

U.S. ARMY CORPS OF ENGINEERS REGULATORY PROGRAM IN VERMONT



US Army Corps
of Engineers®

Speaker: Amanda Sayles
Date: January 23, 2024



OVERVIEW



- **Program Goals & Regulatory Authorities**

- § 10 of the Rivers and Harbors Act
- § 404 of the Clean Water Act (CWA)
 - Exemptions under § 404 of the CWA

- **Jurisdiction**

- Jurisdictional Waters
- Exclusions

- **Permitting Process**

- Forms of Authorization
- Permit Conditions



PROGRAM GOALS & REGULATORY AUTHORITIES



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PROGRAM GOALS

- Provide strong protection of the Nation's aquatic environment, including wetlands, while allowing reasonable and necessary development to proceed
- Provide balanced decisions that are timely, predictable, transparent, consistent, rooted in sound science, and compliant with applicable laws



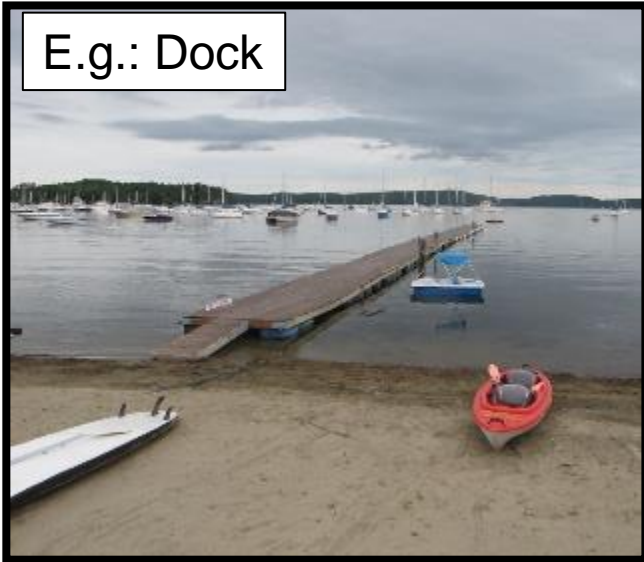
REGULATORY AUTHORITIES



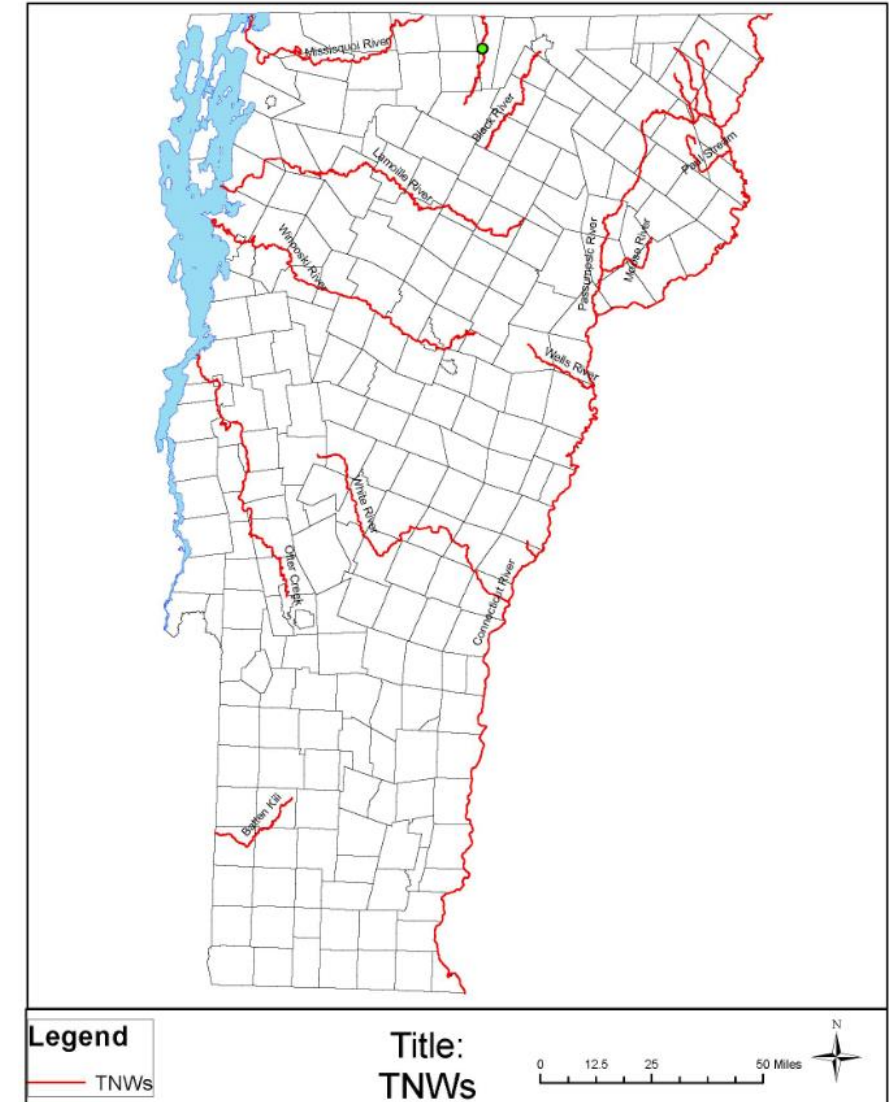
Section 10 of the Rivers and Harbors Act:

Structures and work that are located in, under or over navigable waters of the U.S. that affect the course, location, or capacity of such waters; or the excavating from or depositing material in navigable waters.

