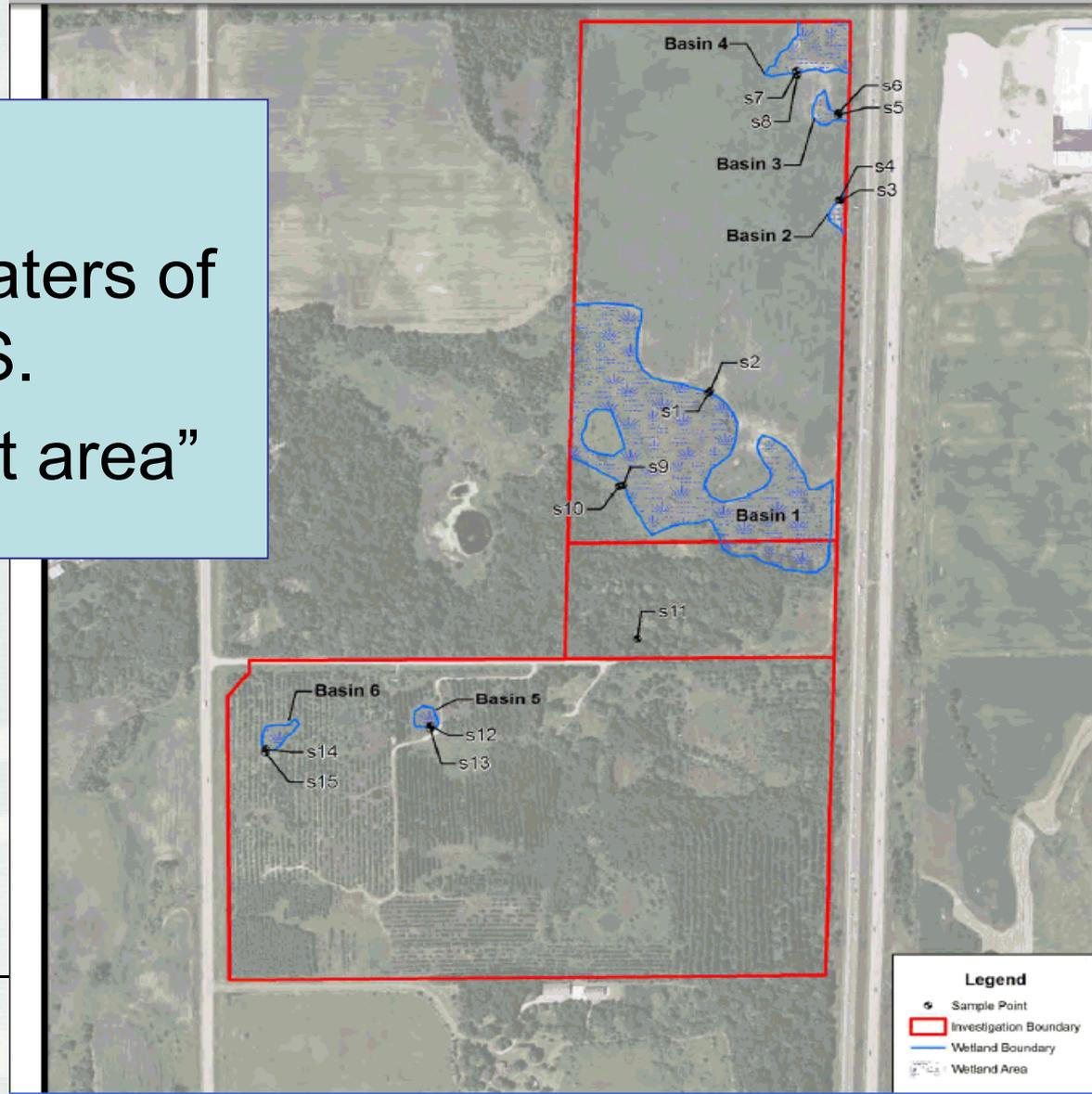
- ▶ May be appealed
- ▶ Process can be very lengthy, involving coordination with HQ and EPA



# Preliminary Jurisdictional Determination

PJD

“There may be waters of  
the U.S.  
within the project area”



# Approved Jurisdictional Determination

- A Corps document stating *the presence or absence* of waters of the United States on a parcel or a *written statement and map identifying the limits* of waters of the United States on a parcel (33 CFR 331.24)
- TNWs, RPWs, and adjacent/bordering/contiguous neighboring/abutting wetlands (continuous surface/shallow subsurface connection to RPWs) or those with a significant nexus

We have an 85-page Guidebook to prove it.

