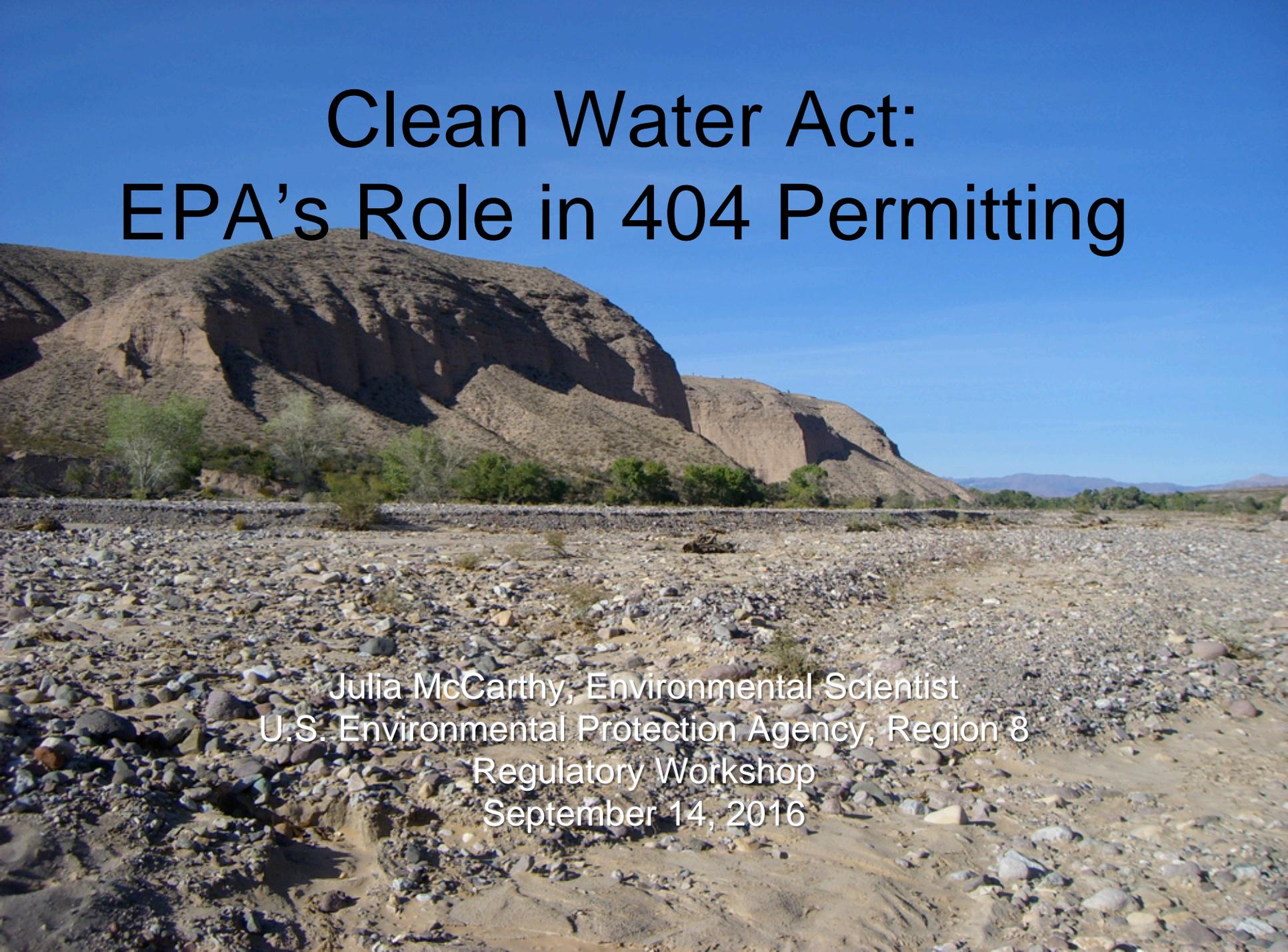


# Clean Water Act: EPA's Role in 404 Permitting

A wide, dry riverbed filled with grey and brown rocks and pebbles stretches across the foreground. In the background, there are large, brown, eroded hills or mountains under a clear blue sky. Some sparse green shrubs are scattered along the base of the hills.

