

# USACE Regulatory Program in Montana

## Passive Restoration and Section 404

**Todd N. Tillinger, P.E.**

Montana Program Manager

Omaha District

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US Army Corps of Engineers  
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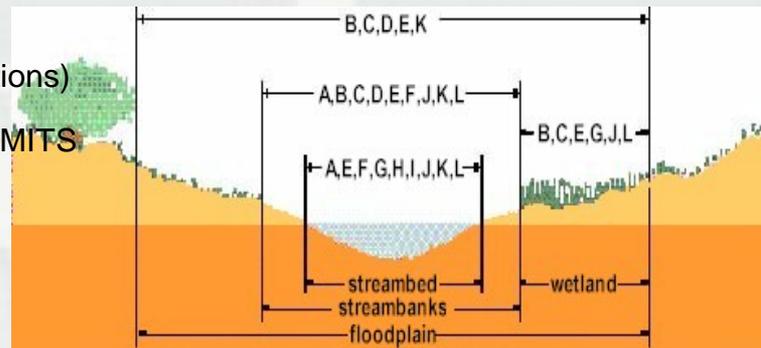
# Overview for Today

- USACE Regulatory Authorities
- Related Laws
- Jurisdiction
- Regulated Activities
- Activities not requiring Corps permits
- How to get a permit
- Mitigation (avoid, minimize, compensate)
- Permit timelines and cost
- Enforcement and non-compliance
- Wrap-up and Questions



# A GUIDE TO STREAM PERMITTING IN MONTANA

- A. MONTANA NATURAL STREAMBED AND LAND PRESERVATION ACT (310)
- B. MONTANA STREAM PROTECTION ACT (SPA 124 Permit)
- 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
- 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



# Corps Regulatory Authorities:

- **Section 10** - Rivers & Harbors Act (1899)
  - ▶ **Navigable** Waters (Yellowstone, Missouri, Kootenai in Montana; different than State Navigable waters)
  - ▶ Course, condition, capacity and location
  - ▶ Most work (docks, ramps, jetties, bridges, riprap, dredging, etc.)
  - ▶ Corps and US Coast Guard
  
- **Section 404** - Clean Water Act (1972)
  - ▶ All waters of the U.S. (including wetlands and tributaries)
  - ▶ Discharge of dredged or fill material
  - ▶ Corps and US Environmental Protection Agency



## Section 10:

Any work on, over, or under the waterway

- **Not just fill placement**
- **Includes boring under or spanning.**
- **Includes**
  - ▶ **Yellowstone River**
  - ▶ **Missouri River**
  - ▶ **Kootenai River**
  - ▶ **All Reservoirs or impoundments of those rivers.**



# Activities that do not require 404 permits:

- Excavation or dredging only
- Driving across a stream
- Incidental fallback
- Placement of driven piling
  - ▶ Fence posts, utility poles, boardwalks, bridge and dock piling
- Exempt Activities (see next slide)



# Exemptions from Section 404

33 CFR Part 323.4(a)(1) – (6)

(Exempt = No Section 404 Permit needed)

1. Normal farming activities such as plowing, seeding and cultivation; on-going operations
2. Maintenance of authorized fills
3. Farm/stock ponds, irrigation diversions
4. Temporary sediment basins
5. State approved program under Section 208
6. Construction of farm and forest roads, temporary mining access roads (with BMPs)



# Corps Regulatory Goals under Section 404:

- **Restore and maintain the chemical, physical, and biological integrity of our nations waters.**
  
- **Balance the need for environmental protection of the nation's waters with the public's need to impact the waters.**



# Related Laws

- National Environmental Policy Act (NEPA), 422 U.S.C 4321-4347
- National Historic Preservation Act, 16 U.S.C. 470
- Endangered Species Act (ESA), 16 U.S.C. 1531 et seq.
- Fish and Wildlife Coordination Act, 16 U.S.C. 742a et seq.
- Wild and Scenic Rivers Act, 16 U.S.C. 1278 et seq.
- Sections 401 & 402 of the CWA, 33 U.S.C. 1341 (MT DEQ, EPA, Tribes)
- Others: State and Local Floodplain Management Laws, Conservation Districts / 310 law, Local laws, Tribal Regulations