E.g.: Dock



E.g.: Aerial Transmission Line





REGULATORY AUTHORITIES

Section 404 of the Clean Water Act:

The discharge of dredged or fill material into all waters of the U.S. (WOTUS)

Discharge of dredged or fill material fill is:

- Material (e.g. rock, sand, soil) placed in WOTUS where the material has the effect of replacing any WOTUS with dry land or changing the bottom elevation of WOTUS
- Redepositing of dredged or fill material
 - Grading, excavation/backfill
- Mechanized land clearing
- Temporary access roads, construction mats
- Temporary water diversions (e.g. cofferdams)



e.g. Cofferdam



e.g. Bank Stabilization





REGULATORY AUTHORITIES



Discharge Of Dredged Or Fill Material Is Not:

- Dredging/excavation and incidental fallback
- Activities that involve only the cutting or removing of vegetation above the ground (mowing, rotary cutting, chain-sawing)
- Pile Driving



EXEMPTIONS



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404(f) EXEMPTIONS

33 CFR 323.4 (a)2



Maintenance:

- Including emergency reconstruction of recently damaged parts, of currently serviceable structures such as riprap, bridge abutments, dams, causeways, etc.
- Does not include modifications that change the character, scope, or size of the original fill design.
- Must occur within a reasonable time after damage occurs



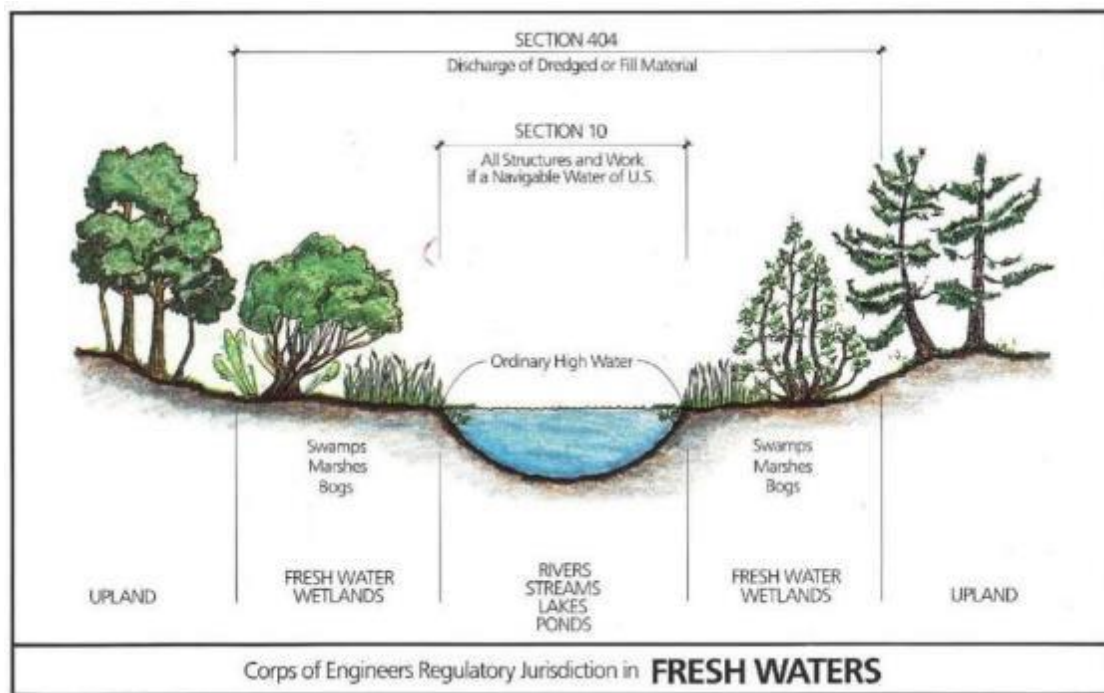
*** Exemptions did NOT change

JURISDICTION



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LIMITS OF JURISDICTION – ORDINARY HIGH WATER MARK (OHWM) & FRESHWATER WETLANDS



“The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”



2023 RULE



- (a)(1)(i) Traditional Navigable Waters (“TNWs”)
- (ii) Territorial Seas
- (iii) Interstate Waters
- (a)(2) Impoundments of Jurisdictional Waters
- (a)(3) Tributaries
- (a)(4) Adjacent Wetlands
- (a)(5) Intrastate lakes and ponds, streams, and wetlands that do not fall within (a)(1) –(a)(4)

