

# USACE REGULATORY PROGRAM IN MONTANA

Omaha District, Regulatory Branch  
Montana Regulatory Office

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US Army Corps  
of Engineers



## Program Overview

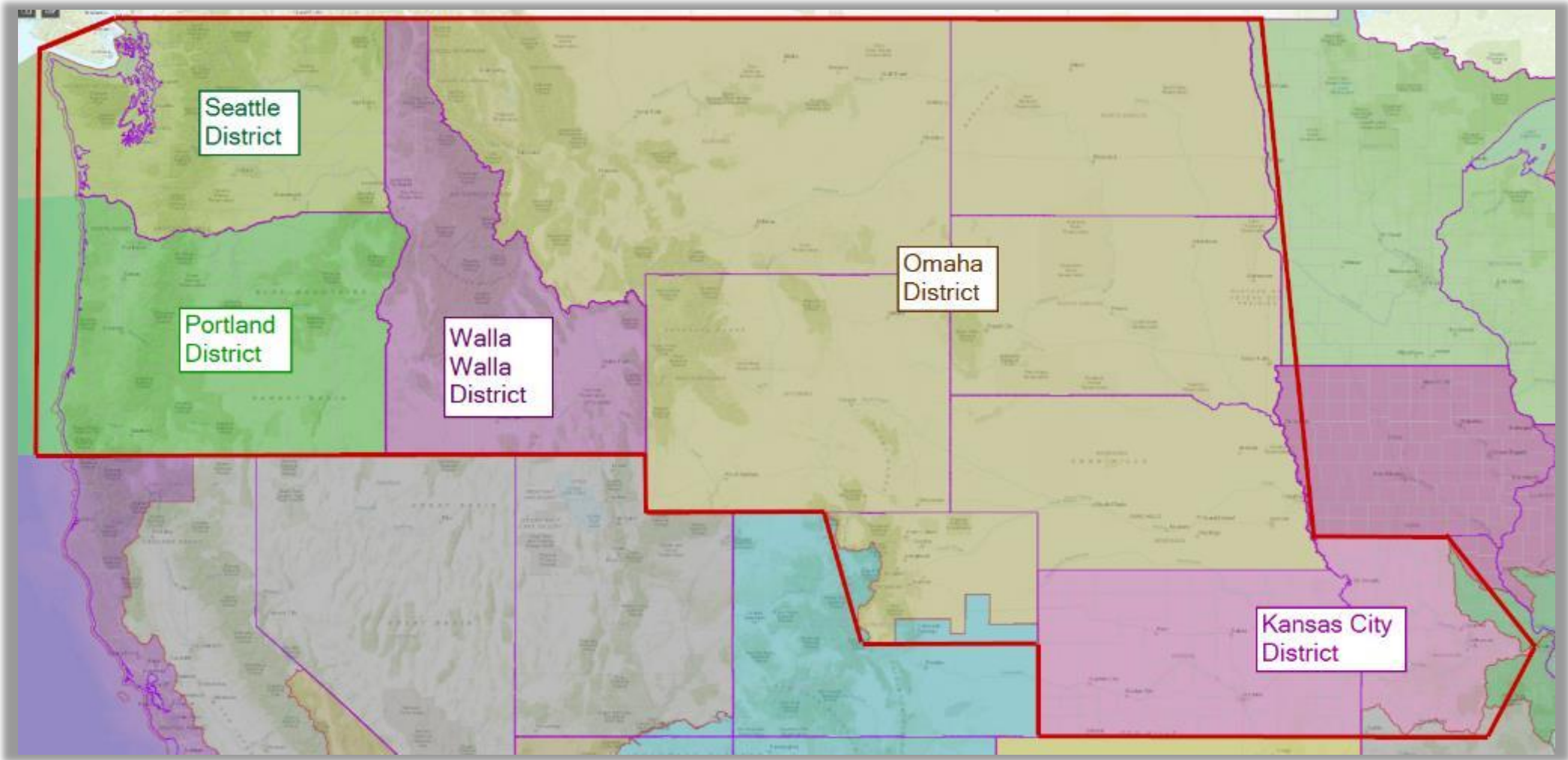
- Who - Montana Regulatory Program
- What - Primary Responsibilities
- Why - Authorities & Jurisdiction
- Where - Waters of U.S.
- How - Permitting and More
- Future.....





