

REGULATORY 101: USACE PERMITTING AND PROCEDURES

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REGULATORY MISSION STATEMENT

The mission of the U.S. Army Corps of Engineers (USACE) Regulatory Program is to protect the nation's aquatic resources and navigable capacity while allowing economic development through fair and balanced decisions.



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REGULATORY STATUTORY AUTHORITIES

Section 10 of the Rivers and Harbors Act of 1899

- Navigable waters of the United States
- “those waters subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce “

Section 404 of the Clean Water Act: Waters of the United States

Current Jurisdictional Regulation is the Navigable Water Protection Rule-

1. Territorial seas and traditional navigable waters - (a)(1)
2. Tributaries - (a)(2)
3. Lakes and ponds, and impoundments of jurisdictional waters - (a)(3)
4. Adjacent wetlands - (a)(4)



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WHAT WE REGULATE – TYPES OF ACTIVITIES

The type of work proposed, and the method used to complete the work determines whether a permit is required from the Corps.

Section 10 - Rivers and Harbors Act:

- work in, over, or under
 - *work* (e.g., dredging or disposal of dredged material, temporary work pads, filling, etc)
- *structures* (e.g., pipelines, breakwaters, transmission lines, etc)

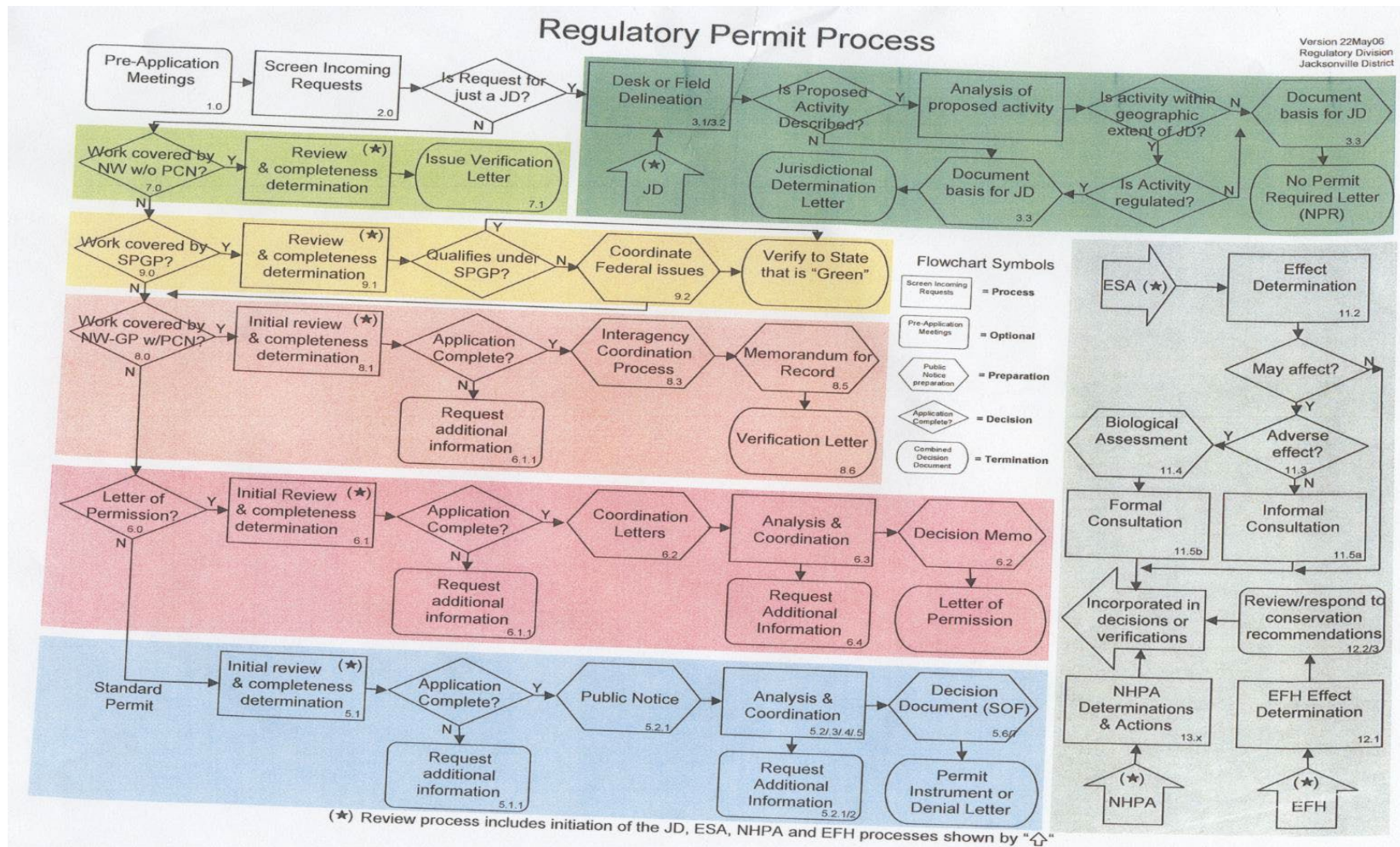
BRIDGES ARE A NOTABLE EXCPTION



Clean Water Act:
- discharges of *dredged*
and *fill* material



SO, YOU WANT A USACE PERMIT??????????



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Common Types of Permits

■ Standard Permits

- Large, complex projects
- Greater than 0.5 acres of waters of the U.S. impact
- Public notice, Alternatives analysis, Public interest review, 404((b)(1) guidelines compliance, etc.



■ Nationwide Permits (NWP)

- NWPs effective 19 March 2017 – 18 March 2022*
- Activities with minimal adverse impacts, up to 0.5 acre
- Common NWPs for road projects:
 - NWP 3 - Maintenance
 - NWP 14 – Linear Transportation Projects
 - NWP 23 – Approved Categorical Exclusions
 - NWP 15 – US Coast Guard Approved Bridges (less common)
- NWP 14 clarified definition of single and complete project
- NWP 3 additional riprap to protect existing structures no longer PCN
- Temporary fills must be removed in their entirety and the affected areas returned to preconstruction elevations and revegetated, as appropriate.



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REVIEW TIMELINES FOR NWP



USACE - determine PCN complete within 30-days of receipt OR request additional information

USACE does not respond to complete PCN within 45-days, applicant may begin work – UNLESS PCN required due to

- Listed species, critical habitat in vicinity or may be affected (General Condition 18)
- Potential to affect historic properties/cultural resources (GC 20)
- USACE 408 review because will alter or occupy a civil works project (GC 32(b)(10))



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NWP PRE-CONSTRUCTION NOTIFICATION PITFALLS

Guidance on Content of complete PCN and timelines -
General Condition 32 of the NWPs

- Clearly defined purpose and need for the proposed project and detailed project description, including both direct and indirect effects.
- Provide name(s) of any species listed as threatened or endangered under the Endangered Species Act or any designated critical habitat that might be affected by the proposed NWP activity.
- List any historic properties that have the potential to be affected by the proposed NWP activity.



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NWP PCN PITFALLS – CONTINUED