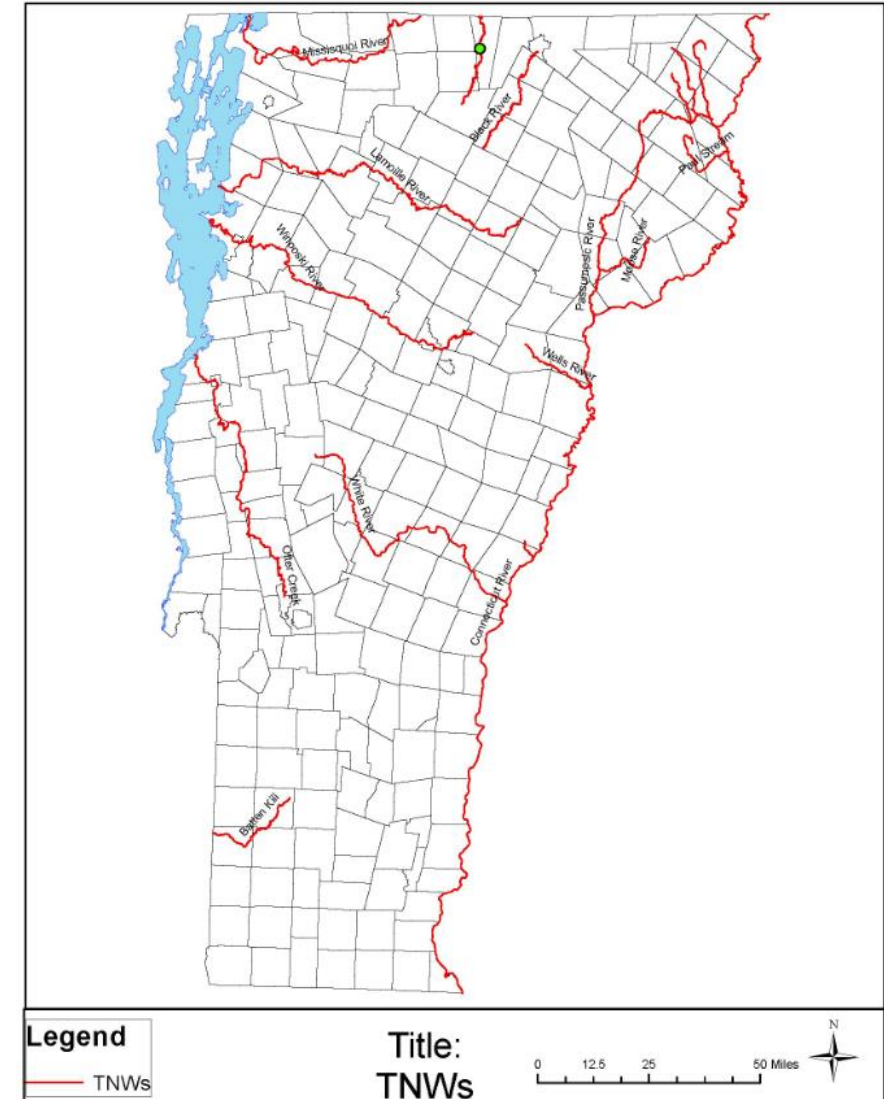
***The 2023 Rule was published in the Federal Register on 18 January 2023. Effective Date 08 September 2023.

(a)(2) TRADITIONAL NAVIGABLE WATERS

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 subject to the ebb and flow of the tide.

TNWs in Vermont:

- Lake Champlain
- Lake Memphremagog
- Moose River
- Winooski River
- Connecticut River
- Otter creek
- White River
- Missisquoi River
- Black River
- Wells River
- Lamoille River
- Waits River
- Batten Kill
- Paul Stream
- Passumpsic River
- East Branch Passumpsic River
- Nulhegan River
- East Branch Nulhegan River
- Black Branch Nulhegan River
- Yellow Branch Nulhegan River
- Ompompanoosuc River



(a)(2) IMPOUNDMENTS

CHARACTERISTICS:

Created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both

- Can be natural (like beaver ponds) or artificial (like reservoirs)
- Can vary in size, with some being very small and others being very large
- Can be located off-channel (i.e., an impoundment with no outlet or hydrologic connection to the tributary network) or in-line with the channel (i.e., an impoundment with a hydrologic connection to the tributary network)