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# WHO WE ARE – NORTHWESTERN DIVISION



NWD – 11 States (nine states in entirety and portions of 2 others)



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# WHO WE ARE – OMAHA REGULATORY BRANCH

4



## Montana: 3 offices

- Billings Office – 2 PMs
- Helena Office – 4 PMs
- Missoula Office – 2 PMs

## North Dakota: 1 office / 6 PMs

## Nebraska: 2 offices

- State Office – 7 PMs
- District Office – 4 PMs

## South Dakota: 1 office / 6 PMs

## Wyoming: 1 office / 3 PMs

## Colorado (~1/3): 1 office / 7 PMs



# WHO WE ARE - MT REGULATORY PROGRAM



## Three Offices in Montana

Helena – Main office

- State Section Chief
- 4 Project Mangers
- Admin Staff

Billings – Satellite office

- 2 Project Managers

Missoula – Satellite office

- 2 Project Managers

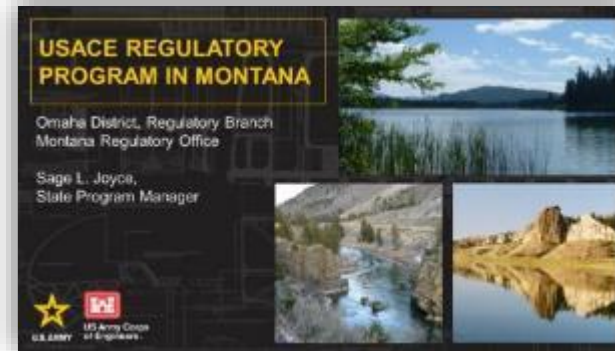


# WHAT WE DO - PRIMARY RESPONSIBILITIES

- Permitting
- Jurisdictional Determinations
- Compliance
- Enforcement
- Mitigation/Mitigation Banking
- Outreach



Dry Land Approved JD



Wetland Delineation



# WHY WE DO WHAT WE DO – PROGRAM JURISDICTION



## ***GEOGRAPHIC JURISDICTION:***

Is the area of a proposed project within the geographic authority of the Corps of Engineers?



## ***ACTIVITY BASED JURISDICTION:***

Is the proposed activity (project component or method) regulated by the Corps of Engineers?







# ***GEOGRAPHIC JURISDICTION:*** **JURISDICTIONAL DETERMINATIONS**



Jurisdictional determinations (JD) are used to specify geographic areas treated as subject to regulation by the USACE under Section 10 RHA / 404 CWA

Determination vs. Delineation vs. Verification

- **Determination:** provides a yes/no (or maybe (PJD) if review area contains WOTUS. Completed by Corps.
- **Delineation:** identifies the boundary and acreage of any aquatic resources in the review area. Prepared by Corps or applicant/consultant.
- **Verification:** revises/confirms delineation. Completed by Corps.







# GEOGRAPHIC JURISDICTION: WOTUS – TIMELINE



1972, October	Clean Water Act signed into law
1986, November	1986 regulations define “waters of the United States”
2015, August	Clean Water Rule (CWR) “2015 Rule” published; enjoined in 28 states
2019, October	CWR repealed; recodifying the 1986 regulations (pre-2015)
2020, April	Navigable Waters Protection Rule (NWPR) published
2021, September	NWPR vacated; return to pre-2015 regime (1986 definition)
2023, January	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
2023, March	2023 Rule effective; operative in certain states ( <u>not operative in Montana</u> )
2023, May	Sackett Supreme Court decision; USACE pause of JDs
2023, June	EPA and Army announce plans to issue a final rule amending the 2023 rule
2023, September	Amended 2023 Rule: publication / effective date; USACE resumes review of AJDs



# ***GEOGRAPHIC JURISDICTION:* PRE-2015 REGULATORY REGIME, CONSISTENT WITH SACKETT**



Current regime within Montana

- Refers to the agencies' pre-2015 definition of “waters of the United States,” as defined in the 1986 regulations

## **Categories of Jurisdictional Waters**

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands

## **Categories of Non-Jurisdictional Waters**

- Waste treatment systems
- Prior converted cropland



# ***GEOGRAPHIC JURISDICTION:*** **PRE-2015 REGIME – (a)(5) Tributaries**



Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).