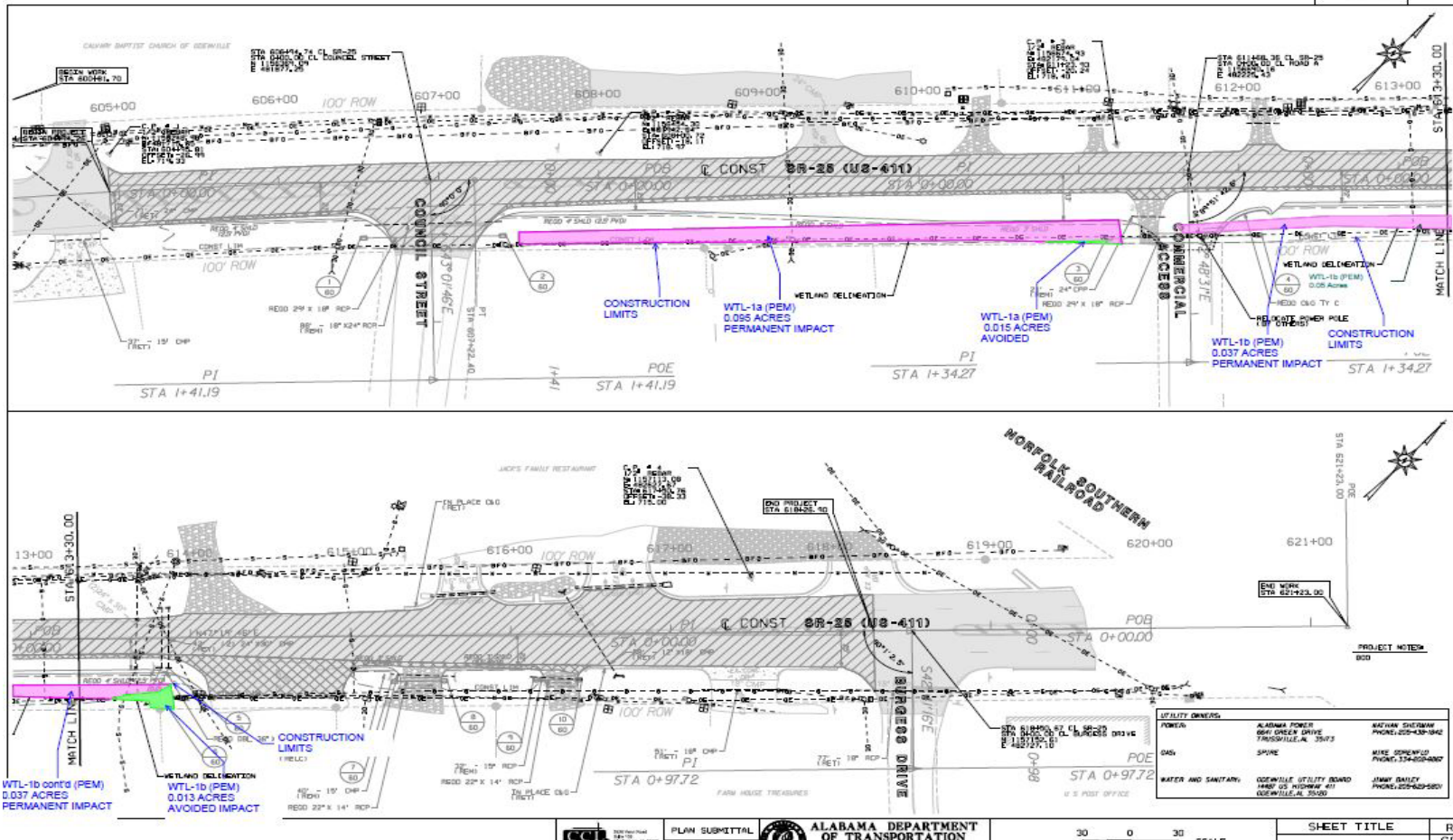
- No NEPA documentation (e.g., T&E and 106 assessments)
- Poor description of impacts (amount & type of fill, volume of dredging)
- Legible, Dimensioned or Scaled drawings – Plan View & Cross Section View (pitfall for both SP and NWP)
- Delineation of wetlands and waters, with report including maps & data forms - **45 days does not start until delineation submitted