Julia McCarthy, Environmental Scientist  
U.S. Environmental Protection Agency, Region 8  
Regulatory Workshop  
September 14, 2016

# EPA Region 8 Water Facts

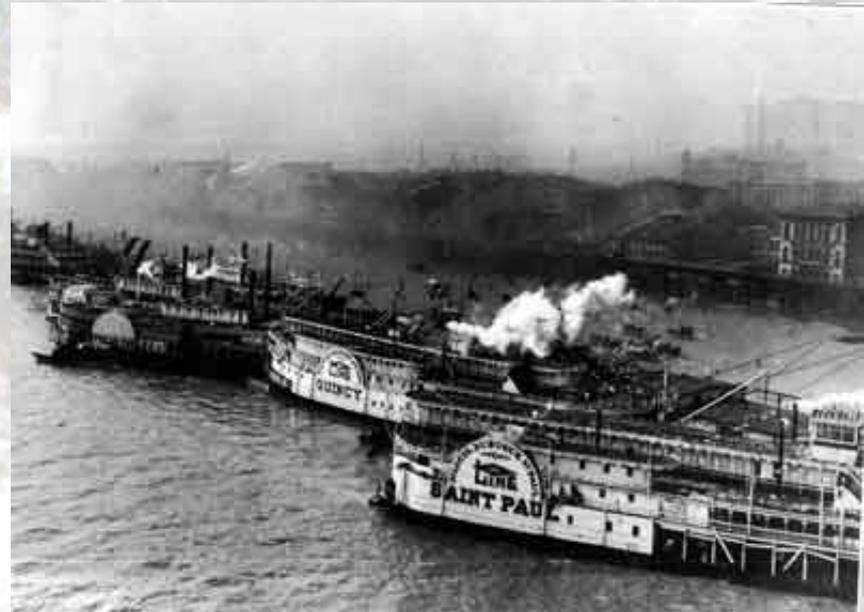
- Region 8: Colorado, Montana, Utah, Wyoming, North and South Dakota
- Headwaters of the Missouri, Colorado, Rio Grande, Arkansas, Platte, and Columbia Rivers.
- Over 70% of the stream miles in Region 8 are intermittent and ephemeral.
- Nearly half of the natural wetlands in Region 8 have been lost.
- The Great Salt Lake ecosystem provides a critical migratory bird staging area in an otherwise arid region. The Great Salt Lake is designated as one of only seven Hemispheric Sites of Importance by the Western Hemisphere Shorebird Reserve Network in the lower 48 states.



# Clean Water Act History 101

## Rivers and Harbors Act 1899

- Construction of bridges, causeways, dams, dikes, etc.
- Prohibited the creation of any unauthorized obstruction to the navigable capacity of any of the waters of the United States
- Regulated by the Department of Army



# Clean Water Act History 101

- 1948: Federal Water Pollution Control Act
- 1960's: Silent Spring and the rise of Ecology
- 1969:Cuyahoga River fire
  - The river that "oozes rather than flows" and in which a person "does not drown but decays."
  - Rivers catching fire was not that rare an occurrence in the United States in the 20th century.



Cuyahoga River 1952

# Clean Water Act History 101

- 1970: EPA established
  - To consolidate in one agency a variety of federal research, monitoring, standard-setting and enforcement activities to ensure environmental protection
- 1972: Water Pollution Control Act Amendments
- 1977: Clean Water Act
  - Reauthorized and expanded '72 Act



## **Objective of the Clean Water Act:**

**“...to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”**



# Clean Water Act

EPA uses regulatory and non-regulatory tools to restore and maintain physical, chemical and biological integrity of the nation's waters.

**Administered by EPA unless otherwise noted...**

**Like Section 404 to be administered by the Corps**

# EPA CWA Authorities

- **Title I: Research and Related Programs**
  - Wetland Program Development Grants (104(b)(3))
- **Title II: Grants for Construction of Treatment Works**
- **Title III: Standards and Enforcement**
  - Effluent Limitations, WQ Standards/TMDL ( 303(d)), National WQ Inventory, Inspections & Monitoring, Enforcement, Vessels, Federal Facilities, Non-Point Source
- **Title IV: Permits and Licenses**
  - 401: State, Territorial and Tribal Certifications
  - 402: NPDES –point and non-point sources
  - 403: Ocean Discharges (not sediment -- applies to 402 permits)
  - 404: Permits for Dredged or Fill Material
- **Title V: Administration and Definitions**