# Jurisdiction: What Aquatic Resources does the Corps Regulate under 404?

- Streams:
  - ▶ Perennial, Intermittent or Ephemeral
- Rivers:
  - ▶ Navigable and Tributaries
- Lakes & Ponds:
  - ▶ Natural or Man-made
- Wetlands:
  - ▶ Adjacent to Lakes, Rivers and Streams
- Ditches and Canals:
  - ▶ Case by Case evaluation

In Summary: “Waters of the United States” or WoUS



# Jurisdiction: What activities does the Corps regulate under 404?

## “Placement of Dredged or Fill Material”

- **Fill Material** is rock, soil, vegetation, concrete, steel, etc.
- **Dredged Material** is material dredged, excavated, or moved around from or within a water of the U.S.
- **Re-deposit** of dredged material is regulated.
- **Driven piles are not** considered fill, and are not regulated under Section 404; Section 10 still applies.
- **Waste materials** such as broken asphalt, bridge or building demolition debris, garbage, car bodies, tires, or other debris **is not fill material**; it is waste material and other laws apply.
- Permanent or Temporary discharges need permits.



<b>U.S. ARMY CORPS OF ENGINEERS</b> <b>APPLICATION FOR DEPARTMENT OF THE ARMY PERMIT</b> 33 CFR 325. The proponent agency is CECW-CO-R.		OMB APPROVAL NO. 0710-0003 EXPIRES: 28 FEBRUARY 2013	
<p>Public reporting for this collection of information is estimated to average 11 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters, Executive Services and Communications Directorate, Information Management Division and to the Office of Management and Budget, Paperwork Reduction Project (0710-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. Please DO NOT RETURN your form to either of those addresses. Completed applications must be submitted to the District Engineer having jurisdiction over the location of the proposed activity.</p> <p style="text-align: center;">PRIVACY ACT STATEMENT</p> <p>Authorities: Rivers and Harbors Act, Section 10, 33 USC 403; Clean Water Act, Section 404, 33 USC 1344; Marine Protection, Research, and Sanctuaries Act, Section 103, 33 USC 1413; Regulatory Programs of the Corps of Engineers; Final Rule 33 CFR 320-332. Principal Purpose: Information provided on this form will be used in evaluating the application for a permit. Routine Uses: This information may be shared with the Department of Justice and other federal, state, and local government agencies, and the public and may be made available as part of a public notice as required by Federal law. Submission of requested information is voluntary, however, if information is not provided the permit application cannot be evaluated nor can a permit be issued. One set of original drawings or good reproducible copies which show the location and character of the proposed activity must be attached to this application (see sample drawings and/or instructions) and be submitted to the District Engineer having jurisdiction over the location of the proposed activity. An application that is not completed in full will be returned.</p>			
(ITEMS 1 THRU 4 TO BE FILLED BY THE CORPS)			
1. APPLICATION NO.	2. FIELD OFFICE CODE	3. DATE RECEIVED	4. DATE APPLICATION COMPLETE
(ITEMS BELOW TO BE FILLED BY APPLICANT)			
5. APPLICANT'S NAME		8. AUTHORIZED AGENT'S NAME AND TITLE (agent is not required)	
First -	Middle -	Last -	First -
			Middle -
			Last -
Company -		Company -	
E-mail Address -		E-mail Address -	
6. APPLICANT'S ADDRESS:		9. AGENT'S ADDRESS:	
Address -		Address -	
City -	State -	Zip -	Country -
7. APPLICANT'S PHONE NOS. w/AREA CODE		10. AGENT'S PHONE NOS. w/AREA CODE	
a. Residence	b. Business	c. Fax	a. Residence
			b. Business
			c. Fax
STATEMENT OF AUTHORIZATION			
11. I hereby authorize _____ to act in my behalf as my agent in the processing of this application and to furnish, upon request, supplemental information in support of this permit application.			
SIGNATURE OF APPLICANT		DATE	
NAME, LOCATION, AND DESCRIPTION OF PROJECT OR ACTIVITY			
12. PROJECT NAME OR TITLE (see instructions)			
13. NAME OF WATERBODY, IF KNOWN (if applicable)		14. PROJECT STREET ADDRESS (if applicable)	
		Address	
15. LOCATION OF PROJECT		City -	
Latitude: -N	Longitude: -W	State -	Zip -
16. OTHER LOCATION DESCRIPTIONS, IF KNOWN (see instructions)			
State Tax Parcel ID		Municipality	
Section -	Township -	Range -	