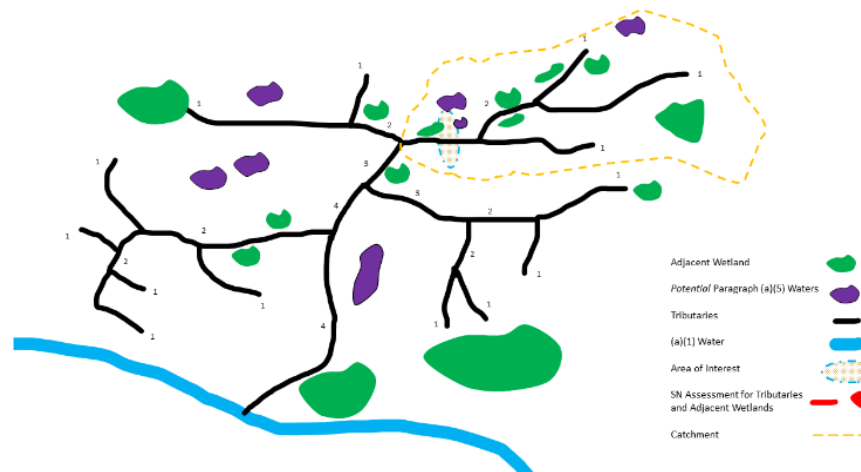
Waterbury Reservoir



(a)(3) TRIBUTARIES

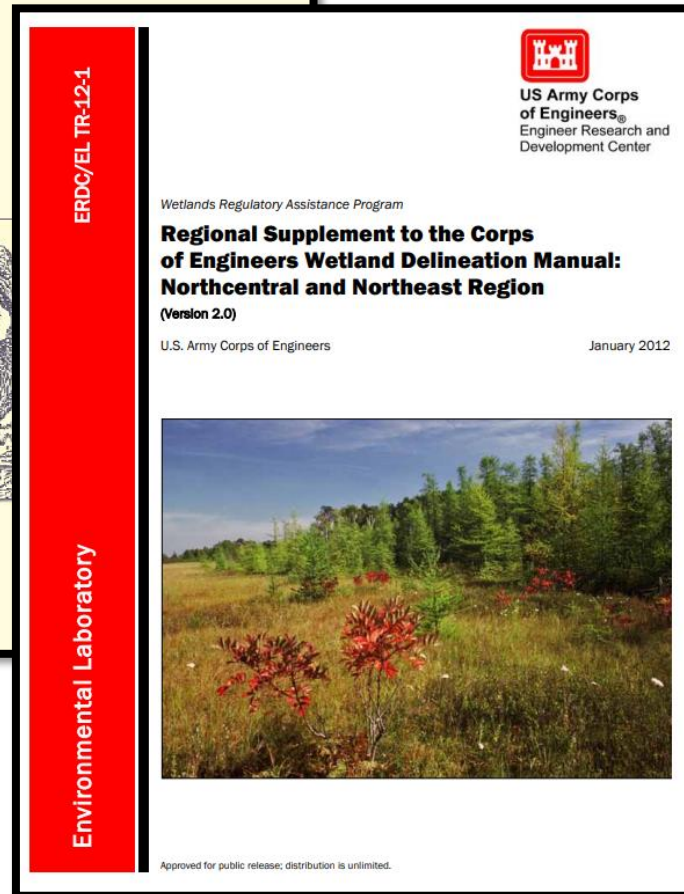
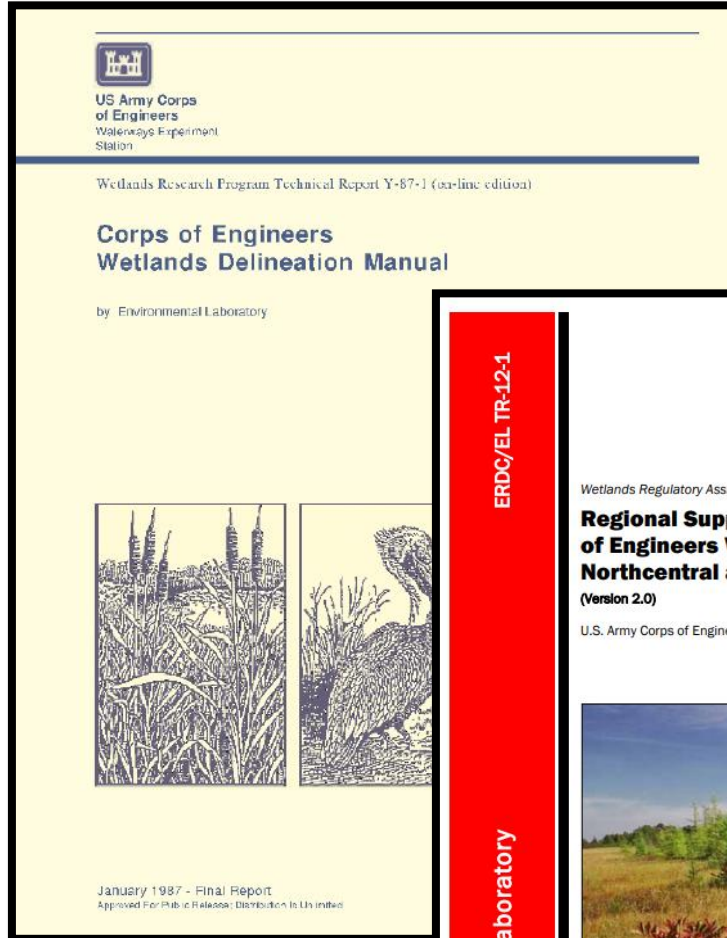


- A tributary for purposes of the 2023 Rule includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment. (88 FR 3082)
- The 2023 Rule text specifies that, in order to be a **jurisdictional (a)(3) tributary**, the tributary must meet *either* the **relatively permanent standard** or the **significant nexus standard**.
- **Relatively permanent standard** – means the flow is not in direct response of precipitation
- **Significant nexus standard** will be applied if the tributary is not relatively permanent
 - The 2023 Rule preamble explains the scope of **significant nexus** (i.e., which waters are “**similarly situated**” “**in the region**”).





(a)(4) ADJACENT WETLANDS



- 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.



EXCLUSIONS:

Categories of Exclusions

- (b)(1) Waste treatment systems
- (b)(2) Prior converted cropland
- (b)(3) Certain ditches
- (b)(4) Artificially irrigated areas that would revert to upland if irrigation ceased
- (b)(5) Certain artificial lakes and ponds
- (b)(6) Artificial reflecting or swimming pools or other small ornamental bodies of water
- (b)(7) Certain waterfilled depressions
- (b)(8) Swales and erosional features

*





JURISDICTIONAL DETERMINATIONS

A jurisdictional determination (JD) is a **written** USACE determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act or under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 CFR 331.2).