- Include water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Can include rivers, streams, lakes, ponds, impoundments, ditches and canals.
- Jurisdictional tributaries must be relatively permanent.
  - Relatively permanent waters (RPW) include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).





# ***GEOGRAPHIC JURISDICTION:*** **PRE-2015 REGIME – (a)(7) Adjacent Wetlands**



Adjacent will be interpreted to mean “having a continuous surface connection.”

## Continuous Surface Connection (CSC)

- Wetlands have a CSC when they physically abut or touch a jurisdictional water.
- Abutting wetlands - “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Can also have a CSC when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see United States v. Cundiff (2009), and prior EPA practice).

\* Note that Sackett is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



# ***GEOGRAPHIC JURISDICTION: JDs / COORDINATION***



- Joint Coordination Memo, Sept 27, 2023
  - “Under the pre-2015 regulatory regime, consistent with Sackett, the agencies:
    - will not assert jurisdiction based on the significant nexus standard,
    - will not assert jurisdiction over interstate wetlands solely because they are interstate,
    - will interpret “adjacent” to mean “having a continuous surface connection,” and
    - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”
- Establishes process, including timelines for coordination
  - All draft AJDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) shall be coordinated at the local level (Region 8, EPA) and may be elevated.



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# ***GEOGRAPHIC JURISDICTION: JDs / TIMELINES***

15



## **Pre-2015 regime, pre-Sackett**

- Sept. 2021 to May 2023 – completed 120 AJDs
- 29 found jurisdictional
- 91 non-jurisdictional
  - 58 dryland & 33 isolated
- Processing times ranged from 1 day to 403 days\*

## **Pre-2015 regime, post-Sackett**

- June to Sept 8, 2023 – completed 1 Dryland AJD
- Sept. 8<sup>th</sup> to present – completed 7 AJDs, all non-JD
- Processing time ranged from 1 day (dryland) to 182 days (non-adjacent)\*

\* Processing delays are often due to the need for a site visit during the growing season (~April – Oct)





# ***GEOGRAPHIC JURISDICTION: JDs / TOOLS***



## **Wetland Delineation Manuals**

- 1987 Manual
- Regional Supplements
  - Arid West (2008)
  - Great Plains (2010)
  - Western M,V&C (2010)
- Automated Data Sheets (all RS)

## **Ordinary High Water Mark Manuals**

- RGL 05-05 – OHWM (2005)
- Arid West (2008)
- Western M,V&C (2014)
- Rapid OHWM ID Data Sheet (Nov 2023)
- Supporting Research & Tech. Reports

## **Antecedent Precipitation Tool (APT) (2020)**

- Latest version - June 2023

## **Streamflow Duration Assessment Methods (SDAMs)**

- Arid West (2021)
- Great Plains (2022)
- Western Mountains (2021)

## **Field Guide to Identifying the Upper Extent of Stream Channels (2022)**

# **ACTIVITY JURISDICTION: TYPES OF WORK REQUIRING PERMITS**



## **Section 10 of the RHA**

Any **work on, over, or under** the waterway that can affect course, condition, capacity and location