# What We Do (most of the time)

- 3 Corps Districts - Sacramento, Albuquerque, Omaha
- Regulatory: CWA Section 404
  - Review IPs and LOPs, JDs, NWP Regional Conditions, etc.
  - Serve on IRTs for mitigation
  - Policy work
  - Tribal 401 Certifications
  - Enforcement Support
- NEPA document review
- State and Tribal: Wetland Program Development Grants



# Clean Water Act Section 404

## **U.S. Army Corps of Engineers**

- administers day-to-day program
- makes individual and general permit decisions
- develops regulatory policy and guidance
- conducts or verifies jurisdictional determinations
- shares enforcement role with EPA
- ensures permits comply with 404(b)(1) Guidelines, NEPA, Historic Preservation Act, ESA, etc.



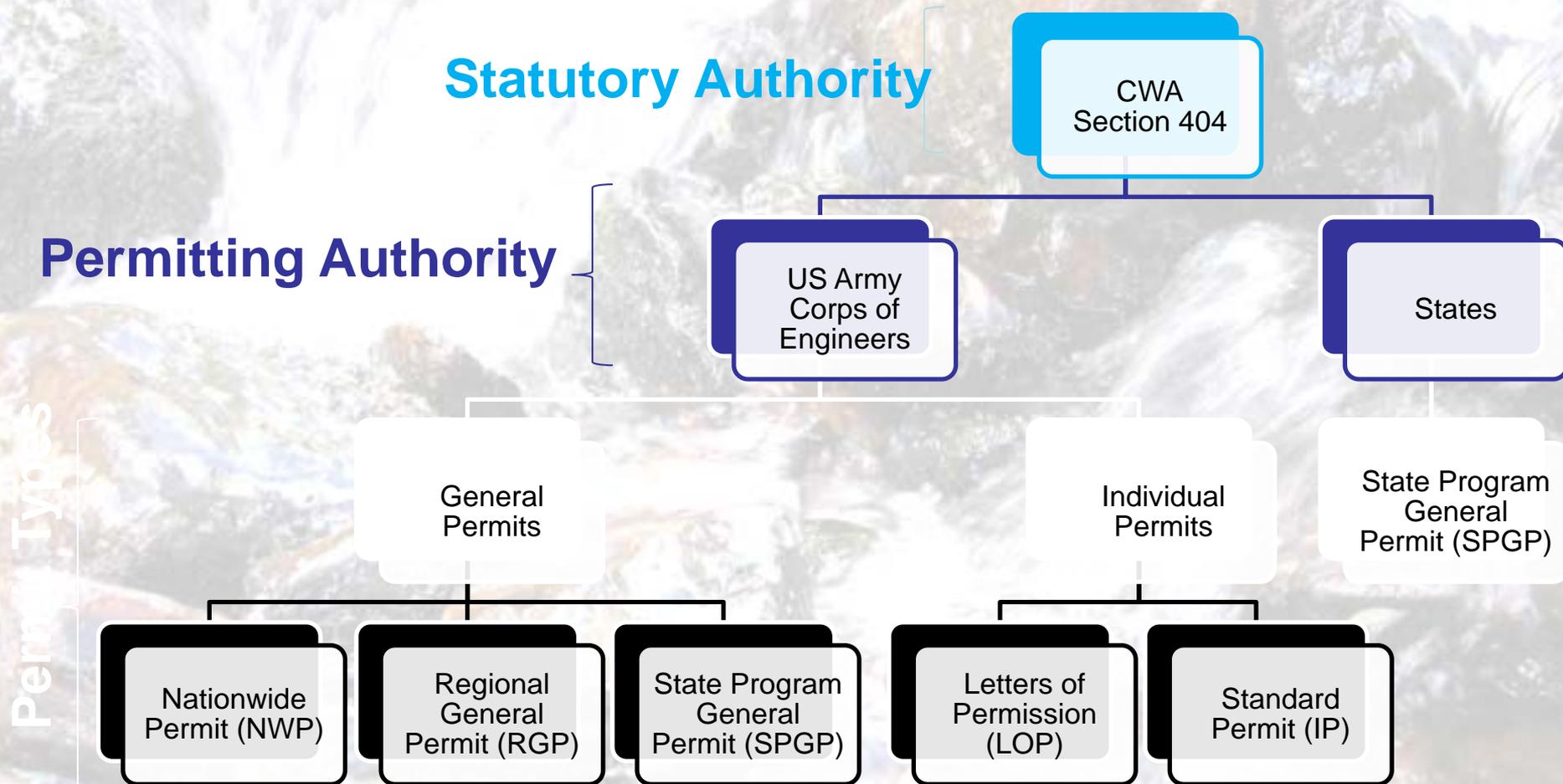
# Clean Water Act Section 404

## U.S. EPA

- reviews permits
- develops environmental guidelines, policy, and guidance
- maintains Section 404(q) “elevation” and (c) “veto” authority
- shares enforcement role with Corps
- identifies exempt activities
- determines geographic scope of jurisdiction
- approves and oversees State assumption



# Clean Water Act Section 404



# Project Coordination and Review: What is EPA looking for?

- Coordination with Corps, applicant and resource agencies early and throughout the process
- Clear and reasonable project purpose
- Thorough alternatives analysis and selection of the LEDPA
- Sequencing and compliance with the (b)(1) Guidelines:
  1. Avoidance
  2. Minimization
  3. Mitigation for any unavoidable adverse impacts
- Evaluation of direct, secondary and cumulative impacts
- Compensatory mitigation consistent with the 2008 Rule
- NEPA/404 integration when appropriate (transportation)
- Response to our comments

# Clean Water Act Section 404

- 404(b) directs Army to apply environmental criteria developed by EPA

*Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary [of the Army] through the **application of guidelines** developed by the Administrator [of EPA], in conjunction with the Secretary [of the Army], which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean*

## “Section 404(b)(1) Guidelines” [40 CFR Part 230]

No 404 permit may be issued unless it complies with 404 (b)(1) Guidelines.

# 404(b)(1) Guidelines

- Purpose is to restore and maintain the chemical, physical, and biological integrity
- Prohibit discharges that result in unacceptable adverse environmental effects
- Binding substantive rules
- Applicable to Section 404 Program, Corps' Civil Works Program and State-assumed 404 programs

# 404(b)(1) Guidelines

- a) No permit may be issued if there is a less environmentally damaging practicable alternative to achieve the basic project purpose.