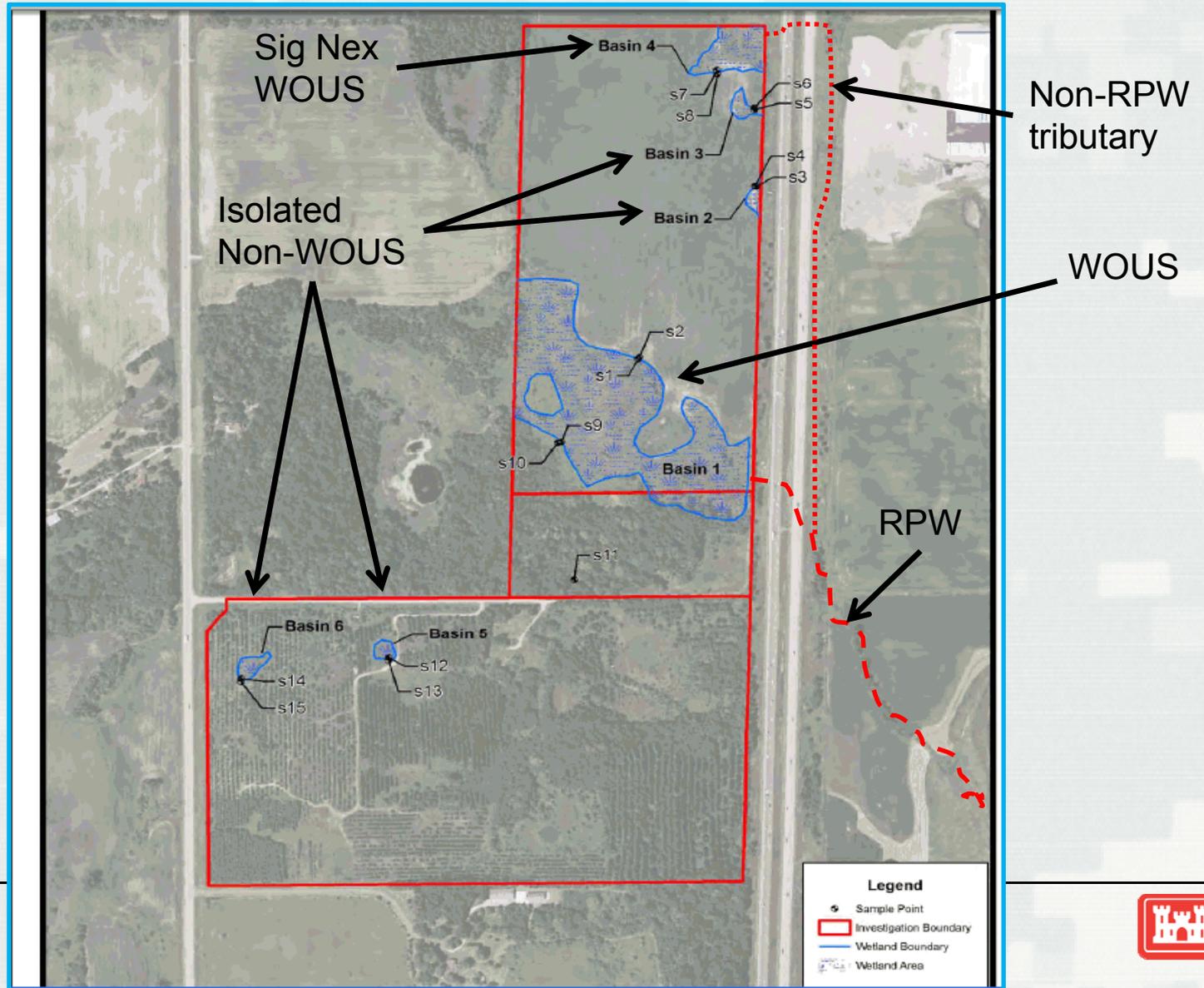


# A few words about Significant Nexus

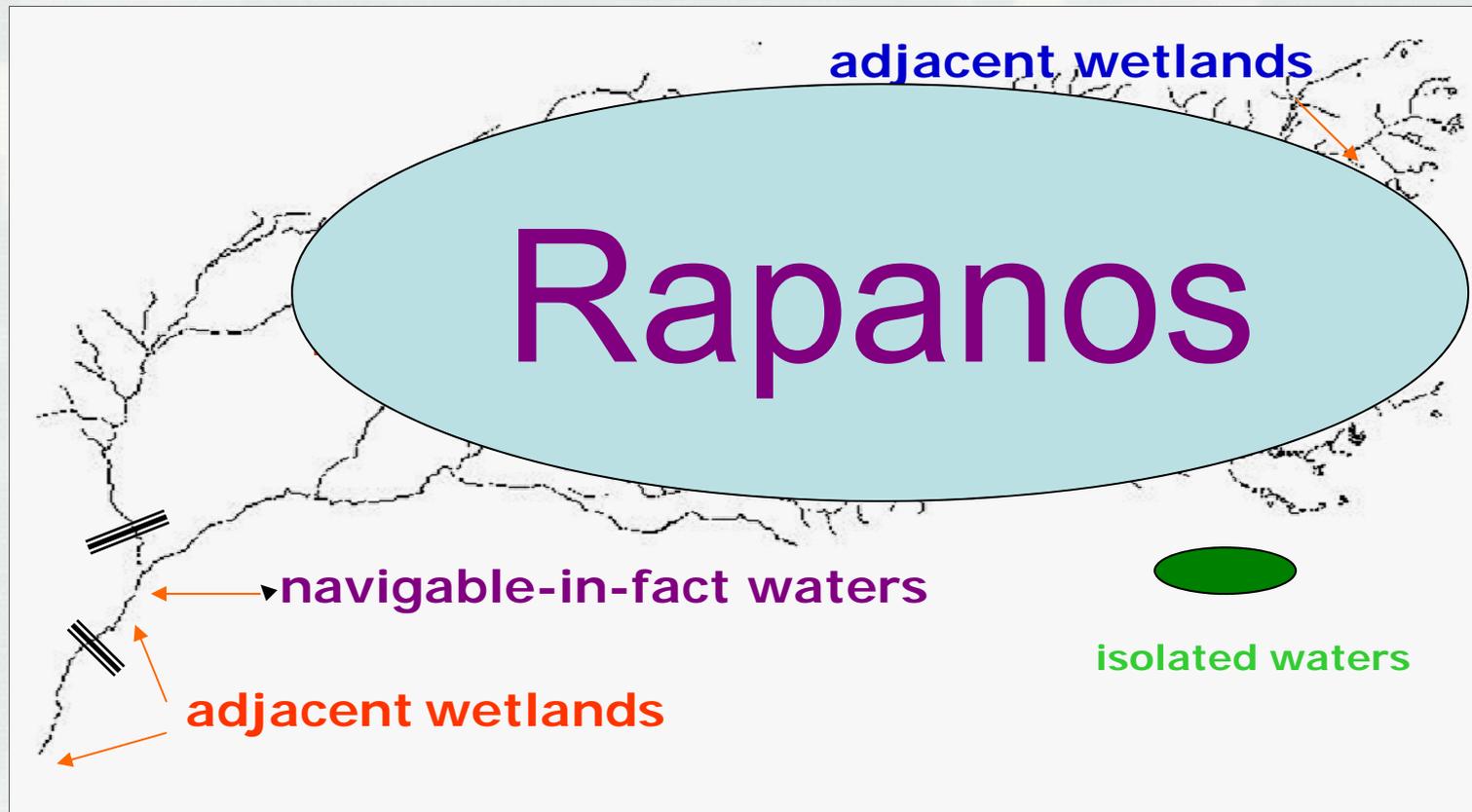
- Case-by-case basis
- “Significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” “
  - ▶ I.e., What's dumped in water upstream eventually gets into a navigable water.
- No nexus when wetlands' effects on water quality are **speculative or insubstantial**.
  - ▶ The further upstream in the watershed, the harder it is to establish a nexus.