- Piers
- Docks
- Floats / Aids to Navigation
- Dredging
- Also fill activities



## **Section 404 of the CWA**

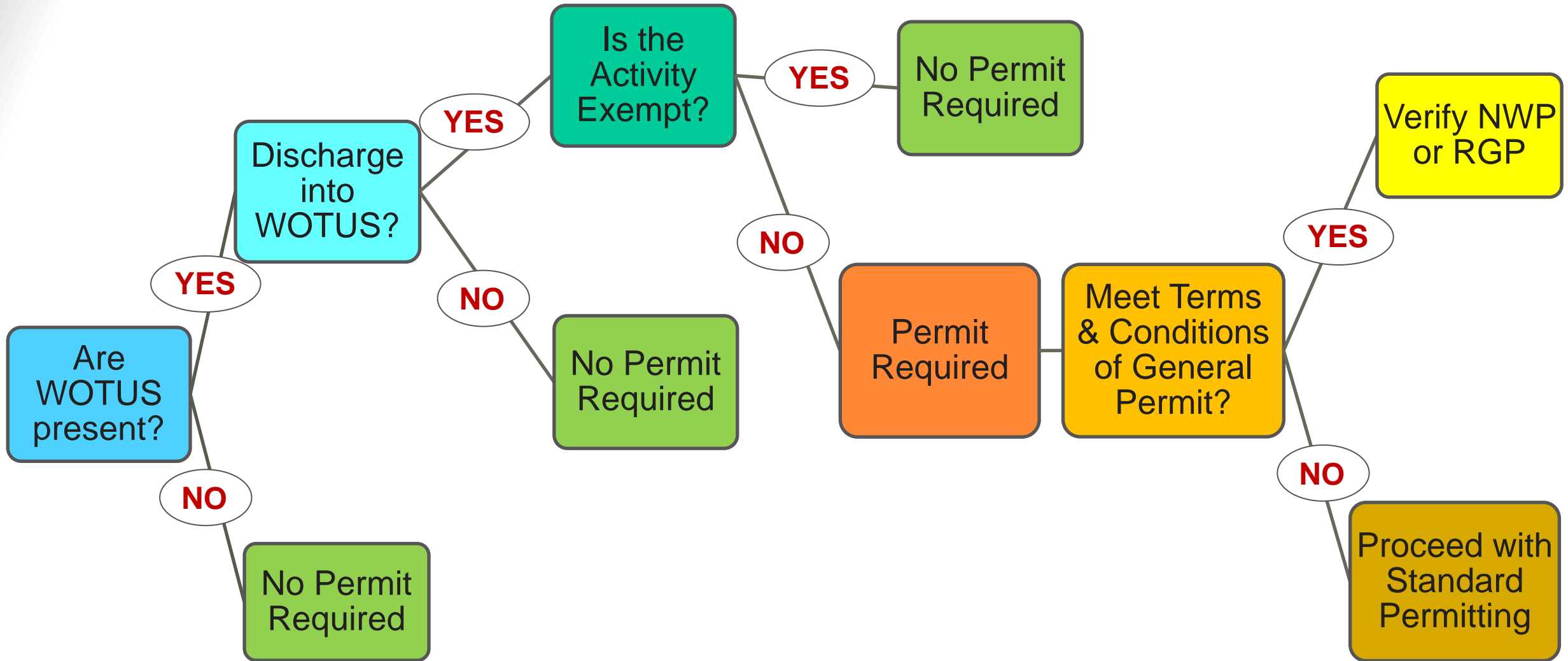
Requires that you obtain a permit from USACE for the **discharge of dredged or fill material** in any **water of the U.S. including wetlands**

- Road construction
- Residential development
- Bank stabilization
- Utility lines
- Restoration projects





# ***GEOGRAPHIC & ACTIVITY JURISDICTION:*** **PATH TO PERMIT or NO PERMIT REQUIRED**







# A GUIDE TO STREAM PERMITTING IN MONTANA

- A. MONTANA NATURAL STREAMBED & LAND PRESERVATION ACT (310 permit)
- B. MONTANA STREAM PROTECTION ACT (SPA 124)
- C. MONTANA FLOODPLAIN AND FLOODWAY MANAGEMENT ACT
- D. FEDERAL CLEAN WATER ACT (404 Permit)**
- E. FEDERAL RIVERS AND HARBORS ACT (Section 10 Permit)**
- F. SHORT-TERM WATER QUALITY STANDARD FOR TURBIDITY (318 Permit)
- G. MONTANA LAND-USE LICENSE OR EASEMENT ON NAVIGABLE WATERS
- H. MONTANA WATER USE ACT
- I. MONTANA WATER USE ACT (Water Reservations)
- J. STORMWATER DISCHARGE GENERAL PERMITS
- K. STREAMSIDE MANAGEMENT ZONE LAW
- L. OTHER LAWS THAT MAY APPLY



