

# US Army Corps of Engineers Regulatory Program Overview

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US Army Corps of Engineers  
**BUILDING STRONG**



# Introduction to the Corps



## Multiple Missions:

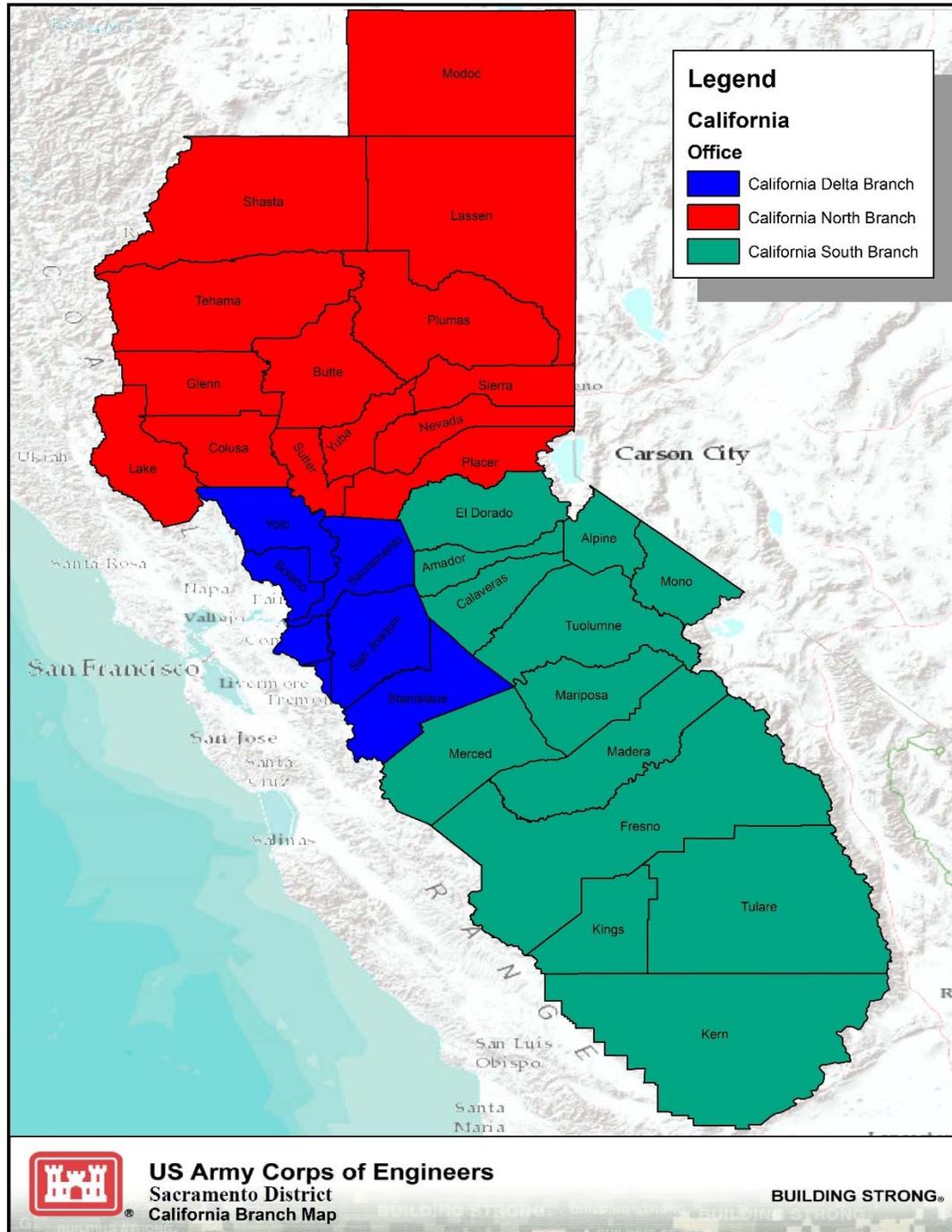
- Navigation
- Flood Control
- Disaster Response
- Military Construction
- Recreation
- **Regulatory**



## Regulatory Mission

To protect the Nation's aquatic resources,  
while allowing reasonable development  
*through fair and balanced decisions.*