# Approved Jurisdictional Determination



# CWA Geographic Jurisdiction: The Regulations in Graphic Form





US Army Corps  
of Engineers  
St. Paul District

### Request for Corps of Engineers Wetland Delineation Review

Please enter the following general information about the property under review:

Name of property owner			
Property Address (No. & Street, City, State, Zip Code)			
Lat. °	Long. °	(decimal degrees)	
County			
Location:	1/4 Section	Township	Range
Size of review area		acre(s)	

By submission of this wetland delineation report I am requesting that the U.S. Army Corps of Engineers, St. Paul District provide me with the following (check only one box):

Wetland Delineation Concurrence. Concurrence with a wetland delineation is a written notification from the Corps concurring, not concurring, or commenting on the wetland boundaries delineated on a property. Under this request, the Corps will not address the jurisdictional status of the wetlands on the property, only the boundaries of the resources within the review area.

Preliminary Jurisdictional Determination. Preliminary Jurisdictional Determination. A preliminary jurisdictional determination is a nonbinding written indication that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel. For purposes of computation of impacts and compensatory mitigation requirements a permit decision made on the basis of a preliminary jurisdictional determination will treat all waters and wetlands in the review area as if they are jurisdictional waters of the U.S. Preliminary jurisdictional determinations are advisory in nature and may not be appealed.

Approved Jurisdictional Determination. An approved jurisdictional determination is an official Corps determination that jurisdictional waters of the United States or navigable waters of the United States, or both, are either present or absent on the property. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act or Rivers and Harbors Act. Approved jurisdictional determinations can be relied upon by the affected party for a period of five years. An approved jurisdictional determination may be appealed through the Corps' administrative appeal process.

In order for the Corps to process your request, the wetland delineation must be prepared in accordance with the 1987 Corps of Engineers Wetland Delineation Manual, any approved Regional Supplements to the 1987 Manual, and the Guidelines for Submitting Wetland Delineations in Minnesota and Wisconsin (<http://www.mvp.usace.army.mil/regulatory/>).

Requestor \_\_\_\_\_ Date \_\_\_\_\_

Name (typed) \_\_\_\_\_

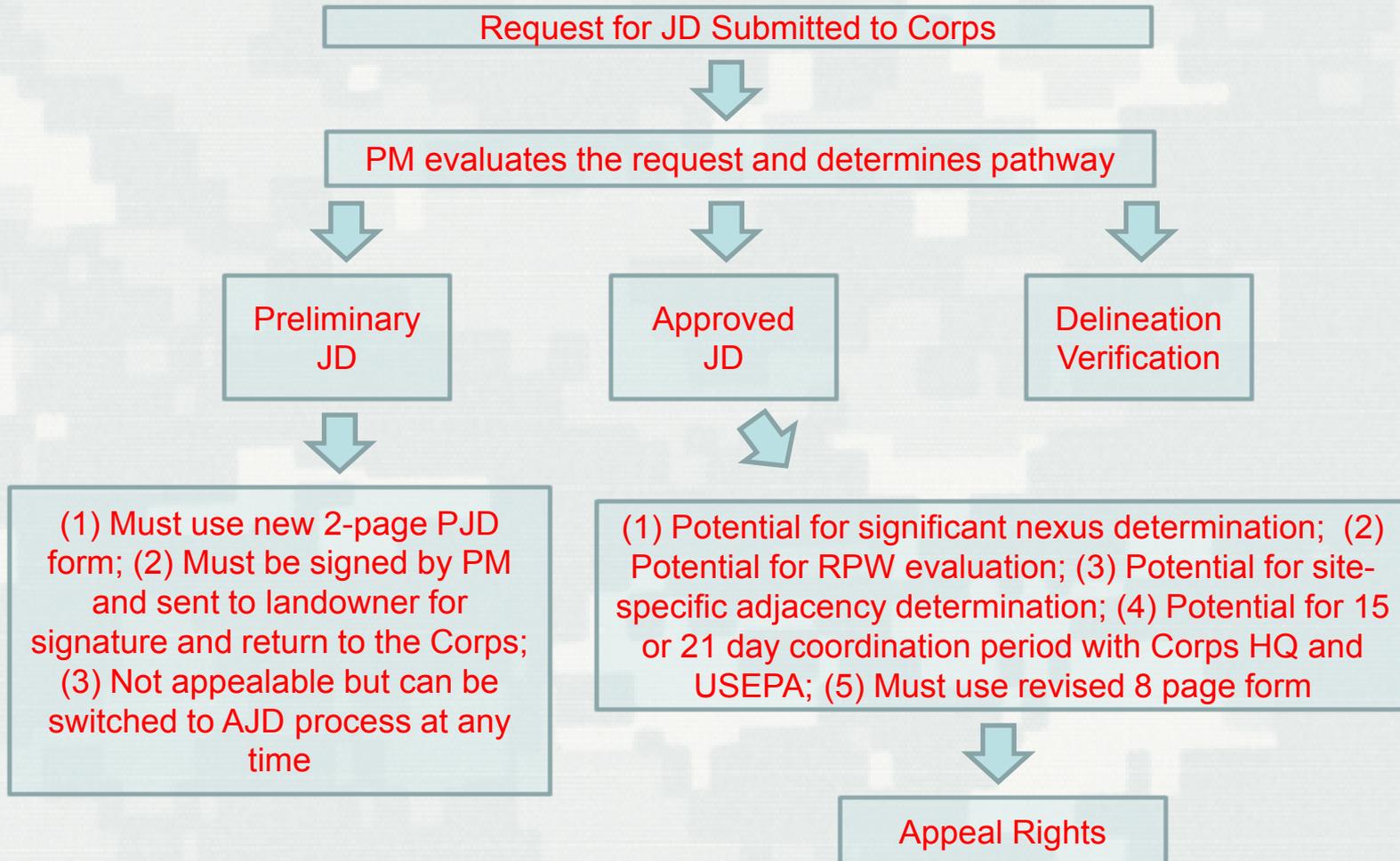
# Wetland Delineation Review Request Form

← Identification of type of review requested

← Signature Blocks for Requestor



# The Jurisdictional Determination Process



# HELPFUL JD INFO

- National Wetland Inventory
- National Hydrography Dataset
- DNR Public Waters Inventory
- Soil Survey (SSURGO) Data
- National Land Classification Dataset
- 303 (d) lists
- Elevation data (USGS Topo Maps/LiDAR or IFSAR)
- Trout stream listing
- Watershed management plans
- Other JDs completed within the watershed
- Case law
- Local knowledge



# JD Take-Home Message



"Mr. President, under the CWA jurisdiction guidance developed by your administration after the Supreme Court decision in Rapanos, would a wetland swale that sometimes discharges to an intermittent stream that flows to a traditional navigable water be covered by the Act?"