## PERMITTING:

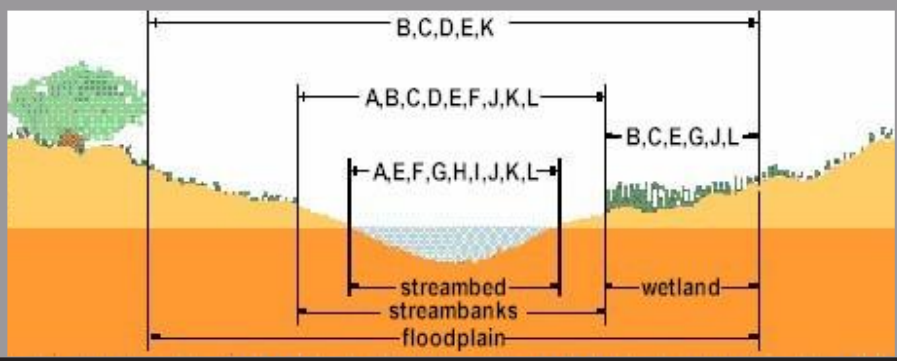
### TYPES OF USACE PERMITS

#### Individual Permits

- Letter of Permission (LOP)
- Standard Permit (SP)

#### General Permits

- Nationwide (NWP)
- Regional (RGP)
- Programmatic (PGP)