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DRAWING EXAMPLE 1



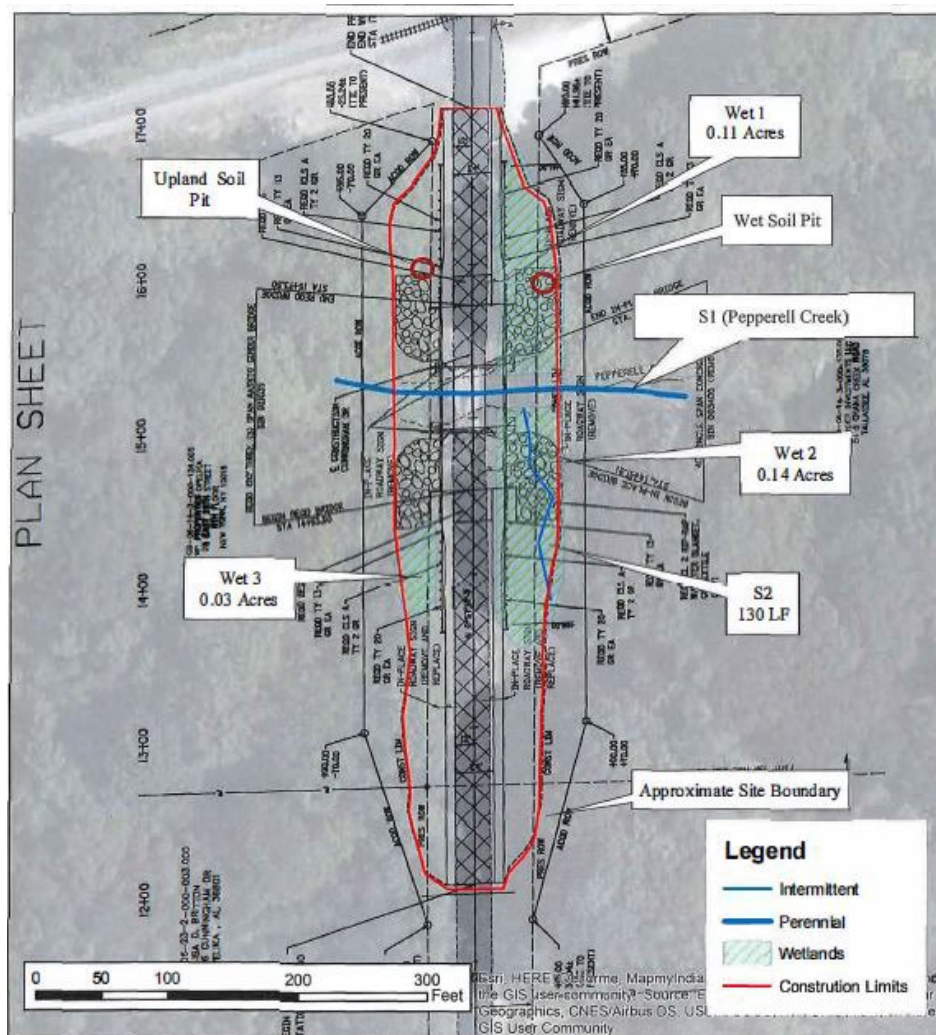
