FIZBIN

Or the art of 404

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Corps Regulatory Statutes

- CLEAN WATER ACT (Federal Water Pollution Control Act of 1972) AND AMENDMENTS
- RIVERS AND HARBORS ACT OF 1899

Section 10 of RHA of 1899

- Requires prior authorization from the Corps of Engineers for any work or structures which could affect the ***location, course, condition, or capacity***
  of Navigable waters

- Navigable waters is a subset of “waters of the United States”

Federal Water Pollution Control Act of 1972

- Renamed "**Clean Water Act**" in 1976 reauthorization
- Corps Statutes are in 33 CFR Parts 320 through 332
- Individual Permits Part 325
  - 401 State Water Quality Certification
  - Indian Country, Pawnee Nation of Oklahoma - EPA
- Nationwide Permits Part 330
- Mitigation Part 332 (new in 2008)
- http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx

Regulatory Permits

- Levels of authorization based on magnitude of impact
  - **Nationwide** permits for projects with *minimal environmental impact*
  - **General** permits for regional categories of *minor impact activities*
  - **Individual** permits require a *more intensive public interest review and impact evaluation*

The Regulatory Office is responsible for public interest decisions fully supported in the file record. The file records are decision documents consisting of Environmental Assessments, 404(b)(1) Guidelines Evaluations, Public Interest Reviews, and Statement of Findings usually resulting in the issuance of a Department of the Army permit. Documenting avoidance, minimization and mitigation.

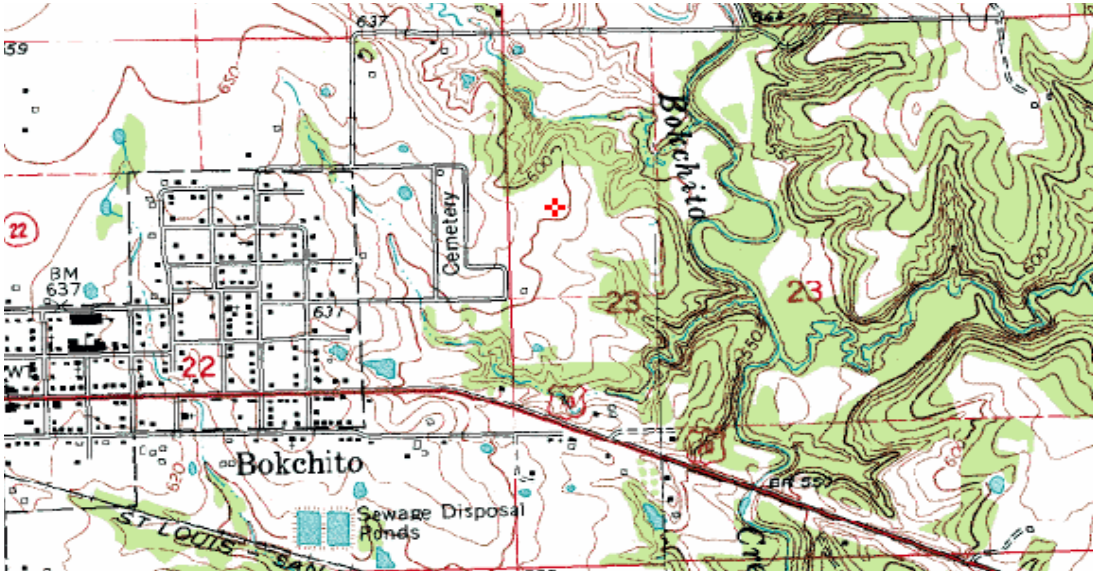
For IPs usually 20 pages.