# Permit Types and Forms

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- General Permits

- ▶ Used for projects that individually and cumulatively have minimal impact
- ▶ GPs include nationwide permits, regional general permits, and programmatic general permits
- ▶ Districts should use GPs whenever possible to reduce processing times

- Letters of Permission

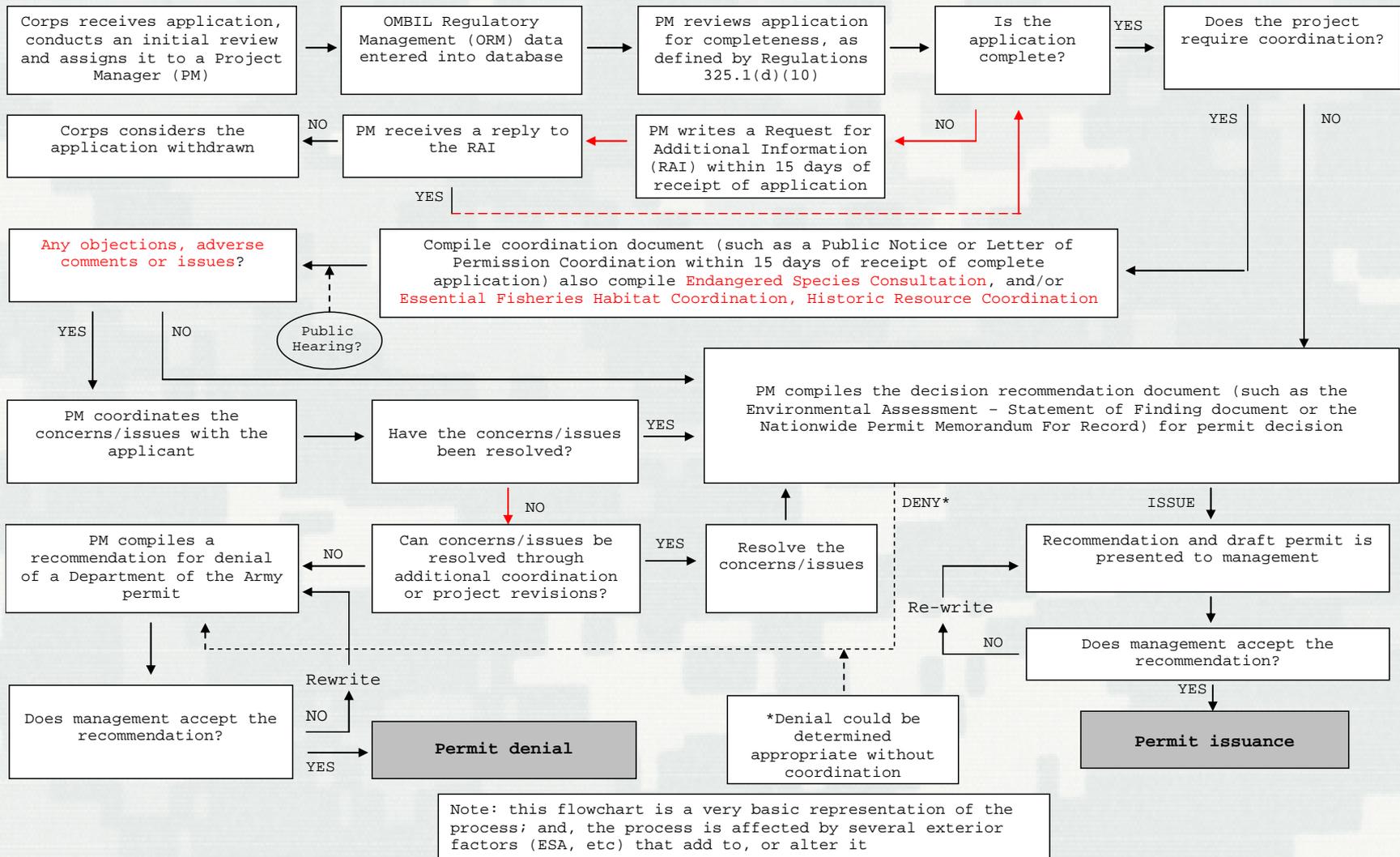
- ▶ An individual permit with an abbreviated processing procedure
- ▶ Most often does not require an individual public notice depending on the statutory authority and the procedures established by the District

- Standard Individual Permits

- ▶ The full Monty



# Regulatory Individual Permit Process Flow Chart





Wayne



# Individual Permits - Minnesota

- Standard Individual Permits (IP)
- LOP-05
  - For use statewide, except within the exterior boundaries Indian Reservations in Minnesota.
- LOP-R
  - For use within the exterior boundaries of Indian Reservations in Minnesota and Wisconsin, except The Mole Lake Band of Sokaogon Chippewa and Fond du Lac Band of Lake Superior Chippewa Reservations.
- LOP-FDL
  - Applicable within the exterior boundaries of the Fond du Lac reservation located in Carlton and St. Louis counties, Minnesota



# General Permits - Minnesota

- **GP-001-MN**
  - Statewide PGP currently in effect in Minnesota that covers certain activities permitted by MDNR.
- **GP-10-R**
  - For use within the exterior boundaries of Indian Reservations in Minnesota and Wisconsin, except The Mole Lake Band of Sokaogon Chippewa and Fond du Lac Band of Lake Superior Chippewa Reservations.
- **RGP-003-MN**
  - For use statewide on 16 project categories of minor impact.
- **PGP-004-LL**
  - PGP proposed in City of Lino Lakes for impacts up to 5 acres consistent with Special Area Management Plan (SAMP).





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St. Paul District

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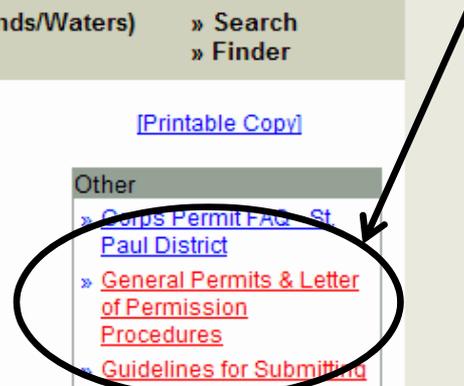
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## General Permits & Letter of Permission Procedures

[\[Printable Copy\]](#)

### MINNESOTA

#### GP-001-MN

The GP-001-MN final action for Minnesota, implemented on May 15, 2007.