40 CFR 230.2



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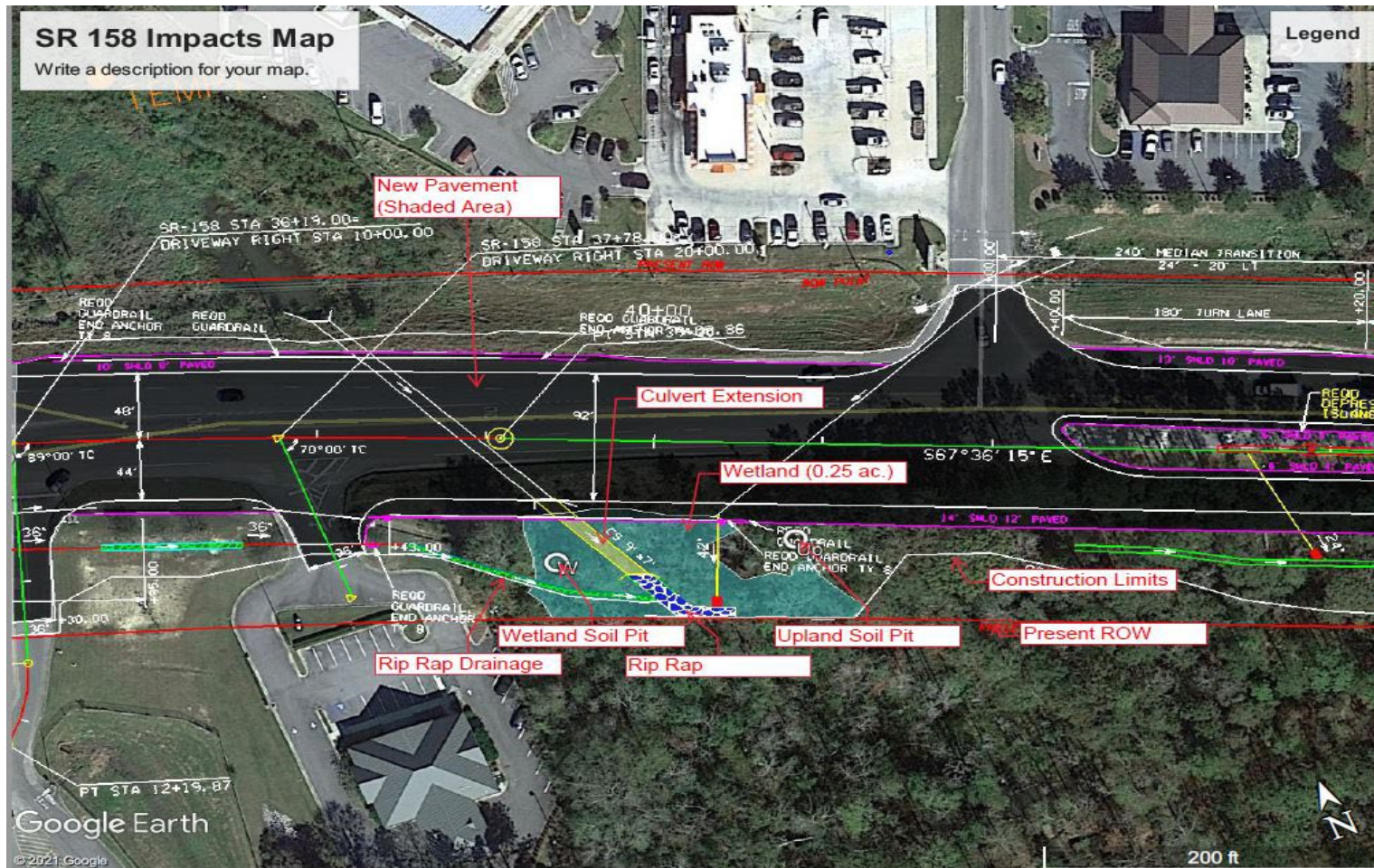
DRAWING EXAMPLE 2



