

Scope of Analysis

Regulatory Program Workshop
February 2015



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US Army Corps of Engineers
BUILDING STRONG®

Scope of Analysis (SOA): Corps Area of Responsibility

- The scope of analysis will describe what portions of an overall project the Corps will evaluate as the area subject to the Federal action (the permit decision). This is the geographic limit of Federal responsibility for the action. It will then be the basis for subsequent NEPA analysis and compliance with other Federal Laws.
- The Corps determines the Scope of Analysis for regulatory program activities.



Appendix B – Determining Factors for SOA

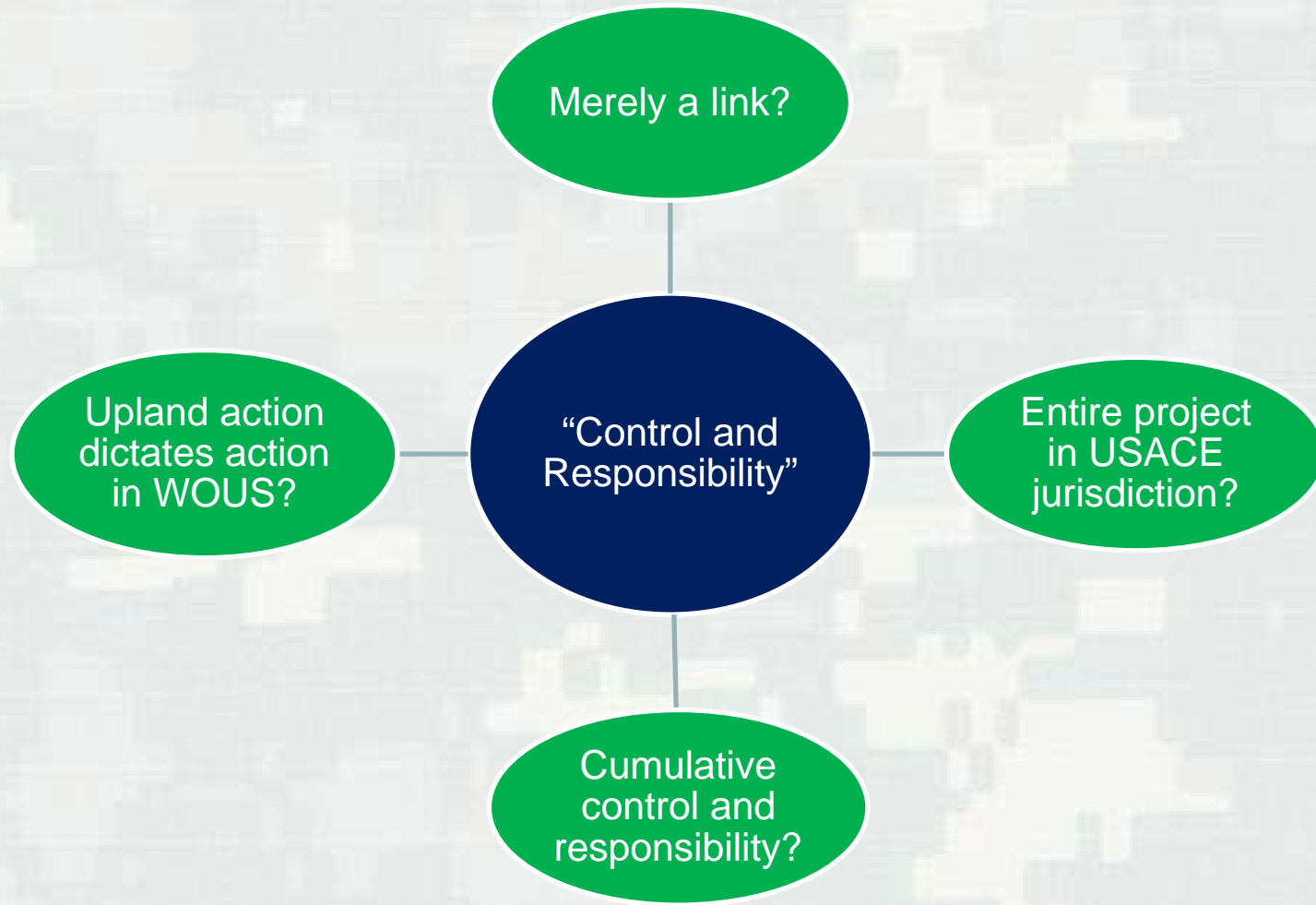
33 CFR 325, Appendix B

- Four factors considered in determining sufficient Federal “control and responsibility”:
 - (i) Whether or not the regulated activity comprises “merely a link” in a corridor type project (e.g., a transportation or utility transmission project).
 - (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
 - (iii) The extent to which the entire project will be within Corps jurisdiction (distribution of WOUS throughout the site).
 - (iv) The extent of cumulative Federal control and responsibility (suggests that the Corps should NOT be the lead Federal agency in every case).



Appendix B – Determining Factors for SOA

33 CFR 325, Appendix B



RGL 88-13: NEPA Scope of Analysis

- Corps HQ issued on November 3, 1988.
- DE should limit SOA to the specific activity requiring a permit and any additional portions (uplands) of the project over which there is sufficient Federal control and responsibility to warrant NEPA review.
- This limiting of the scope analysis recognizes that, notwithstanding the link between issuance of a permit and project construction, NEPA was not intended to apply to purely non-Federal activities.