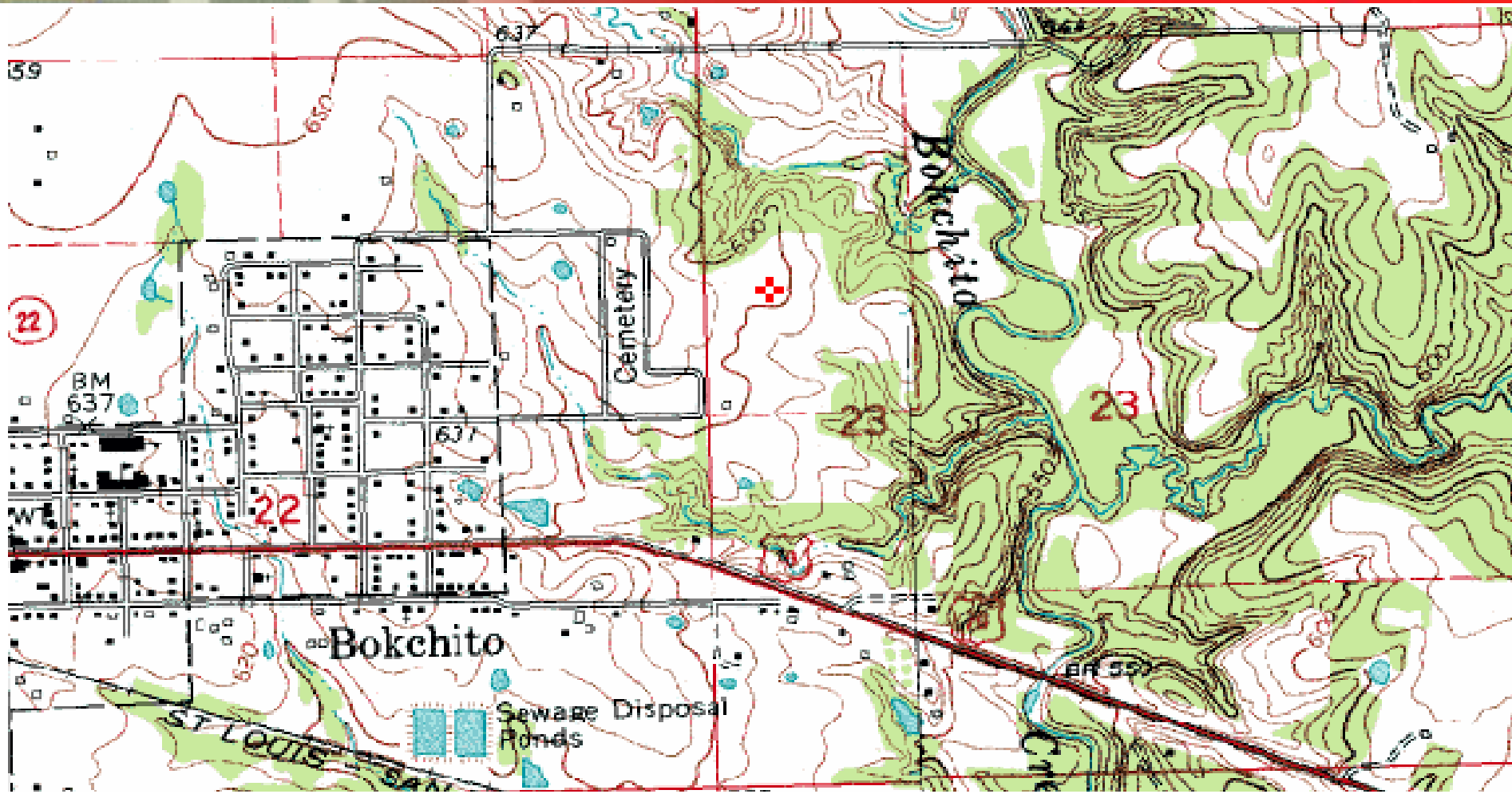
For PCN NWPs 5 pages and Documenting avoidance, minimization and mitigation.

Section 404 of CWA

- Requires prior authorization from the Secretary of the Army (Corps) for the *discharge* (placement) of dredged or fill material into “waters of the United States”

- Waters of the United States includes coastal and navigable waters, rivers, lakes, streams, intermittent and ephemeral streams, natural ponds, and “adjacent” wetlands
  - **Streams blue line or dashed blue line on 7.5’ U.S.G.S. Quad**