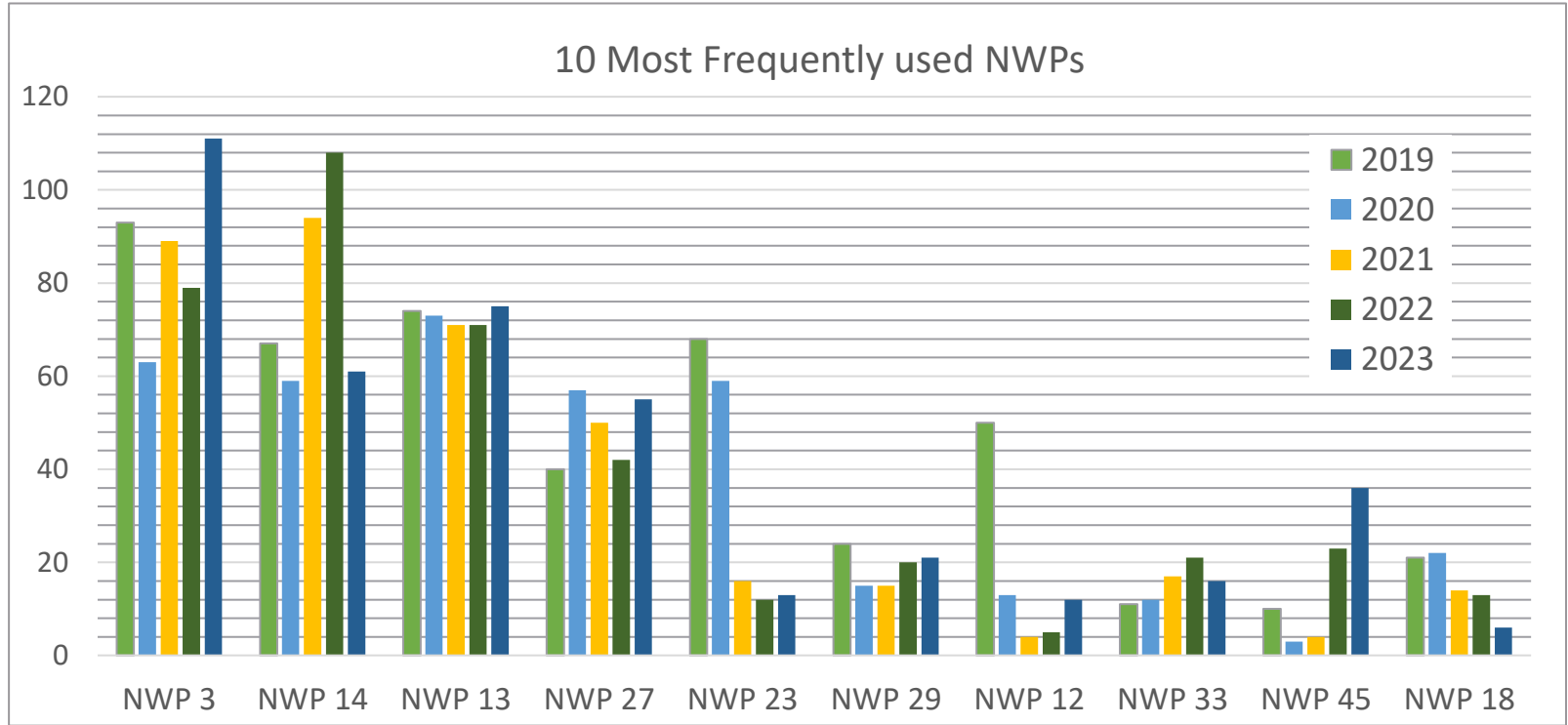
# MT REGULATORY ACTIONS 2019-2023

## Top 10 NWP Types

- NWP 3 - Maintenance = 435
- NWP 14 - Transportation = 390
- NWP 13 - Bank Stabilization = 364
- NWP 27 - Aquatic Restoration = 244
- NWP 23 - Approved CATEX = 168

Less than 100 each...

- NWP 29 - Residential Development
- NWP 12 - Utility Lines/Oil-NG Pipeline
- NWP 33 - Temp Facilities
- NWP 45 - Repair of Uplands
- NWP 18 - Minor Discharges



2,294 Nationwide Permit Reviews  
 Avg. Processing Time: 65 days



# MT REGULATORY ACTIONS 2019-2023



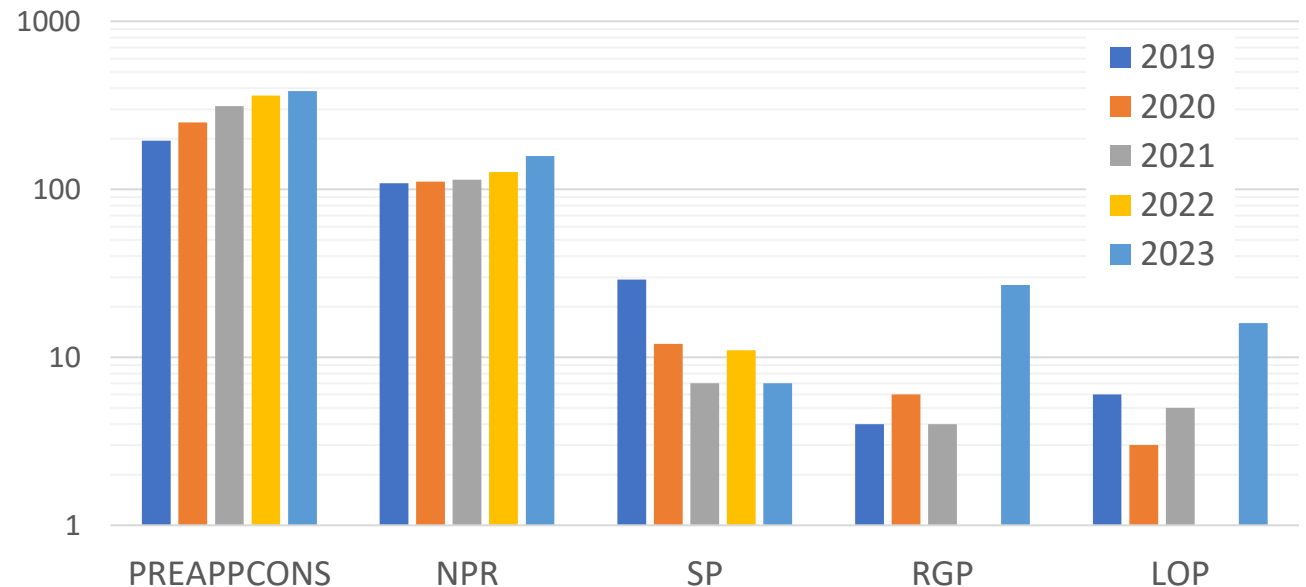
## Permitting

- Letter of Permission = 31 (Issued 23)  
Avg. Time: 137 days
- Regional General Permit = 41 (Verified 32)  
Avg. Time: 62 days
  - “Emergency” RGP = 30
- Individual Standard Permits (SP) = 66  
Issued (22) / Denied (1) / Withdrawn (43)  
Avg Time: 180 days