- b) No permit may be issued if it violates State water-quality standards, the Coastal Zone Management Act, or would jeopardize a threatened or endangered species.
- c) No permit may be issued if it causes or contributes to significant degradation of the aquatic ecosystem.
- d) No permit may be issued unless measures are taken to minimize and mitigate for adverse environmental impacts.



# Other Project Considerations

EPA may comment on the following issues if linked to Corps action

- Impaired water bodies and/or TMDL
- Construction and post-construction stormwater BMPs
  - SWPPP
  - Low Impact Development
- Floodplain protection
- Groundwater quality and quantity
- Species impacts
- Air Quality

# Clean Water Act Section 404

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# Clean Water Act Section 404

Developing environmental guidelines, policy and guidance:

- 2008 Mitigation Rule- EPA and Corps co-development and compliance
- Waters of the U.S. policy – EPA and Corps co-development and implementation

# Development of the Clean Water Rule

- On April 21, 2014, EPA and the U.S. Dept. of Army (Army) published a proposed rule defining “waters of the U.S.” for public comment.
- On June 29, 2015, EPA and the Army published the final **Clean Water Rule** to define “waters of the U.S.” (80 FR 37054)  
*“to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.” (Gina McCarthy, 2015)*
- On August 28, 2015, the Clean Water Rule became effective (litigation will be discussed next).

# Clean Water Rule Litigation

- On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court.
- In response to this decision, EPA and the Department of Army resumed nationwide use of the agencies' prior regulations defining the term "waters of the United States," applying relevant case law, applicable policy, and the best science and technical data on a case-by-case basis in determining which waters are protected by the Clean Water Act.

# Clean Water Act Section 404

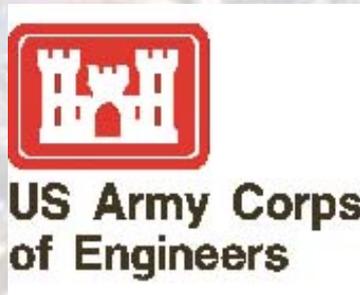
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# Clean Water Act Section 404

- 404(q) directs Army, EPA, DOI(FWS) and DOC(NMFS) to develop procedures for reducing delays and redundancy in the 404 permit process.
- 1992 Memorandum of Agreement between agencies
  - Outlines dispute resolution procedures
  - Potential for permit elevation where a project will have significant adverse effects on aquatic resources of national importance



# Clean Water Act Section 404

- CWA Section 404(c) authorizes EPA to prohibit or restrict the placement of dredged or fill material in waters of the U.S. (including withdrawal of specification)
- Unacceptable adverse effect(s):
  - Municipal water supply;
  - Shellfish beds and fishery areas;
  - Wildlife, or;
  - Recreation areas.