- Two types: **Preliminary** Jurisdictional Determination (PJD)
Approved Jurisdictional Determination (AJD)
- JDs are typically made at the request of the landowner or project proponent. USACE generally does not issue a JD of any type when a JD is not requested.
- Additional information can be found in the Corps Regulatory Guidance Letter (RGL) 16-01, including the request form:
<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Guidance-Letters/>

PERMITTING PROCESS



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USACE PERMITS



Vermont General Permits (VTGPs):

Consists of 21 activity-based GPs

<https://www.nae.usace.army.mil/Missions/Regulatory/State-General-Permits/Vermont-General-Permit/>

Self-Verification (SV)

- Project proponent confirms that project will comply with all terms and general conditions (GCs) of VTGPs
 - Impact threshold is generally <5,000 sq. ft. for each GP and <200 linear ft. along banks
 - No notification Process

Pre-Construction Notification (PCN)

- Requires application submittal and project plans
 - Impacts $\geq 5,000$ sq. ft., but <1 acre
 - Submit an application

Individual Permit

- Impacts ≥ 1 acre
- Projects that do not meet the “minimal impact” criteria of the VTGPs
- Alternatives Analysis required
- Submit an application



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GP # 9 SHORELINE AND BANK STABILIZATION

GP 9. SHORELINE AND BANK STABILIZATION PROJECTS (Sections 10 & 404): Bank stabilization activities necessary for erosion protection along the banks of lakes, ponds, streams, and any other open waters. Includes bulkheads, seawalls, riprap, revetments or slope protection and similar structures, as well as vegetative planting, soil bioengineering, or alternative techniques that are a combination of the two (e.g. living shorelines), specifically for the purpose of shoreline protection.

Not authorized under GP 9: (a) Bank stabilization ≥ 500 LF in total length and/or involving more than an average of 1 CY of fill per linear foot placed below the plane of the ordinary high water mark (OHWM) in Lake Champlain, Lake Memphremagog and Wallace Pond and adjacent wetlands; (b) Stream channelization or relocation activities; or (c) breakwaters, groins and jetties.

Self-Verification Eligible

1. No fill in Lake Champlain, Lake Memphremagog, Wallace Pond and adjacent wetlands.
2. Bank stabilization < 200 linear feet long and does not exceed an average of 1 CY of fill per linear foot placed below the plane of OHWM in WOTUS other than Lake Champlain, Lake Memphremagog, Wallace Pond and adjacent wetlands.
3. $< 5,000$ SF of temporary fill associated with bank stabilization in waterways and/or wetlands, other than Lake Champlain, Lake Memphremagog, Wallace Pond and adjacent wetlands.

Pre-Construction Notification Required

1. Work not eligible for SV.
2. Bank stabilization < 500 linear feet and an average of < 1 CY of fill per linear foot placed below the plane of OHWM in Lake Champlain, Lake Memphremagog, Wallace Pond and adjacent wetlands.



GENERAL CONDITION #11

§ 106 OF THE NATIONAL HISTORIC PRESERVATION ACT



SV

- The applicant contacts the State Historic Preservation Officer
- **AND**
- The applicant contacts the Stockbridge-Munsee Tribal Historic Preservation Officer when in Bennington, Rutland, or Addison County. OR if the project is in any other county in Vermont the Wampanoag Tribe of Gay Head (Aquinnah) shall be notified.

AND

- A “*no effect*” determination was reached

PCN

- USACE consults with the State Historic Preservation Officer
- **AND**
- USACE consults with the Stockbridge-Munsee Tribal Historic Preservation Officer when in in Bennington, Rutland, or Addison County. OR if the project is in any other county in Vermont the Wampanoag Tribe of Gay Head (Aquinnah) shall be notified by the USACE.