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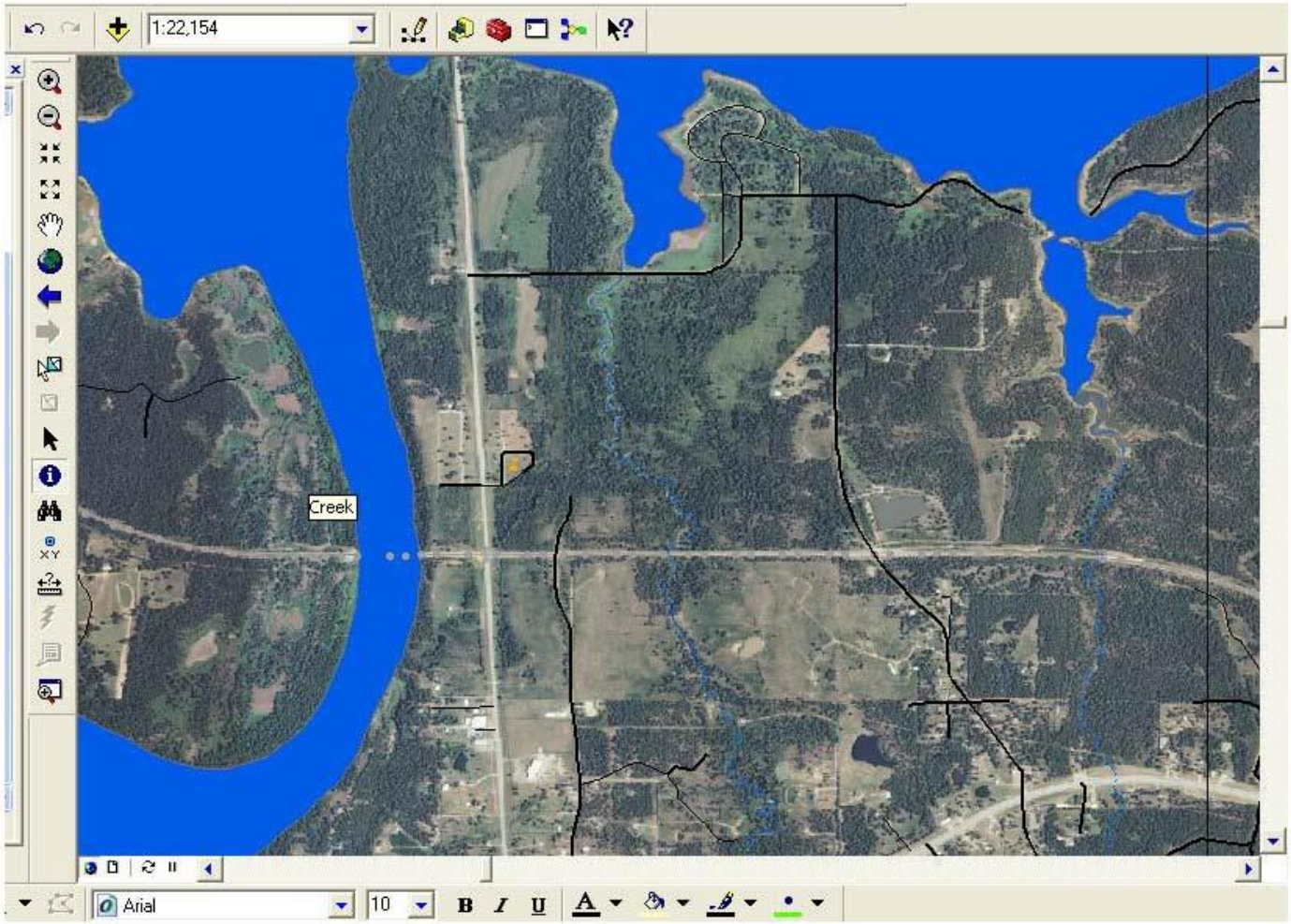