Revised: 6/2/15 (316 form 270). Form may be downloaded from: <a href="http://www.dlrcr.mil.gov/licenses-and-permits/stream-permitting">www.dlrcr.mil.gov/licenses-and-permits/stream-permitting</a>	<b>AGENCY USE ONLY:</b> Application # _____ Date Received _____ Date Accepted _____ / Initials _____ Date Forwarded to DFWP _____
This space is for all Department of Transportation and SPA 124 permits (government projects). Project Name _____ Contract Number _____ Contract letting date _____ MEPA/NEPA Compliance <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, #14 of this application does not apply.	

**JOINT APPLICATION FOR PROPOSED WORK IN MONTANA'S STREAMS, WETLANDS, FLOODPLAINS, AND OTHER WATER BODIES**

Use this form to apply for one or all local, state, or federal permits listed below. The applicant is the responsible party for the project and the point of contact unless otherwise designated. "Information for Applicant" includes agency contacts and instructions for completing this application. To avoid delays, submit all required information, including a project site map and drawings. Incomplete applications will result in the delay of the application process. Other laws may apply.

The applicant is responsible for obtaining all necessary permits and landowner permission before beginning work.

PERMIT	AGENCY	FEE
<input checked="" type="checkbox"/> 310 Permit	Local Conservation District	No fee
<input type="checkbox"/> SPA 124 Permit	Department of Fish, Wildlife and Parks	No fee
<input type="checkbox"/> Floodplain Permit	Local Floodplain Administrator	Varies by city/county (\$25 - \$500+)
<input type="checkbox"/> Section 404 Permit, Section 10 Permit	U. S. Army Corps of Engineers	Varies (\$0 - \$100)
<input type="checkbox"/> 318 Authorization	Department of Environmental Quality	\$250 (\$18); \$400 - \$20,000 (401)
<input type="checkbox"/> 401 Certification		
<input type="checkbox"/> Navigable Rivers Land Use License, Lease, or Easement	Department of Natural Resources and Conservation, Trust Lands Management Division	\$50, plus additional fee

**A. APPLICANT INFORMATION**

NAME OF APPLICANT (person responsible for project): \_\_\_\_\_  
 Has the landowner consented to this project?  Yes  No

Mailing Address: \_\_\_\_\_  
 Physical Address: \_\_\_\_\_  
 Day Phone: \_\_\_\_\_ Evening Phone: \_\_\_\_\_ E-Mail: \_\_\_\_\_

NAME OF LANDOWNER (if different from applicant): \_\_\_\_\_  
 Mailing Address: \_\_\_\_\_  
 Physical Address: \_\_\_\_\_  
 Day Phone: \_\_\_\_\_ Evening Phone: \_\_\_\_\_ E-Mail: \_\_\_\_\_

NAME OF CONTRACTOR/AGENT (if one is used): \_\_\_\_\_  
 Mailing Address: \_\_\_\_\_  
 Physical Address: \_\_\_\_\_  
 Day Phone: \_\_\_\_\_ Evening Phone: \_\_\_\_\_ E-Mail: \_\_\_\_\_

**B. PROJECT SITE INFORMATION**

NAME OF STREAM or WATER BODY at project location \_\_\_\_\_ Nearest Town \_\_\_\_\_  
 Address/Location: \_\_\_\_\_ Geocode (if available): \_\_\_\_\_  
 1/4 \_\_\_\_\_ 1/4 \_\_\_\_\_ 1/4, Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_ County \_\_\_\_\_  
 Longitude \_\_\_\_\_, Latitude \_\_\_\_\_

The state owns the beds of certain state navigable waterways. Is this a state navigable waterway? Yes or No.  
 If yes, send copy of this application to appropriate DNRC land office – see Information for Applicant.