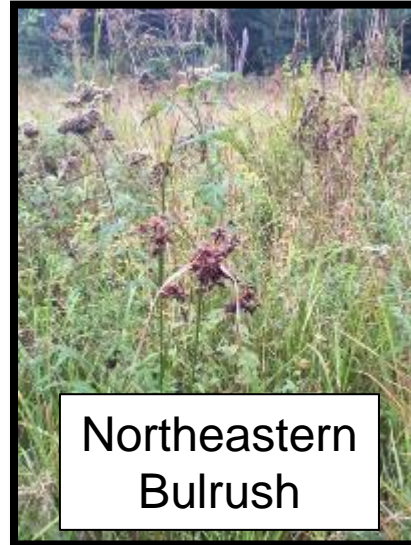
GENERAL CONDITION #12

§ 7 OF THE ENDANGERED SPECIES ACT

Indiana Bat



Northeastern
Bulrush



Dwarf
Wedgemussel



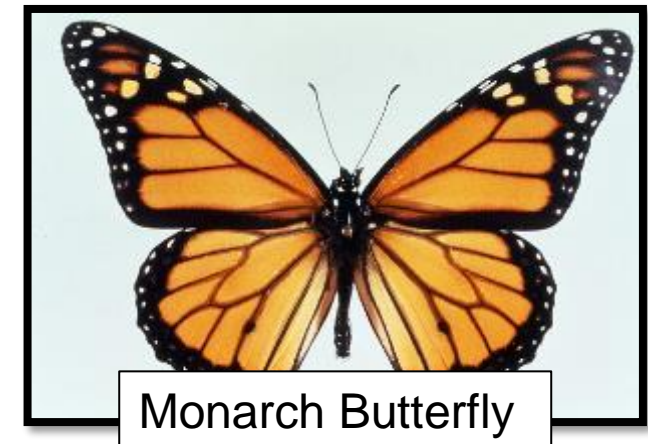
Canada
Lynx



NLEB



Monarch Butterfly





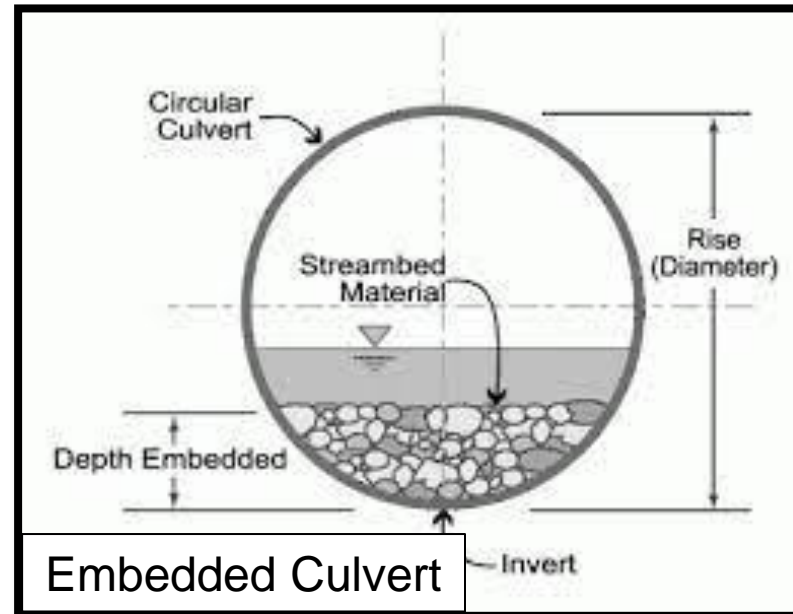
GENERAL CONDITION #20

WATERWAY/ WETLAND WORK AND CROSSING



All permanent crossings of rivers, streams, brooks, etc. shall meet the following performance standards in order to qualify for SV (See GP for entire list):

- Design the structure to maintain a streambed composition and form throughout the culvert similar to and continuous with the adjacent reaches.
- In stream work is completed between July 1 to October 1
- Permanent and temporary crossings of waterbodies and wetlands shall be installed in such a manner as to preserve hydraulic and ecological connectivity, on either side of the crossing. The permittee shall take necessary measures to correct wetland damage due to lack of hydraulic connectivity.

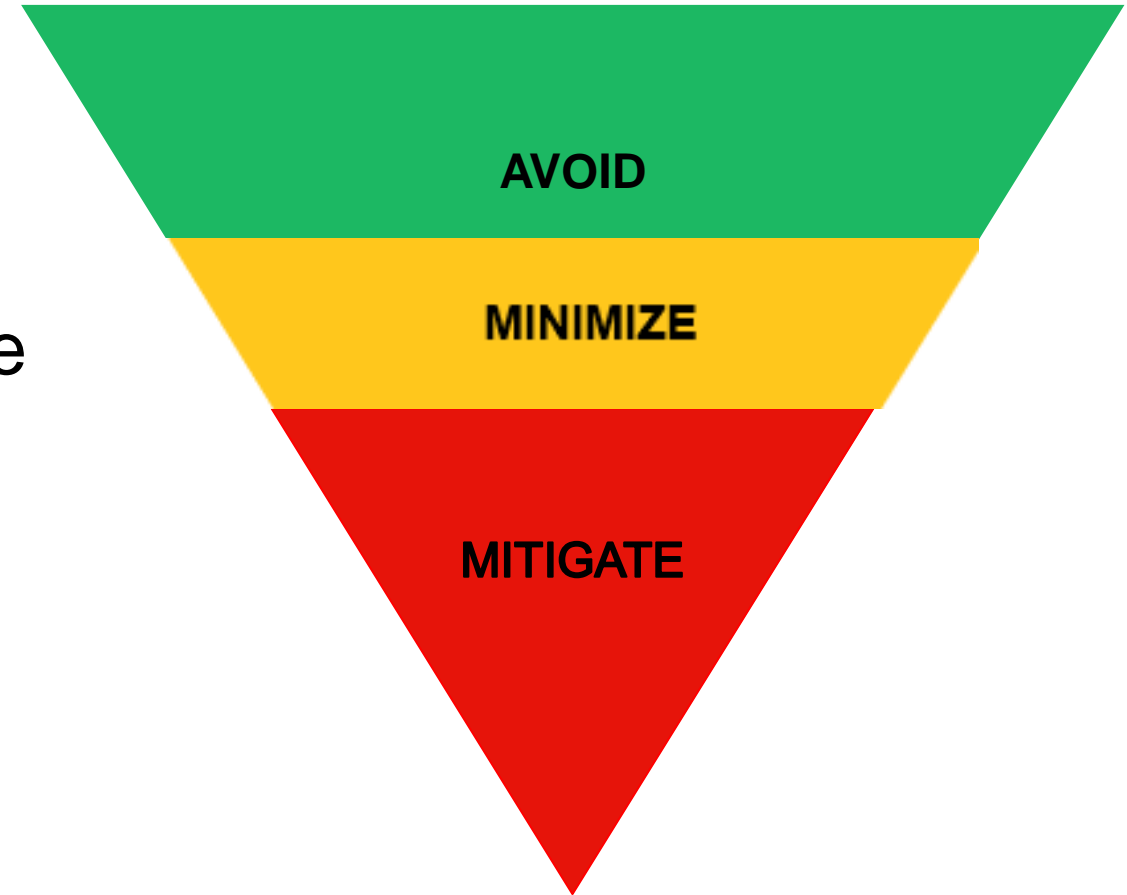




GENERAL CONDITION #3: MITIGATION (AVOIDANCE, MINIMIZATION, & COMPENSATORY MITIGATION)



- **AVOID IMPACTS** to waters of the U.S. to the maximum extent practicable
- **MINIMIZE IMPACTS** to waters of the U.S. to the maximum extent practicable
- **MITIGATE** for the unavoidable impacts of the project
 - VT In-Lieu-Fee