FINAL PERMIT AND PUBLIC NOTICE [pdf](#) version

Statewide Programmatic General Permit currently in effect in Minnesota that covers certain activities permitted by MDNR.

#### RGP-003-MN

The RGP-003-MN final action for Minnesota, implemented on August 1, 2006.

FINAL PERMIT AND PUBLIC NOTICE [pdf](#) version

Listing of Designated Trout Streams [pdf](#) version

#### LOP-05-MN

The LOP-05-MN final action for Minnesota, implemented on July 31, 2006.

FINAL PERMIT AND PUBLIC NOTICE [pdf](#) version

Section 404 LOP Procedures for MN.

Other

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# GP-001-MN

- Exclusion examples:
  - >3 ac of impact to wetlands
  - Alteration of >500 linear feet of natural water course
  - Activities that warrant Federal evaluation to address government's trust responsibility to Tribes
  - Impacts to Section 10 waters that will have unacceptable adverse effect on navigation
- Corps authorization letter provided after 30-day interagency notification period



# RGP-003-MN

- Up to .5 ac on 16 categories of minor impact
- Under consideration for re-issuance



# PGP-004-LL

- Applicable only within the City of Lino Lakes
- Programmatic based upon Rice Creek Watershed District implementation of the Lino Lakes Special Area Management Plan (SAMP)



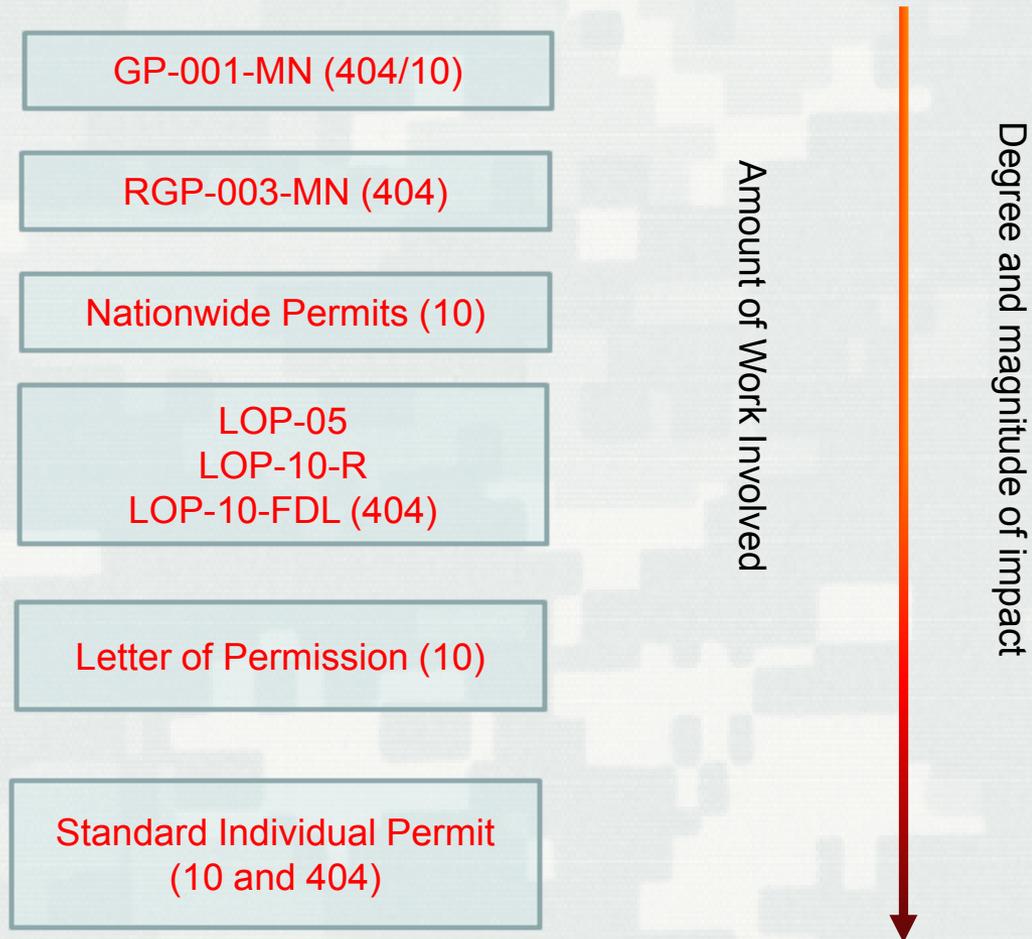
# LOP-05-MN

- Private project impacts up to 3 ac
- Public road impacts up to 5 ac
- 10-day internet notice
- Internal Environmental Review Document (mini-EA)



# MVP Permitting Structure

## Minnesota



# Regulatory 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



# 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



# CWA 404(b)(1) Guidelines

- Substantive Environmental Criteria (40 CFR 230.10)
- Non-water dependent projects must conduct alternatives analysis (sequencing)
- LEDPA – Least Environmentally Damaging Practicable Alternative
  - Practicable in terms of cost, logistics & existing technology





# Federal Register

Thursday,  
April 10, 2008

Part II

**Department of  
Defense**

Department of the Army, Corps of  
Engineers  
33 CFR Parts 325 and 332

**Environmental  
Protection Agency**

40 CFR Part 230  
Compensatory Mitigation for Losses of  
Aquatic Resources; Final Rule

## ■ Federal Mitigation Rule

### ▶ Watershed-based mitigation

- Restoration
- Enhancement
- Establishment
- In certain cases, preservation

### ▶ Type/Location of Compensatory Mitigation in order of preference:

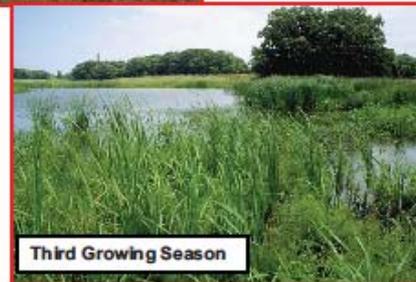
- Mitigation banking
- In-lieu fee program credits
- Permittee-responsible watershed approach
- Permittee-responsible on-site, in-kind
- Permittee-responsible off-site and/or out-of-kind



US Army Corps  
of Engineers  
St. Paul District

## St. Paul District Policy For Wetland Compensatory Mitigation In Minnesota

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### Basic Compensation Ratios