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DRAWING EXAMPLE 3



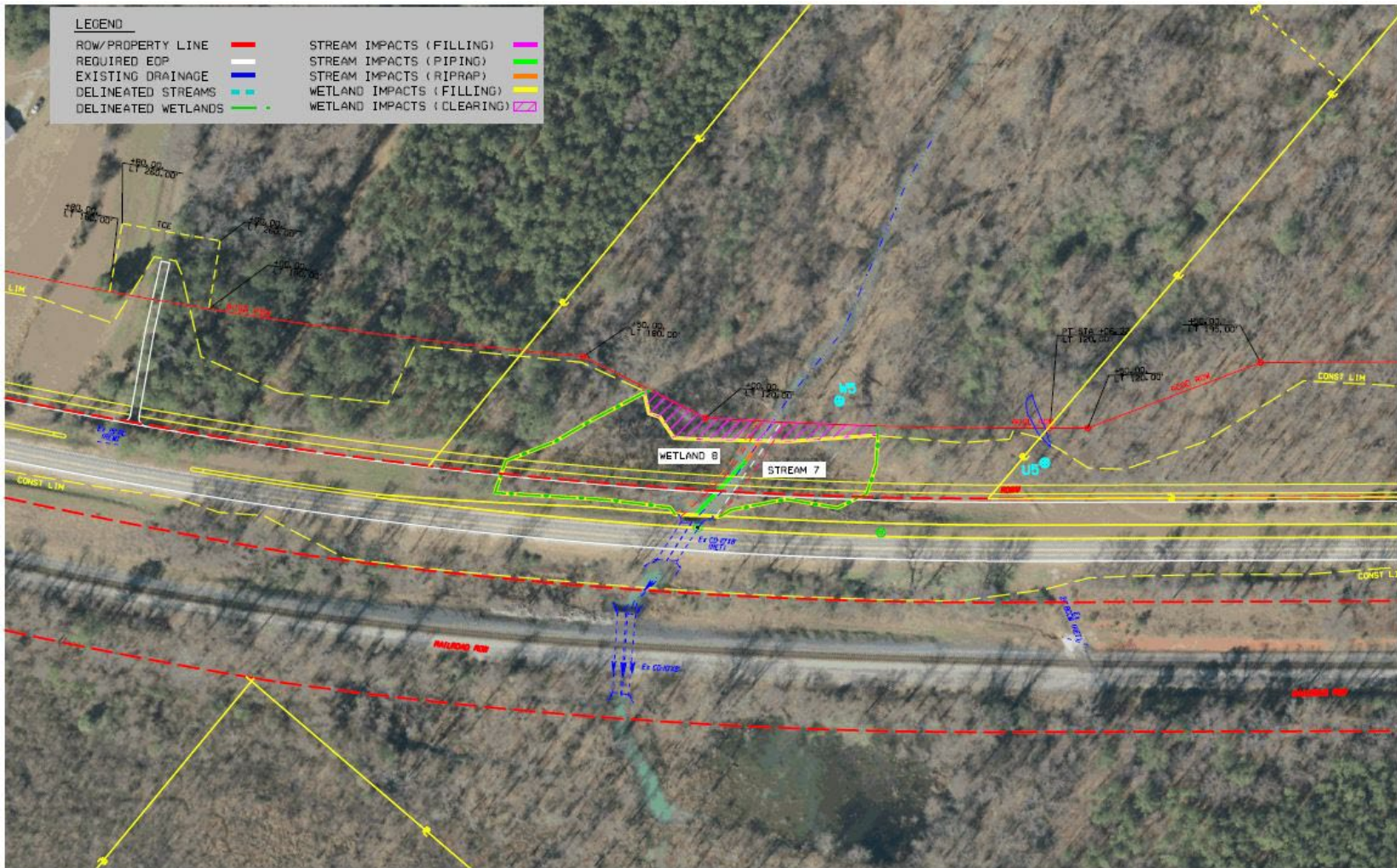
40 CFR 230.2



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DRAWING EXAMPLE 4



40 CFR 230.2



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NWP PCN PITFALLS – CONTINUED

- No clear mitigation statement or assessments of wetland and stream quality (Stream SOP worksheets, WRAP, etc.) Measures of avoidance and minimization not addressed.
- If project will affect waterway in National Wild & Scenic River System or designated study river – identify it in PCN (Yes! There are a few in Alabama)

But there is help...USACE has developed ENG FORM 6082: United States Army Corps of Engineers (USACE) **NATIONWIDE PERMIT PRE-CONSTRUCTION NOTIFICATION (PCN)**



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CATEGORICAL EXCLUSIONS

NWP 23 – Approved Categorical Exclusions

Not all projects granted Cat Ex by FHWA are considered eligible by USACE for authorization as NWP 23

(ex. high quality wetlands/streams, more than minimal adverse impacts)

RGL 05-07 identifies categories of FHWA activities approved by USACE HQ as eligible for NWP 23

<http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-07.pdf>

RGL 05-07 identifies Cat Ex activities that require submission of PCN to USACE if jurisdictional wetlands and/or waters impacted

Identify in PCN which Cat Ex the activity falls under



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REVIEW TIMELINES FOR SP

USACE - determine application complete within 15-days of receipt & publish 30-day public notice OR request additional information required for public notice

Goal is to issue permits within 120 calendar days of **complete** application receipt - frequently not possible under current regulatory constraints, review requirements

Issues requiring extended periods of time to resolve stop the review “clock”. Review clock resumes once resolved.

(ex. Section 7 consultation, cultural resource sites or Tribal issues (Section 106), 404(b)(1), new water quality cert. process*, coastal zone consistency, effects on federal navigation projects, etc.)