# Regulatory Authorities

## Rivers and Harbors Act of 1899

- **Section 10**
  - *Work and Structures within Navigable Waters*
- **Section 14 (“Section 408”)**
  - *Impact/Modification to Federally Authorized Projects*  
*\*\*Separate process through CVFPCB and Corps Flood Protection & Navigation Section*

## Clean Water Act

- **Section 404**
  - *Discharge of Dredged or Fill Material*



# Section 10

## Rivers and Harbors Act of 1899

- **All** work affecting navigable waters, interstate lakes or rivers
- Within, above, or below waters
- All tidally influenced waters including wetlands



# Federally Navigable Waters

- Designated by Congress
  - Past and present commerce.
- Include all tidal areas (e.g. Delta)
- Most major rivers
  - American
  - Sacramento
  - San Joaquin
  - Merced
  - Feather
  - Mokelumne



# Section 404

- Discharge of dredged or fill material into waters of the U.S., including wetlands
  - Does not include piles
- Ordinary High Water Mark



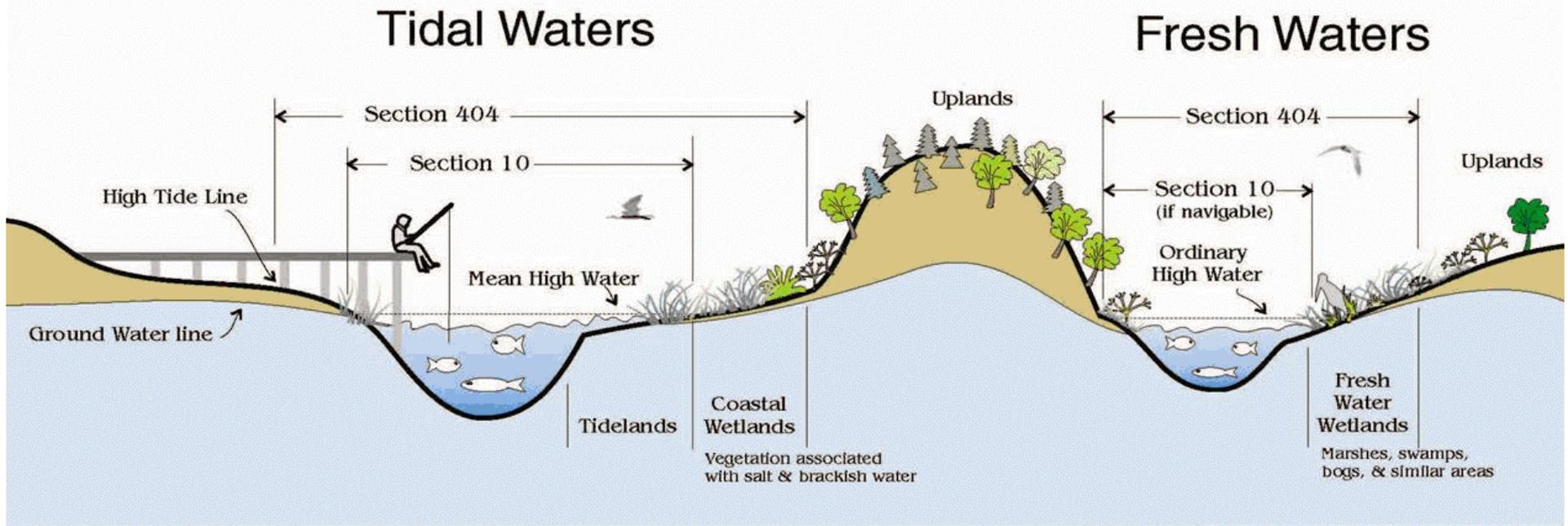
# USACE Regulatory

## – PERMITTING PROCESS –

1. Jurisdiction – Delineation and JD
2. Permit Application/PCN – Pre-application meeting
3. Compliance with Other Laws (Sec 7, 106, 401)
4. Individual Permit
  - a. Public Notice
  - b. Alternatives Analysis
  - c. NEPA / Decision Document
5. Permit Decision/Issuance



# Waters of the United States



Typical examples  
of regulated activities

**Section 103**  
Ocean Disposal  
of Dredged Material

Ocean discharges of  
dredged material

**Section 404**  
Discharge of Dredged or Fill Material  
(all waters of the U.S.)

All filling activities, utility lines, outfall structures,  
road crossings, beach nourishment, riprap,  
jetties, some excavation activities, etc.