<80% Area 2.5:1

>80% Area 1.5:1

### Minimum Compensation Ratios

<80% Area 2:1

>80% Area 1:1

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January 2009



# Permit Denial

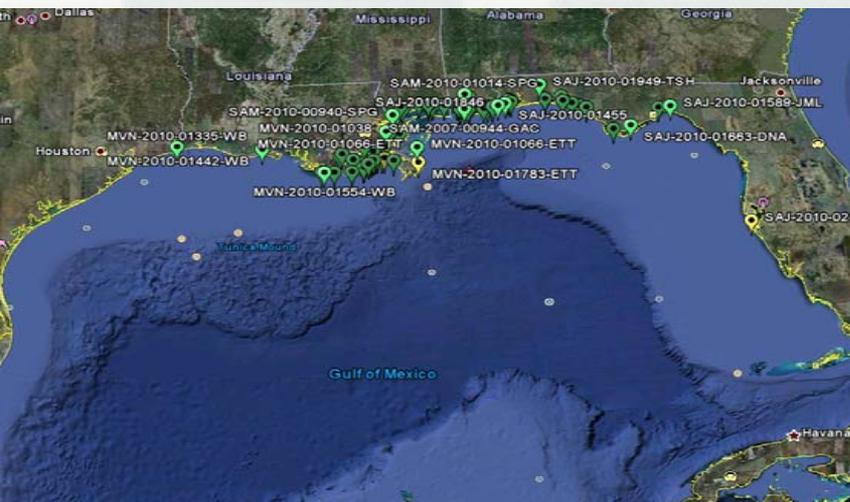
- Project IS contrary to the public interest
- Project does NOT comply with the 404(b)(1) Guidelines
  - ▶ Practicable Alternative Exists
  - ▶ Violates Water Quality Standards
  - ▶ Results in Significant Degradation
  - ▶ Impacts to aquatic resources not minimized to the extent practicable



# Emergency Permit Procedures

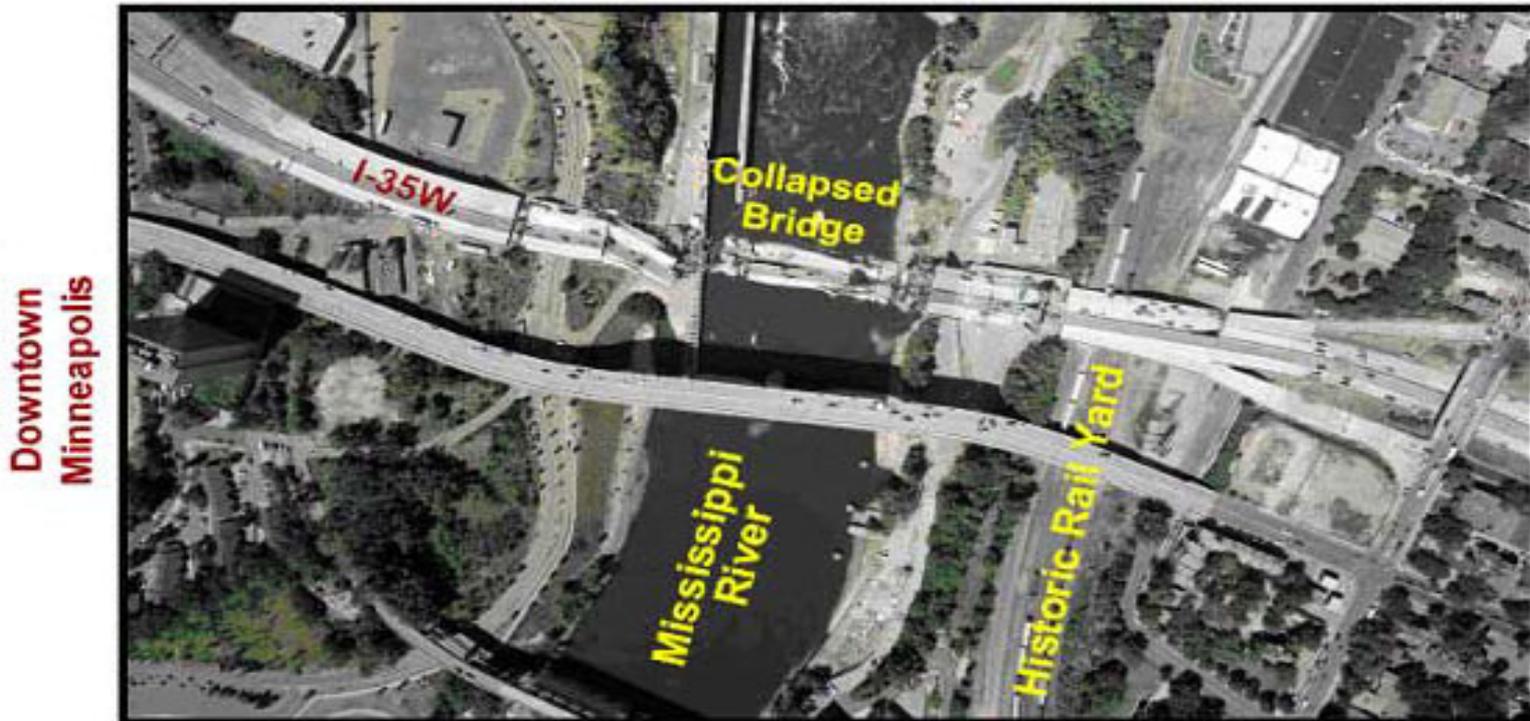
## 33 CFR 325.2(e)(4)

- Situation resulting in “hazard to life ... loss of property, or ... economic hardship if corrective action not taken ...”
- MSC Commander authorizes District Commander to use expedited permit processing procedures to authorize to work:
  - ▶ Post Deepwater Horizon
  - ▶ Post Hurricane/Storm Event



# Emergency Permit Procedures

Figure 6 Aerial Photo of Bridge Area



Aerial Photo Courtesy of MnDOT, August 14, 2007

**35W Bridge rebuild was permitted using existing exemptions and GPs**

# Section 7

## Endangered Species Act

**Consult with Fish & Wildlife 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 has issued a Jeopardy Biological Opinion**