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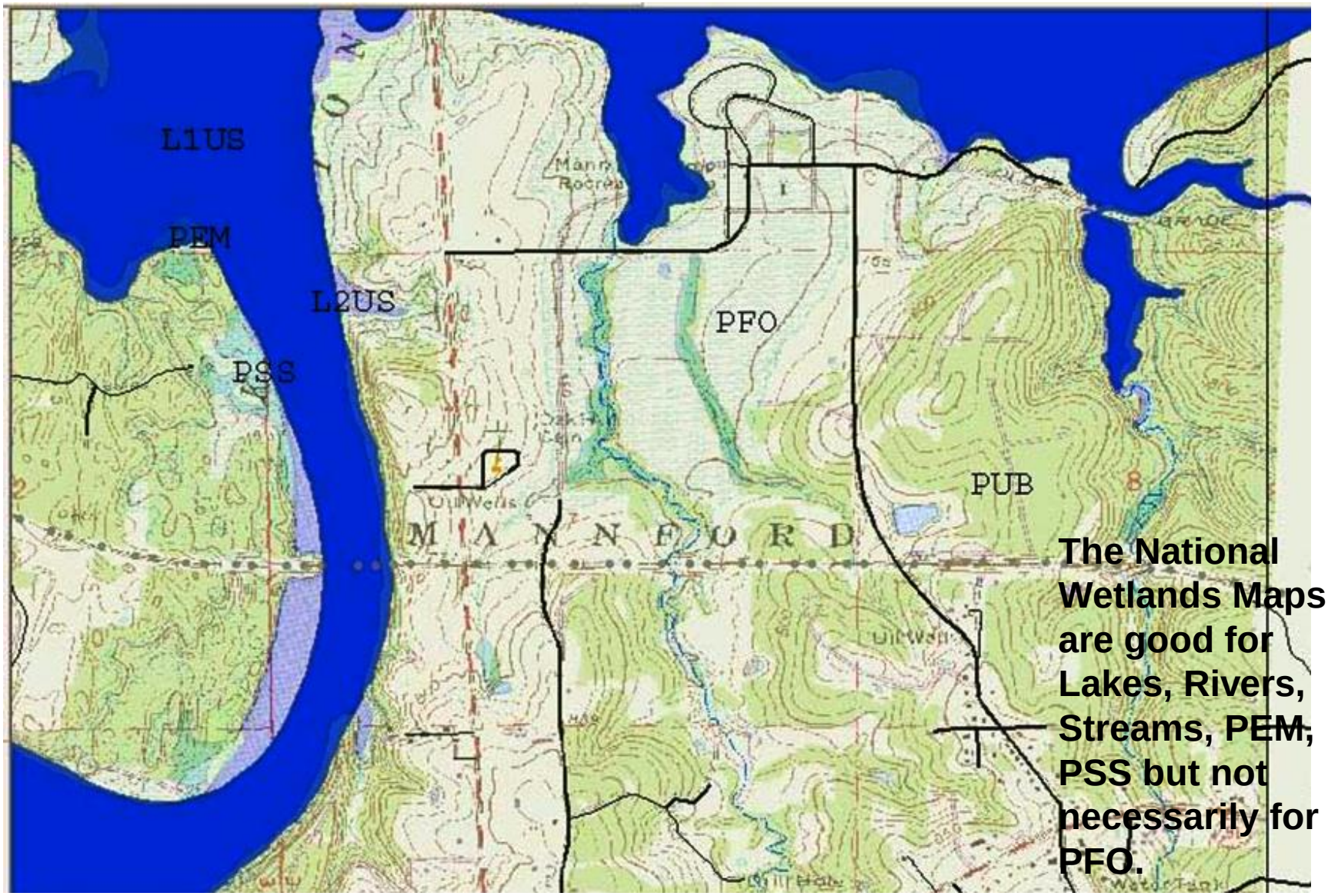