Issued Standard Permits			
Transportation	Bank Stabilization	Development	Ag-Related
11	6	3	2

## Other Actions

- Pre-Application Meetings = 1,515
- No Permit Required (NPR) = 622  
Avg. Time: 34 days
  - 147 - No Geographic Jurisdiction
  - 475 - No Activity Jurisdiction / Exempt







## Total Temporary Impacts

- Wetlands = 59 acres
  - NWP 27 (57 acres)
  - Transportation (17.4 acres)
  - NWP 12 (5.5 acres)
  - Standard Permits (3.3 acres)
- River/Stream = 63 acres
  - NWP 27 (34 acres)
  - NWP 12 (5 acres)

Avoided impacts to 13 acres of wetlands and 2.7 acres of stream bed \*



\* Rough estimate of minimized area based upon initial applications.

## Total Permanent Impacts

- Wetlands = 129 acres
  - Transportation (79 acres)
  - NWP 27 (8 acres)
  - Development (8 acres)
- River/Stream = 145 acres
  - NWP 27 (69.5 acres)
  - NWP 3 (16 acres)
  - NWP 45 (12.5 acres)
  - NWP 13 (10 acres)



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# MT REGULATORY PROGRAM INITIATIVES

23



Future development of RGPs to streamline permitting:

## **RGP-19-MT – Low-Tech Process-Based Restoration Activities**

- Stream habitat improvement projects associated with the restoration, enhancement or creation of wetland and riparian areas using low-tech stream restoration techniques.
- Post-Assisted Log Structures (PALS) and Beaver Dam Analogues (BDA).
- Self-verification checklist for applicants to acknowledge their intent to comply with the terms and conditions of the permit.

## **RGP-87-MT - Lakeshore Permits on Flathead Lake**

- Renewal of a historic GP for certain types of projects on Flathead Lake within Flathead, Lake, and Sanders Counties, and the Flathead Reservation.
- Reduce the Corps' workload; facilitate efforts of Flathead & Lake CDs and CSKT with the aquatic resources within their jurisdictions; and reducing the burden on the regulated public.
- Self-verification checklist – acknowledge T&C & that additional permits were granted



# PARTNERSHIPS WITH USACE / EPA



Partner with Corps / EPA to develop:

- Programmatic General Permits (PGP) - Reduces the duplication of permitting efforts by separate agencies.
- Advanced Identification (ADID) of Disposal Areas - Planning process to evaluate the wetlands within a certain area, identifying areas suitable or unsuitable for the discharge of dredged or fill material.
- Special Area Management Plans (SAMPs) - Collaborative interagency planning within a geographic area, establishing approvals, abbreviated processes, and/or restrictions for activities in environmentally sensitive areas that are under strong developmental pressure.





# STATE, TRIBAL, & LOCAL PROGRAMS



- Develop state or local regulatory programs to cover aquatic resources under federal jurisdiction as well as those not protected as WOTUS
- Partnerships and landowner incentives to conserve and protect wetlands, including voluntary restoration and protection programs
- Adopt non-regulatory programs such as watershed/wetlands planning initiatives, outreach, or acquisition programs





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# ***CHANGE:*** PAST, PRESENT AND FUTURE

26



CHANGE is normal, natural, and an absolute reality of the Corps' Regulatory program.

- Executive Orders
- Regulations and laws
- Interpretation
- Court decisions
- State laws/program assumption
- Political climate





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# MONTANA REGULATORY OFFICES

Please send all permit applications, pre-application meeting requests, and AJD requests to:

[Montana.Reg@usace.army.mil](mailto:Montana.Reg@usace.army.mil)

Helena Office	Billings Office	Missoula Office
100 Neill Avenue Helena, MT 59601-3329 (406) 441-1375	P.O. Box 7032 Billings, MT 59103 (406) 657-5910 / 5912	1600 North Avenue West, Suite 105 Missoula, MT 59801 (406) 541-4845

## Coming soon: RRS – Regulatory Request System

An online submission and tracking system for regulatory requests

- Pre-apps, JDs, & reporting suspected unauthorized activity active now
- Submissions for permitting – coming later this year??



# QUESTIONS?