DA Application Form 4345 and "Montana Joint Application" are both accepted



# Timelines and Costs of Corps Permits

- **Nationwide Permits**
  - ▶ (30-60 days, no-cost)
- **Regional General Permits**
  - ▶ (30-60 days, no-cost)
- **Letters of Permission**
  - ▶ (30-60 days, no-cost)
- **Individual Permits**
  - ▶ (120+ days, \$0 to \$100 if issued)



# Nationwide Permit 27

- Current (2012) version expires March 18, 2017
- Restoration, establishment, and enhancement
- Requires individual Section 401 Water Quality Cert.
- Requires net increases in aquatic resource function and services
- No conversions unless relocated on the site
  - ▶ No stream to pond, or wetland to open water, etc. unless relocated on the project.
- No stream channelization
- Would generally cover the “passive” restoration work such as the small willow brush dams
- Usually no separate compensatory mitigation



# “Mitigation”

## 33 CFR 320 and 33 CFR 332

- Mitigation in all forms must occur throughout the application and review process.
- Mitigation includes **avoiding** impacts to the extent practicable.
- Unavoidable impacts must be **minimized**.
- **Compensation** may be necessary for unavoidable impacts.
- Compensation may occur on-site or off-site, but must be within the watershed.



# §332.3 – Compensatory Mitigation Requirements

- Established a Hierarchy\*:
  - ▶ Credit purchase from established bank.
  - ▶ Credit purchase from an In-Lieu Fee Program
  - ▶ Permittee-responsible mitigation under watershed approach
  - ▶ Permittee-responsible mitigation on-site & in-kind
  - ▶ Permittee-responsible mitigation off-site & out-of-kind

\*Any method used must replace lost functions and services



# What if you don't get a permit, or do not comply with permit terms?

- Possible: complete restoration of the site
- Possible: after-the-fact permitting/mitigation
- Possible: referral to US EPA for Civil and/or Criminal enforcement
- Possible: Fines or Administrative Penalties
- Possible: Federal Prison
- All or some of the above?



**Post and brush lines at breaches in historic beaver dams reverse conversion of ponds to uplands**



Small leaky brush structures work in succession to stack up water



**BUILDING STRONG®**

Willow and conifer post and brush lines in severely degraded stream



Year 1 following installation:  
Sediment trapped behind each  
brush line raised streambed and  
water table. Best as iterative  
process, multiple years.



# Willow Brush Dams



# Beaver Dam Analogs, Larger Stream



Elijah Portugal, Joseph Wheaton, and Nick  
Bouwes 2015



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# Questions?

## Montana Regulatory Program

### USACE – Omaha District

#### Helena Regulatory Office

10 West 15th Street, Suite 2200  
Helena, Montana 59626

(406) 441-1375

#### Missoula Regulatory Office

1600 North Avenue West, Suite 105  
Missoula, MT 59801

(406) 541-4845

#### Billings Regulatory Office

Post Office Box 2256  
Billings, Montana 59103

(406) 657-5910

2 PMs in Billings  
2 PMs in Missoula

3 PMs + State Manager in Helena



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# Contact Information:

Todd N. Tillinger, P.E.  
Montana Program Manager  
Omaha District  
U.S. Army Corps of Engineers  
10 West 15<sup>th</sup> Street Suite 2200  
Helena, Montana 59626-9705

Phone 406-441-1375  
Fax 406-441-1380

[todd.n.tillinger@usace.army.mil](mailto:todd.n.tillinger@usace.army.mil)

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Montana.aspx>



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