# CWA Section 404(c)

- Cases initiated by EPA since 1972: 30
- Cases resulting in a final determination: 13
- Cases pending: 1
  
- Most recent final determinations:
  - 2011: Spruce Mine in WV - 6.6 miles of high-quality headwater streams
  - 2009: Yazoo Pumps, MS – 67,000 acres of highly productive wetlands in the Lower Mississippi Delta
  - 1990: Two Forks Reservoir, CO – 30 miles of South Plate River, including 14 miles of “gold medal” trout stream

# Clean Water Act Section 404

## U.S. EPA

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# Clean Water Act Section 404

- Section 404 violations fall into two broad categories:
  - failure to comply with the terms or conditions of a Section 404 permit
  - Discharging dredged or fill material into waters of the U.S. without a permit
- 1989 Memorandum of Agreement between EPA and the Corps
  - Corps has the lead on Corp-issued permit violation cases.
  - For unpermitted discharges, EPA and the Corps determine the appropriate lead agency based on criteria in the MOA.

# Clean Water Act Section 404

## U.S. EPA

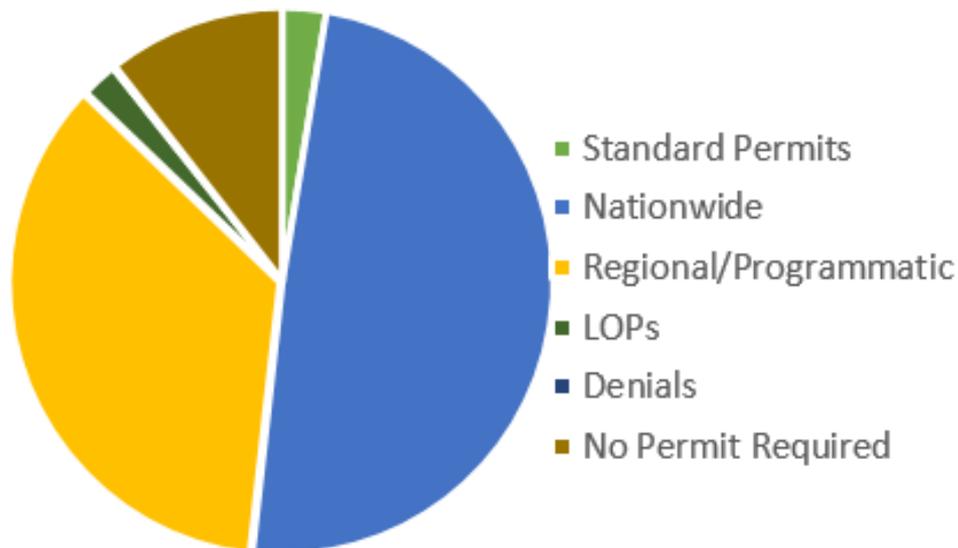
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# Permit Actions

## CORPS' ACTIONS & PERMIT DECISIONS FY 2015

FY 2015 Corps Actions



## NUMBER OF FINAL ACTIONS\*\* FY15

|                               |               |
|-------------------------------|---------------|
| Standard Permits              | 1,700         |
| Nationwide Permits            | 32,000        |
| Regional/Programmatic         | 23,000        |
| Letters of Permission (LOPs)  | 1,400         |
| Applications Denied           | 97            |
| <i>No Permit Required</i>     | <i>6,900</i>  |
| <b>TOTAL</b>                  | <b>65,097</b> |
| Jurisdictional Determinations | 49,000        |

\*\* Note –totals often vary as data are updated to reflect more accurate information. Database changes and data conversion also affect previous FY totals. Numbers may be rounded or approximated. Issued/Verified totals are provided for permit types. Regional type above includes regional general permits and programmatic general permits. Source – HQ ORM2 reports.

# Questions?



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