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SP EVALUATION PITFALLS

Inadequate 404(b)(1) avoidance and minimization information – FHWA not focused on this regulation

- Alternatives- Least Environmentally Damaging Practicable Alternative (LEPA)*
- Provide concise comparison between wetland, stream, T&E species, cultural resource, hazardous material, housing/business relocation impacts for alternative designs and alignments considered
- Provide discussion of why bridging is not feasible for a particular wetland/stream crossing (ex. cost, design logistics, no appreciable minimization of impacts)
- Inadequate project information related to factual determinations



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SUBPART C – PHYSICAL AND CHEMICAL CHARACTERISTICS

- 
- **Substrate**
 - **Suspended particulates/turbidity**
 - **Water Quality**
 - **Current patterns & water circulation**
 - **Normal water fluctuations**
 - **Salinity gradients**

40 CFR 230.2



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SP EVALUATION PITFALLS - CONTINUED

Inadequate information about the type of fill materials that would be discharged in wetlands and streams (ex. riprap, commercial earthen fill, fill from on-site cut, pre-cast concrete)

Legible, Dimensioned or Scaled drawings – Plan View & Cross Section View

No clear mitigation statement or assessments of wetland and stream quality (Stream SOP worksheets, WRAP, etc.)



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LEAD FEDERAL AGENCY

FHWA funded projects – FHWA typically lead federal agency even if a USACE permit is required.

MUST Provide USACE with documentation showing FHWA has ensured compliance with NEPA, Section 7 of the Threatened & Endangered Species Act, and Section 106 of the National Historic Preservation Act, etc.

Similarly, the U.S. Coast Guard might be considered the lead federal agency for constructing a bridge (or other included structure*) over a Section 10 water.



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Questions?

Call us!!

251-690-2658

<http://www.sam.usace.army.mil/Missions/Regulatory.aspx>



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