# Historic Properties and Cultural Resources

Federal trust responsibility with the Tribes



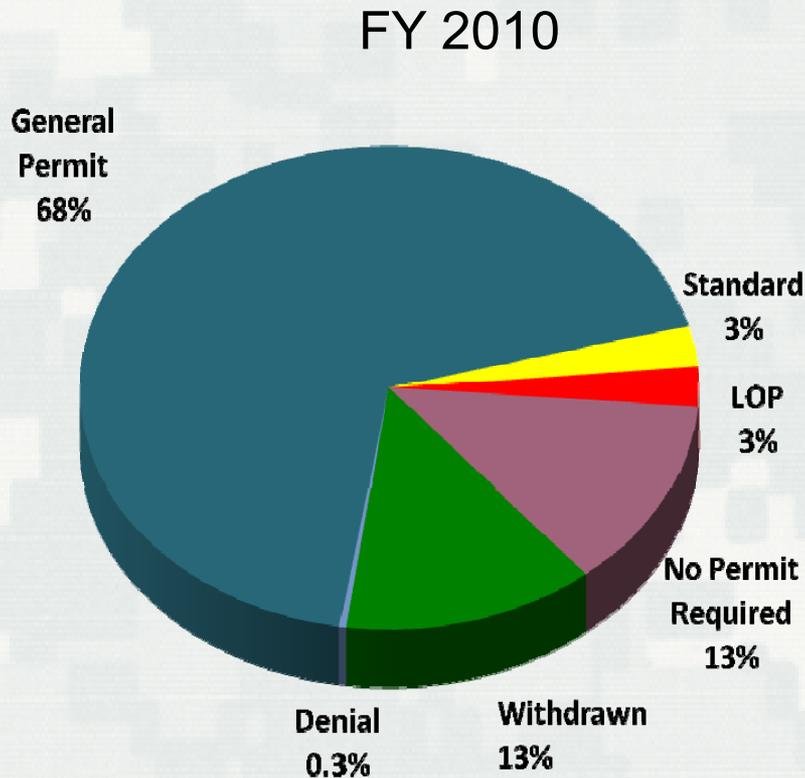
Section 106 of National Historic  
Preservation Act of 1966 (amended 1992)



# Permit Statistics

## ALL PERMIT DECISIONS

FY 2009 & 2010



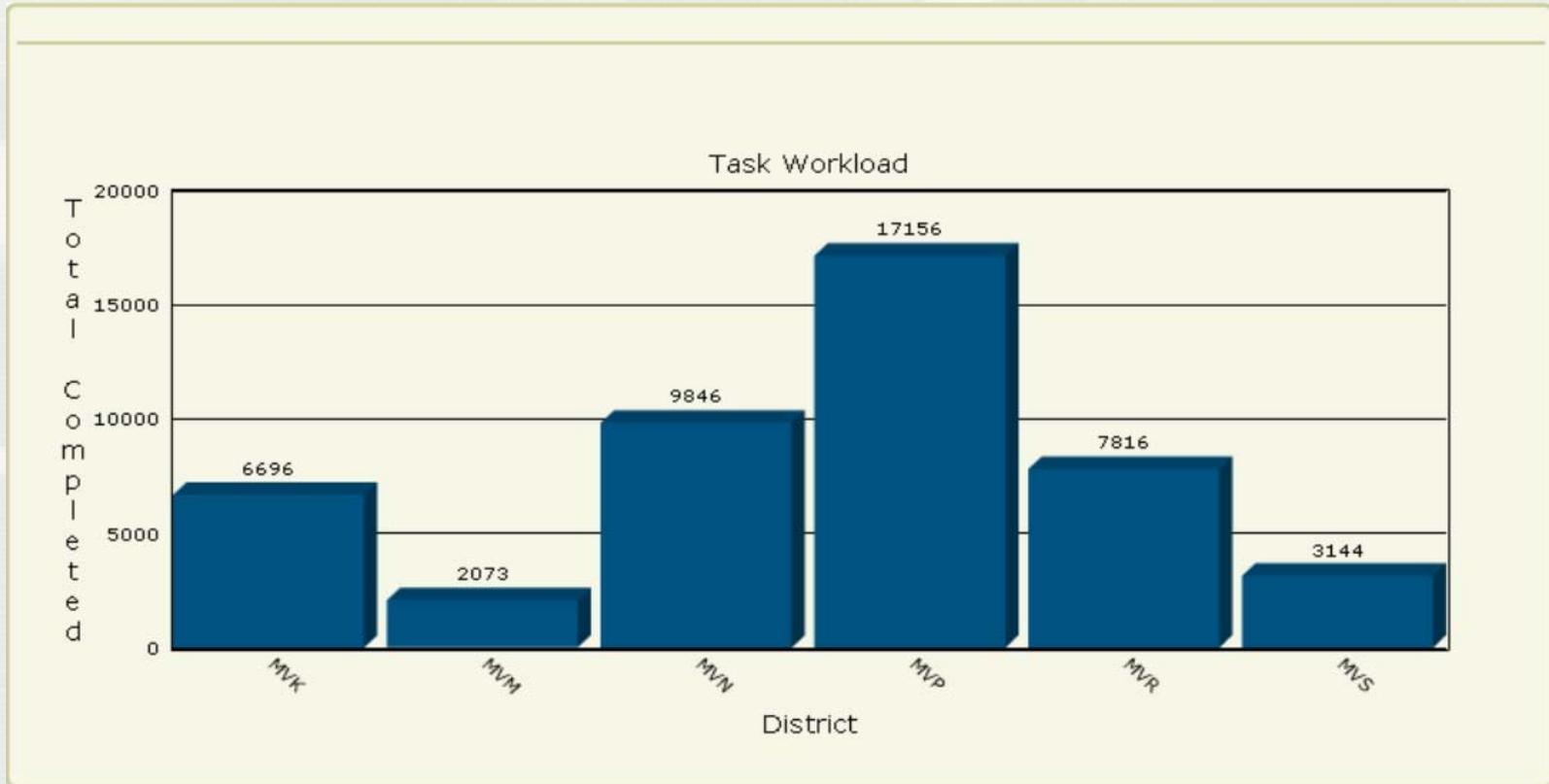
<u>TOTAL FINAL ACTIONS</u>		
	<b>FY09</b>	<b>FY10**</b>
Standard Permits	2690	2086
Nationwide	30229	32073
Regional	21760	21046
Letters of Permission 2009		1597
Denials	280	261
<i>Withdrawn</i>	10901	10263
<i>No Permit Required</i>	10315	9865
<b>TOTAL</b>	<b>78,184</b>	<b>77,191</b>