The National Wetlands Maps are good for Lakes, Rivers, Streams, PEM, PSS but not necessarily for PFO.

Definitions Water of the U.S.

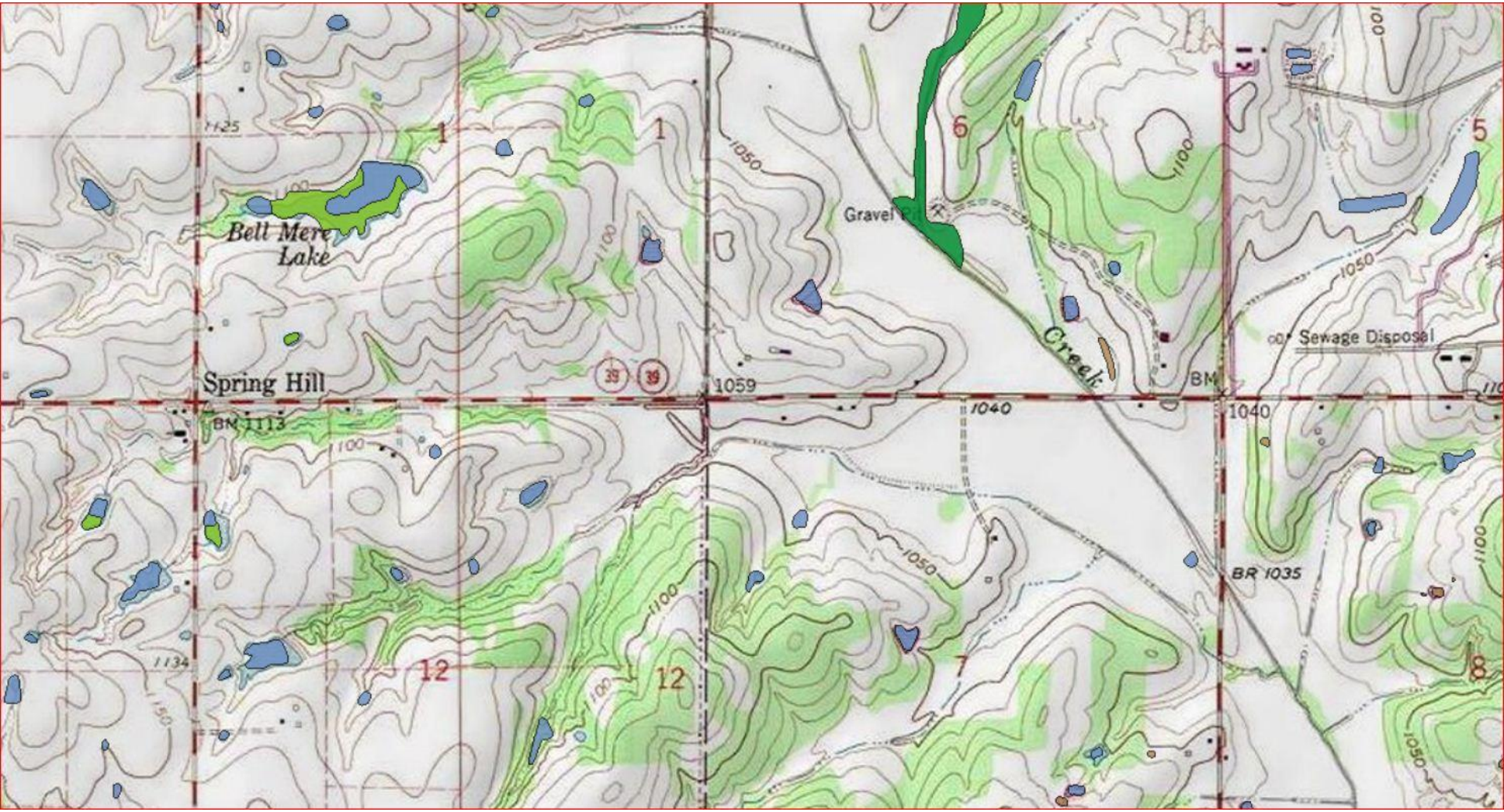
- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are… intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce….

Definitions

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

ODEQ regulates waters of the state.

Regulated Ditches



Definitions

- The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Definitions

- What this comes down to is, if the soil perches enough water, for about three weeks straight, during the growing season, then plants adapted for this are prevalent. Think black willow trees.

- It's the just enough areas that are tough.

Definitions

- Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands.“ The term "adjacent" means bordering, contiguous, or neighboring.

Avoidance and Minimization of Impacts

- Avoidance - Selection of alternative sites or methods to eliminate impacts to the aquatic environment
- Minimization – Reduction of project size and scope or reconfiguring project “footprint” to reduce magnitude of expected impacts,
  - Constrain and manage the timing of the project,
  - Full restoration of temporary disturbances

Section 404 (b)(1) Guidelines

- Considerations for Special Aquatic Sites (wetlands, sanctuaries/refuges, mudflats, vegetated shallows, coral reefs, riffle/pool complexes)
- Two rebuttable presumptions:
  - there are practicable alternatives to "non-water dependent" discharges
  - that alternatives to discharges into Special Aquatic Sites are less damaging to the aquatic ecosystem and are preferable

Section 404 (b)(1) Guidelines

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Compensatory Mitigation

- Compensation in the form of restoration, enhancement, creation, or preservation of aquatic habitats, wetlands, and associated upland buffers
- Mitigation Banks - In Leiu Fee - On-Site vs. Off-site (proximity to impact) - In-Kind vs. Out-of-Kind
- Temporal losses – time for compensatory site to mature
- Risk of Failure or Underachievement

Mitigation Value = Ecological Boost

Definitions

The Corps definition of Critical Resource Waters is the Outstanding Resource Waters and High Quality Waters as defined by the Oklahoma Water Resources Board.