DUCKS UNLIMITED-VERMONT IN-LIEU FEE PROGRAM

27



Date of instrument approval: January 2011

Program Sponsor: Ducks Unlimited, Inc. – Great Lakes Office

Estimated value of program (total funds accrued to date): ~\$5 Million

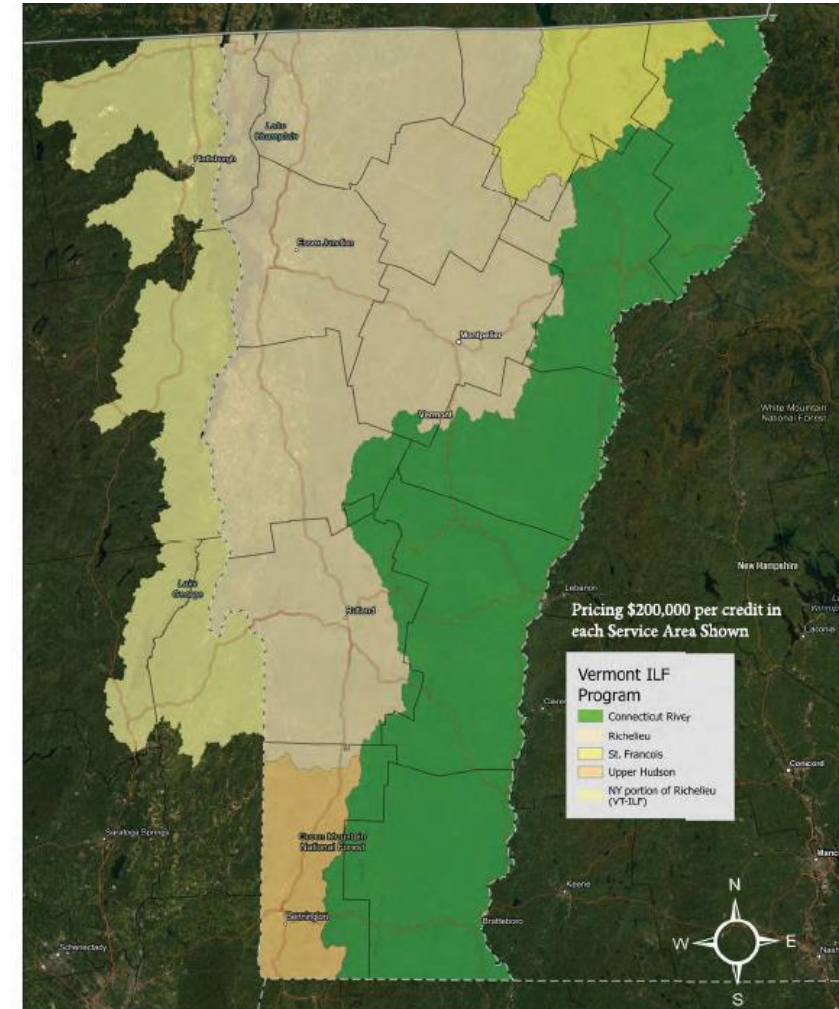
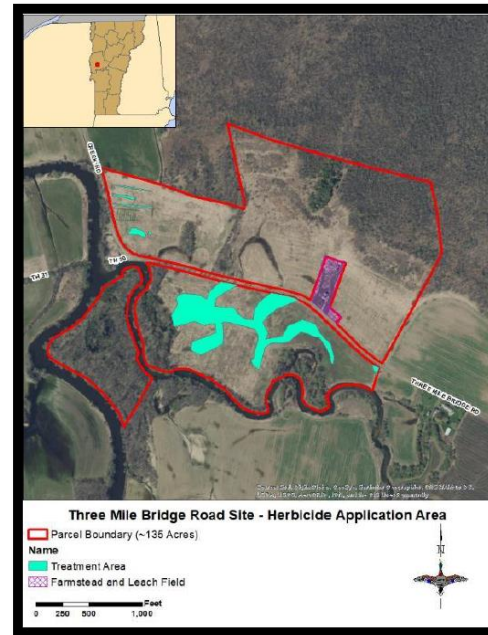
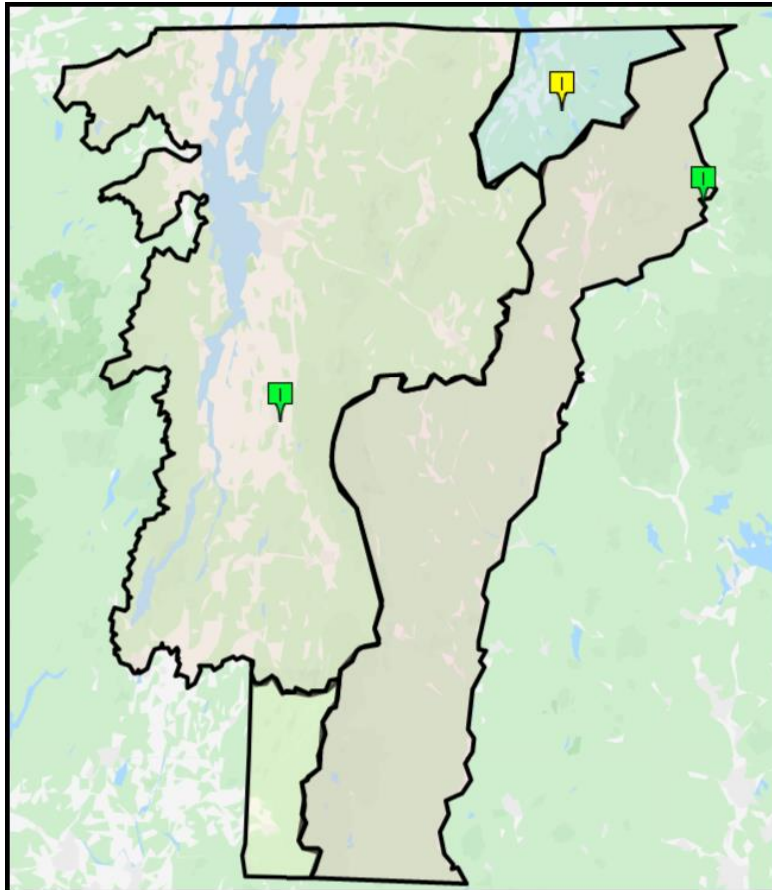
Total ILF projects initiated: 3 and 1 pending approval