**Section 10**  
All Structures and Work  
(navigable waters)

Dredging, marinas, piers, wharves,  
floats, intake / outtake pipes,  
pilings, bulkheads, ramps, fills,  
overhead transmission lines, etc.

# Determining Jurisdiction

- **Must determine whether Corps has jurisdiction before taking an action**
- **Two step process:**
  1. Where are the waters? (*scientific*)
    - Delineation of wetlands, ordinary high water mark
  2. Does the Corps have Jurisdiction? (*legal, administrative*)
    - RGL 08-02 – Preliminary JDs
- **Complex, can be time-consuming – *start early***

# Jurisdiction – Courts and Guidance

- **SWANCC** (Jan 9, 2001)
  - Isolated
- ***Carabell & Rapanos*** (Jun 19, 2006)
  - Significant nexus
  - TNW, RPW, Non-RPW
  - Abutting vs. Nonabutting
- **Clean Water Rule**
  - Court Injunction



# Regulatory Guidance Letter 08-02

- Preliminary Jurisdictional Determination
  - Faster than approved JD
- All waters “may be” jurisdictional
- Preliminary CANNOT:
  - Determine there are NO waters
  - Determine waters are not jurisdictional
- Approved JD may be required



# Permitting

- **Permit required for any:**
  - Discharge of dredged or fill material (404)
  - Work or structures in or affecting navigable waters (10)
  
- **Some Exemptions (404 only) [33 CFR 323.4]**
  - Some agricultural activities
  - Repair/maintenance of approved structures
  - Each defined with limits
  - May not impair flow/reduce extent of waters



# Exemptions (404 Only)

- **Maintenance** (including emergency reconstruction)
  - Currently serviceable structures
  - Emergency reconstruction must occur within a reasonable period
- **Does Not Include:**
  - Modification that changes
    - Scope
    - Character
    - Size



# Determining Need for Permit

- 1) Is activity regulated?
- 2) Does activity take place in waters of the US?
  - Wetland delineation/JD necessary
- 3) Is activity exempt (404 only)?
- 4) Does activity meet terms/conditions of a general permit?
- 5) Can activity be processed as a Letter of Permission?
- 6) Process Standard Permit



# Corps Permit “Scope of Analysis”

- May DIFFER from “Project Area” as defined in other application (e.g., CEQA)
- Corps has sole discretion to designate
- How much of the project is under federal control (waters, ESA, NHPA)?
- Important consideration for linear projects – do not assume that Corps will include the whole project within its permit area



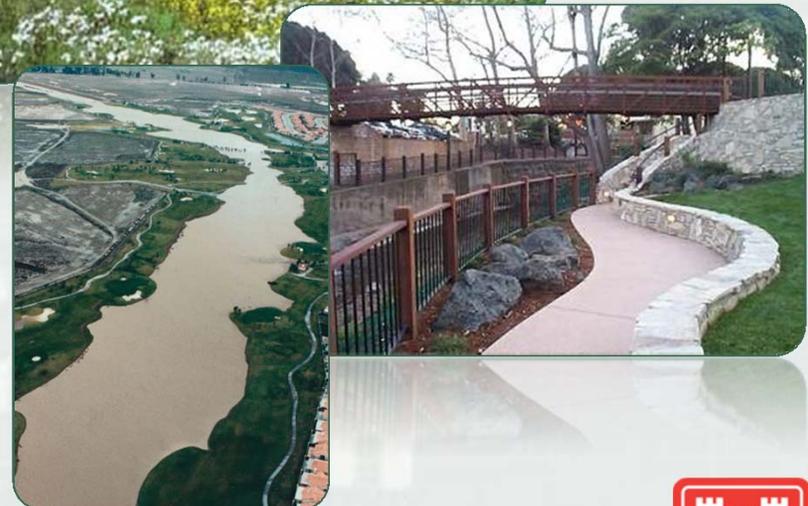
# Permit Types

## General Permits

- Regional
- Programmatic
- Nationwide

## Individual Permits

- Standard
- Letters of Permission



# General Permits

- Minimal Impacts
- Issued at Local or National level
- Activities must meet statutory requirements (ESA, EFH, NHPA, 401)
- Activities under General Permits
  - must meet terms/conditions
  - may require notification
  - may need to compensate for loss of waters
- Over 90% of activities