ODEQ regulates waters of the state.

Definitions

Critical Resource Waters

Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

Definitions

For use in Critical Resource Waters

Tulsa District has issued General Permits (GP 12 for utility lines) and (GP 14 for road crossings). Both of these permits give ODEQ a 10 day comment period.

Definitions

Critical Resource Waters

For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38 a pre-construction notification is required in accordance with general condition 31 (PCN), for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters.

Nationwide Permit 3

Maintenance. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3 provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill;

PCN if removing accumulated sediments and debris in the vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and/or the placement of new or additional riprap to protect the structure.

Nationwide Permit 6

Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term “exploratory trenching” means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. No PCN if meet general conditions. Contact Corps Lake Manager if applicable.

NWP 12
Utility Line Activities

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours and the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project……..This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way;… (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (See general condition 31.) (Sections 10 and 404)

NWP 13

Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria: (a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects; PCN > 500'.

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects; PCN > 1 yd^3 /prf

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

(g) The activity is not a stream channelization activity.

Nationwide Permit 14

Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. The discharge cannot cause the loss of greater than 1/2 acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

Corps property 4f work with each lake manager.

This Nationwide Permit (NWP) also authorizes temporary structures, fills, and work necessary to construct the linear transportation project.

Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites.

Shoofly - Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows.

Shoofly - Temporary fills must be removed in their entirety, and the affected areas returned to pre-construction elevations. This means revegetated.

PCN required if > than one tenth acre or discharges into wetlands (special aquatic sites)

Nationwide Permit 18

Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a PCN to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark, or (2) the discharge is in wetlands (special aquatic sites). (See general condition 31.) (Sections 10 and 404)

NWP 25 Structural Discharges

Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States. (Section 404)

<u>No PCN if you meet the general conditions.</u>

Nationwide Permit 33

Temporary Construction, Access, and Dewatering

Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements……. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). ……. (Sections 10 and 404)

GC 20. Historic Properties

- Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.
- Corps will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act.
- For activities that may have the potential to cause effects, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

GC 18. Endangered Species

- No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation
- No activity is authorized under any NWP which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.
- Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat
- The applicant shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.

General Conditions

2. Aquatic Life Movements
6. Suitable Material
9. Management of Water Flows
10. Fills Within 100-Year Flood Plains
12. Soil Erosion and Sediment Controls (BMP's)
13. Removal of Temporary Fills – Revegetation
16. Tribal Rights
21. Discovery of Previously Unknown Remains and Artifacts
23. Mitigation.

General Conditions

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit.

For example, if a road crossing is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ½ -acre.

General Conditions

31. Pre-Construction Notification

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet……. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation.

- (4) The PCN must include a delineation of wetlands, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site.

General Conditions

31. Pre-Construction Notification

(5) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse effects are minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

District Engineer's Decision

If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. ……..Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k).

http://www.swt.usace.army.mil/Missions/Regulatory.aspx

Section 404 Enforcement and Compliance

- Activities commenced without authorization are **violations**
  - EPA has primacy for enforcement
  - Potential fine up to $25,000 per day
- Activities not in accordance with permit conditions are **non-compliance** matters
  - USACE has primacy for
  - enforcement
  - Potential fine up to
  - $10,000 per day

Submissions (permit applications) to the Corps

Engineer Form 4345 or ODOT approved application

Good project description

Understandable by an “uninformed” third party

Project location on an 7.5’ USGS Quad Map

Clear, simple, reproducible drawings (8 ½ “ by 11”)

Note proposed aquatic impacts – Is mitigation plan required?

Environmental consultant assistance

Important to remember

- Demonstrate avoidance consideration and minimization measures for aquatic resource
- Develop mitigation plan to compensate for unavoidable aquatic resource impacts
- Remember certain waters have special status…(scenic rivers and tributaries, HQW, endangered species-inhabited waters…)
- Regional General Permit 14 authorizes work in the CRW (ORW and HQW) areas.

- Don’t copy something from somewhere else.
- Keep in mind Corps workload - plan ahead
- Mr. Marcus Ware handles most local government applications
- Consult early w/ Corps Regulatory Staff

  (Pre-application Consultation meeting)

  (Ask Questions)

Questions

Questions later

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