Total credits required by authorized projects: 47.82

Cost of 1 wetland credit: \$200,000 (aprox. \$4.59/SF)

Total land preserved: ~ 734.24 acres

Number of Service Areas: 4 (*Richelieu extends into the State of New York)



USACE VERMONT PROJECT OFFICE

Contact USACE to discuss
jurisdiction and **permit**
requirements

Address:

**U.S. Army Corps of Engineers
Vermont Project Office
11 Lincoln Street
Essex Junction, Vermont**

Phone:

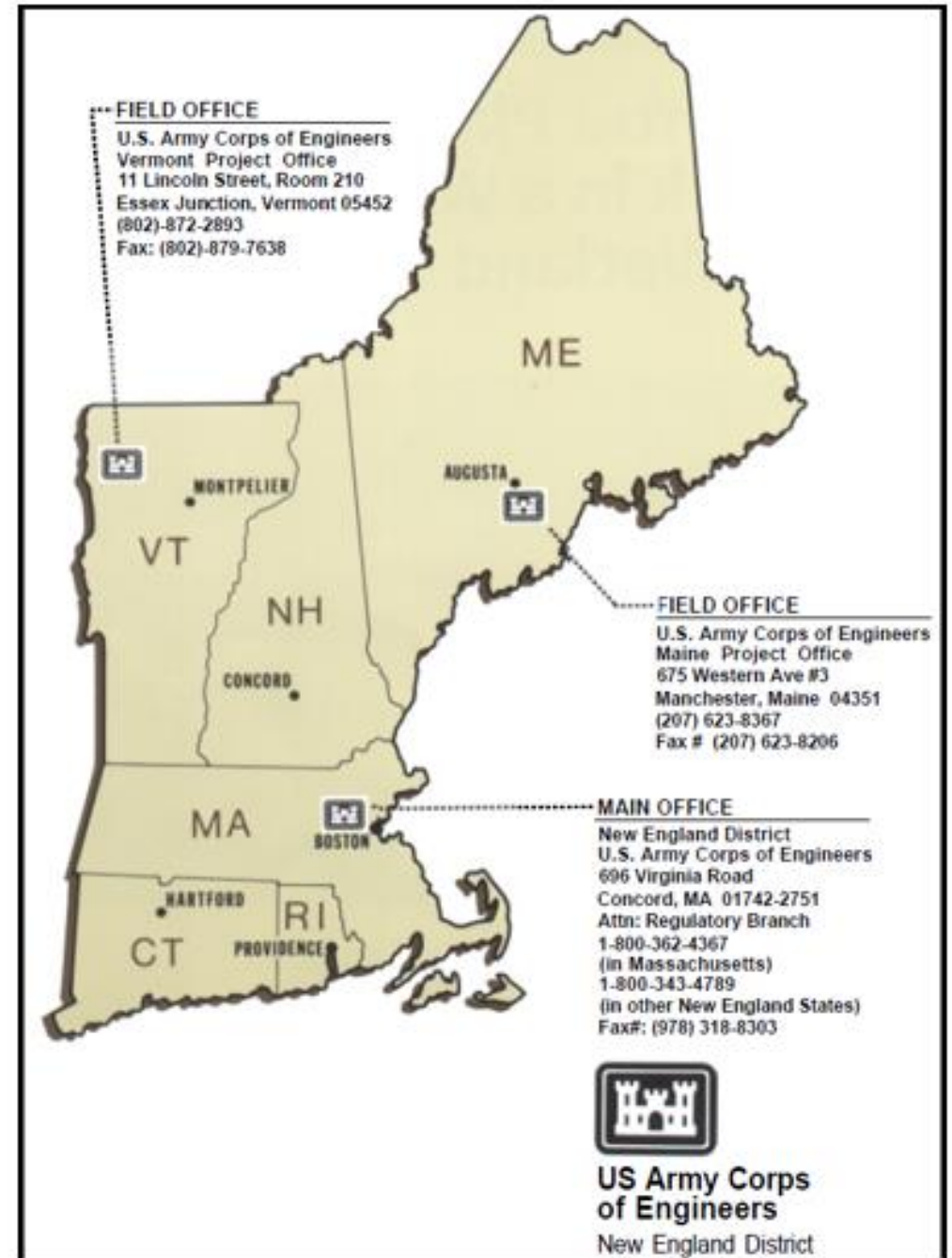
802-872-2893

Email:

cenae-r-vt@usace.army.mil



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QUESTIONS?



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