\*\* Source: ORM2  
Data Run 9 May 2011



# MVD Incoming Project Actions FY10

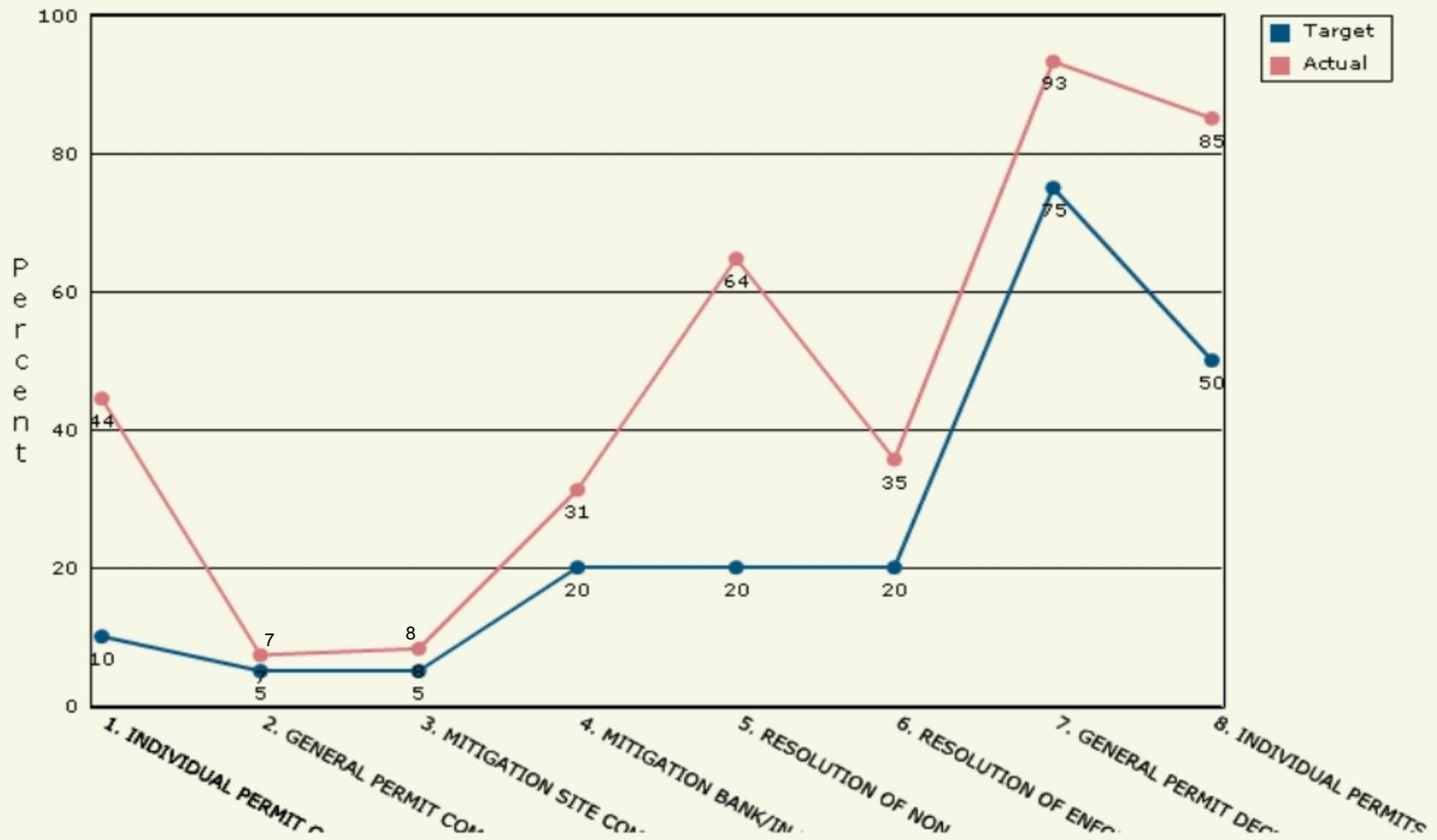
All actions associated with permit review, based on ORM Data



# Regulatory Performance

Search Criteria: ORG = St. Paul District FISCAL YEAR = 2011 QUARTER = 4

## St. Paul Districts Performance Measures Actuals & Targets



# Regulatory Program Goals & Challenges

## Goals

- Timeliness
- Predictability
- Consistency
- Transparency
- Cost Effective
- Sound Science

## Challenges

- Workload
- Scope
- Interagency Coordination Requirements
- Court Decisions
- Consistency
- Complexity



# There's a new game in town...

It's the old game, we're just playing it right.

## BUILDING STRONG...

As long as you get your permit first.





#### Missions

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#### Regulatory >

##### Notices

- » [Email Notification of Public Notices](#)
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##### Projects & Studies

- » [PolyMet Mining, Inc., NorthMet Mine and Ore Processing Facilities, Hoyt Lakes, Minnesota](#)

## Regulatory

### Wetlands and Permit Hotline

651-290-5525  
 800-290-5847 ext. 5525  
[mvp-reg-inquiry@usace.army.mil](mailto:mvp-reg-inquiry@usace.army.mil)

#### Overview of the Corps' Permit Programs

The mission of the Corps of Engineers' Regulatory Program is to protect the nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions. The Corps evaluates permit applications for essentially all construction activities that occur in the nation's waters, including wetlands.

The Corps' Regulatory Programs include Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The St. Paul District's regulatory jurisdiction covers the states of Minnesota and Wisconsin.

Under Section 10, a Corps permit is required to do any work in, over or under a 'Navigable Water of the U.S.' Waterbodies have been designated as 'Navigable Waters of the U.S.' based on their past, present or potential use for transportation for interstate commerce.

Under Section 404, a Corps permit is required for the discharge of dredged or fill material into waters of the U.S. Many waterbodies and wetlands in the nation are waters of the U.S. and are subject to the Corps' Section 404 regulatory authority.

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##### Other

- » [Corps Permit FAQ - St. Paul District](#)
- » [General Permits & Letter of Permission Procedures](#)
- » [Guidelines for Submitting Wetland Delineations & Delineation Manual Supplement Information](#)
- » [Navigable Waters of the United States](#)
- » [St. Paul District Regulatory Personnel Contact Information](#)
- » [St. Paul District Section Boundaries](#)
- » [Useful Links/Presentations](#)
- » [Wetland Consultants List](#)