# General Permit Types: Regional and Programmatic

## Regional Permits

- Issued by a division or district engineer
- Several RPs in CA
  - Emergency Actions
  - Private Boat Docks in Delta
  - Small Erosion Repair Program



## Programmatic Permits

- Issued by a division or district engineer
- Based on existing local/state/other Fed agency program
- Designed to avoid duplication with that program



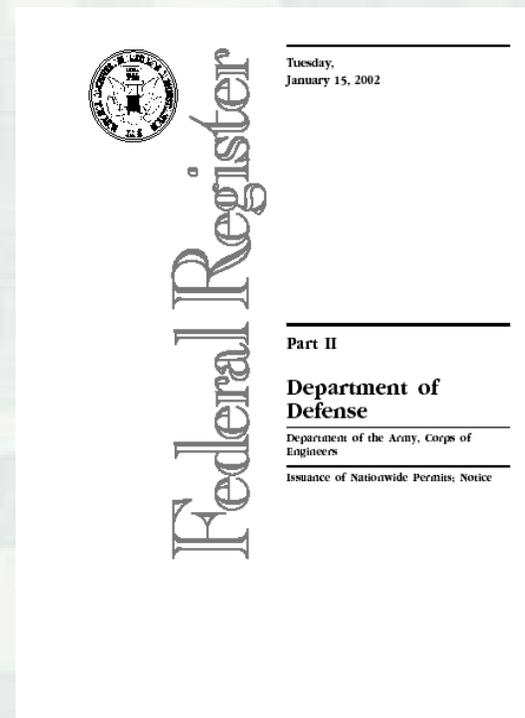
# General Permit Types: Nationwide Permits

- **NWP Program [33 CFR 330, 1991]**
  - Issued every five years (*March 2007-2012*)
  - Covers Sec 404 and 10
  - Terms, general conditions, definitions
  - Regional conditions added by districts
  - Pre-construction notification (PCN) vs. Non notifying



# Nationwide Permits (NWP)

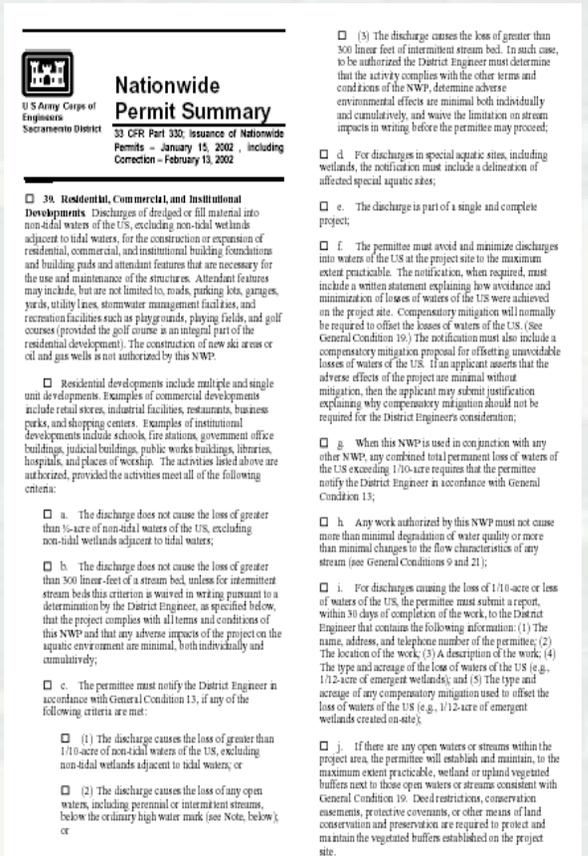
- 48 NWP's
- Most require Corps verification (PCN)
- Accelerated timeline
  - Except **ESA, NHPA**
- Expire March 18, 2017
- Regional Conditions



# Types of Nationwide Permits

- Activity specific

- NWP 3 – Maintenance
- NWP 12 – Utility Line Activities
- NWP 14 – Linear Transportation Projects
- NWP 27 – Aquatic Habitat Restoration
- NWP 29 – Residential Developments
- NWP 33 – Temporary Construction, Access, and Dewatering
- NWP 39 – Commercial and Institutional Developments



**Nationwide Permit Summary**  
 U.S. Army Corps of Engineers  
 Sacramento District  
 33 CFR Part 330, Issuance of Nationwide Permits - January 15, 2002, including Correction - February 13, 2002

**39. Residential, Commercial, and Institutional Developments** Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as play grounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP.

Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are not exempt, provided the activities meet all of the following criteria:

- a. The discharge does not cause the loss of greater than ½-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters;
- b. The discharge does not cause the loss of greater than 500 linear-feet of a stream bed, unless for intermittent stream beds this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;
- c. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:
  - (1) The discharge causes the loss of greater than 1/10-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters; or
  - (2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note, below); or
  - (3) The discharge causes the loss of greater than 300 linear feet of intermittent stream bed. In such case, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;
  - d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;
  - e. The discharge is part of a single and complete project;
  - f. The permittee must avoid and minimize discharges into waters of the US at the project site to the maximum extent practicable. The notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the US were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the US. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the US. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;
  - g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the US exceeding 1/10-acre requires that the permittee notify the District Engineer in accordance with General Condition 13;
  - h. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);
  - i. For discharges causing the loss of 1/10-acre or less of waters of the US, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage of the loss of waters of the US (e.g., 1/12-acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the US (e.g., 1/12-acre of emergent wetlands created on-site);
  - j. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Dead restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site.



# Individual Permit Types

## **Standard Permits**

- Issued for a specific activity (project) [33 CFR 325]
- Public notice
- Public interest review
- NEPA review

## **Letters of Permission** (*Minimal Impacts*)

- Issued for specific activity with minor impacts
- Requires coordination with resource agencies
- No public notice
- Abbreviated review process, NEPA Cat Ex



# Permit Application Process

1. Pre-application meeting available
2. Complete Application
  - Application form (ENG 4345)
  - Description of the project and how it would comply with all permit conditions – General AND Regional
  - Wetland delineation (does not need to be verified yet)
  - Biological assessment
  - Cultural resources report



# Permit Application Process

3. Public Notice / Agency Notice (Standard Permit)
4. Corps evaluates projects for:
  - Compliance with Regulations, including Mitigation
  - Endangered Species Act (**ESA**)
  - National Historic Preservation Act (**NHPA**)
  - Alternatives Analysis
    - Avoid, minimize and mitigate
    - Least Environmentally Damaging Practicable Alternative (LEDPA)



# Permit Application Process

## 5. Decision Document

- Public interest evaluation
- Interagency consultation

## 6. Permit Decision

## 7. Compliance (Post-construction)



# Corps Permit Program Decision Criteria

- Decision Criteria
  - Public Interest Review Factors
  - Compliance with Section 404(b)(1) Guidelines
  - Compliance with Federal Acts



# Public Interest Review Factors

- Conservation
- Economics
- Aesthetics
- Environmental Concerns
- Fish & Wildlife
- Historic & Cultural Resources
- Food Production
- Recreation
- Land Use
- Water Quality
- Water Supply
- Navigation
- Rare/Endangered Species
- Safety
- Energy Needs



# Section 404(b)(1) Guidelines

- Applications MUST Comply
  - Least Environmentally Damaging Practicable Alternative (LEDPA)
  - Compliance with Special Restrictions
  - Not contribute to Significant Degradation of Waters
  - Adoption of Appropriate and Practicable Mitigation



# Compensatory Mitigation

- Only after (1) Avoidance and (2) Minimization
- Options
  - Permittee responsible creation or restoration
  - Purchase credits from a mitigation bank – commercial
  - Purchase credits from an in lieu fee program – not-for-profit
- April 2008 Final Mitigation Rule
  - Watershed approach
  - Emphasis on order of typically successful mitigation
- No minimum or maximum ratio (depends on quality and project impacts)



# Compliance with Other Laws

- **Endangered Species Act**
  - Cannot jeopardize species, critical habitat
- **Section 401 of Clean Water Act**
  - Water quality certification must be issued by State
- **Section 106 of National Historic Preservation Act**
  - Assess impact/mitigate effect on historic properties, listed or eligible



# Summary of Tips

- Waters/wetlands ID and jurisdiction – start early
- Remember RGL 08-02 as a good tool for certain sites
- Request pre-application meetings for bigger, complex projects
- Collaborate and ensure that biologists/regulatory specialists are plugged in early and for key analyses/decisions – avoid “surprises!”
- Get Section 7 and Section 106 in pipeline early
- Call us with any questions and to keep on track/manage projects



# Contact Information

Sacramento District Regulatory Office:

Main: 916-557-5250

FAX: 916-557-7803

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

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