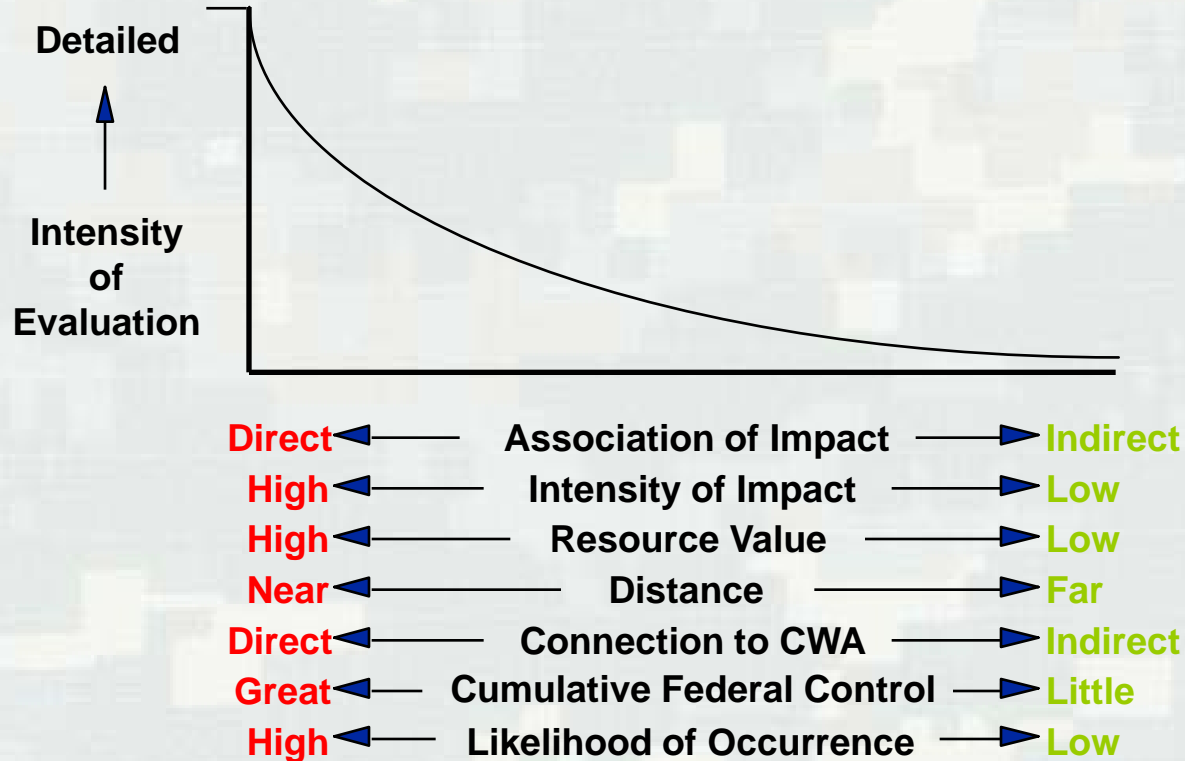


RGL 88-13: NEPA Scope of Analysis

- When analyzing indirect impacts, the DE should consider the strength of the relationship between those impacts and the regulated portion of the activity (i.e. whether or not the impacts are likely to occur even if the permit is not issued) in deciding the level of analysis and what weight to give those impacts in the decision.
- The above considerations are particularly relevant where the NEPA analysis is extended to areas outside of Corps jurisdiction.



Evaluation of Impacts Outside WOUS



❖ Relative importance/ranking of factors varies case by case (conceptual - not a formula).

❖ One factor located either far to the left/right may dominate the entire analysis.



Case Studies

- Limited Scope of Analysis:
 - Sylvester (1989 9th Circuit) – NEPA analysis need not include the effects of the larger development project, that state regulations control the design of the project and that the larger project was already subject to extensive state environmental review (SMCRA).
 - “The mere fact that the overall project would benefit from the permitted activities (and visa versa) is insufficient”



Case Studies Cont.

- Limited Scope of Analysis:
 - Morongo Band of Mission Indians (9th Cir. 1998) – Court found that the utility of Phase I did not depend upon the completion of later phases of the project. Therefore, the Corps need not review all three phases at once (imposition of the “independent utility” test).
 - “Corps need not expand its scope of analysis beyond the jurisdictional areas if the “permitted activities could exist independently from the larger project”



Case Studies Cont.

- Limited Scope of Analysis:
 - Wetland Action Network (2000 9th Circuit) – Based on the limited geographic distribution of WOUS and on the No Federal Action Alternative, the Corps had appropriately limited the scope of analysis to only the areas in and immediately adjacent to WOUS.
 - “Even though the permitted activities are more than merely incidental to the overall project, if they are not the centerpiece or compelling force of the entire project, then the scope of analysis need not be expanded”



Case Studies Cont.

- Expanded Scope of Analysis:
 - Save Our Sonoran (2004 9th Circuit) – Court determined that based on the geographic distribution of WOUS throughout the site the Corps should expand scope of analysis to address the entire development.
 - “Due to unique geographic features, under any development alternative, construction of the overall project would impact jurisdictional WOUS”
 - “Construction of the overall project is dictated by the inextricable interconnectedness of jurisdictional and non-jurisdictional activities”
 - “The environmental effects in non-jurisdictional areas have a reasonably close causal relationship with the permitted activities”



USACE Permits are Federal Actions

- Therefore, USACE Permits must comply with NEPA, and many other statutes, such as:
 - Endangered Species Act (ESA)
 - National Historic Preservation Act (NHPA)
 - Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA)
 - Clean Air Act



Scope of Analysis - Section 106 (NHPA)

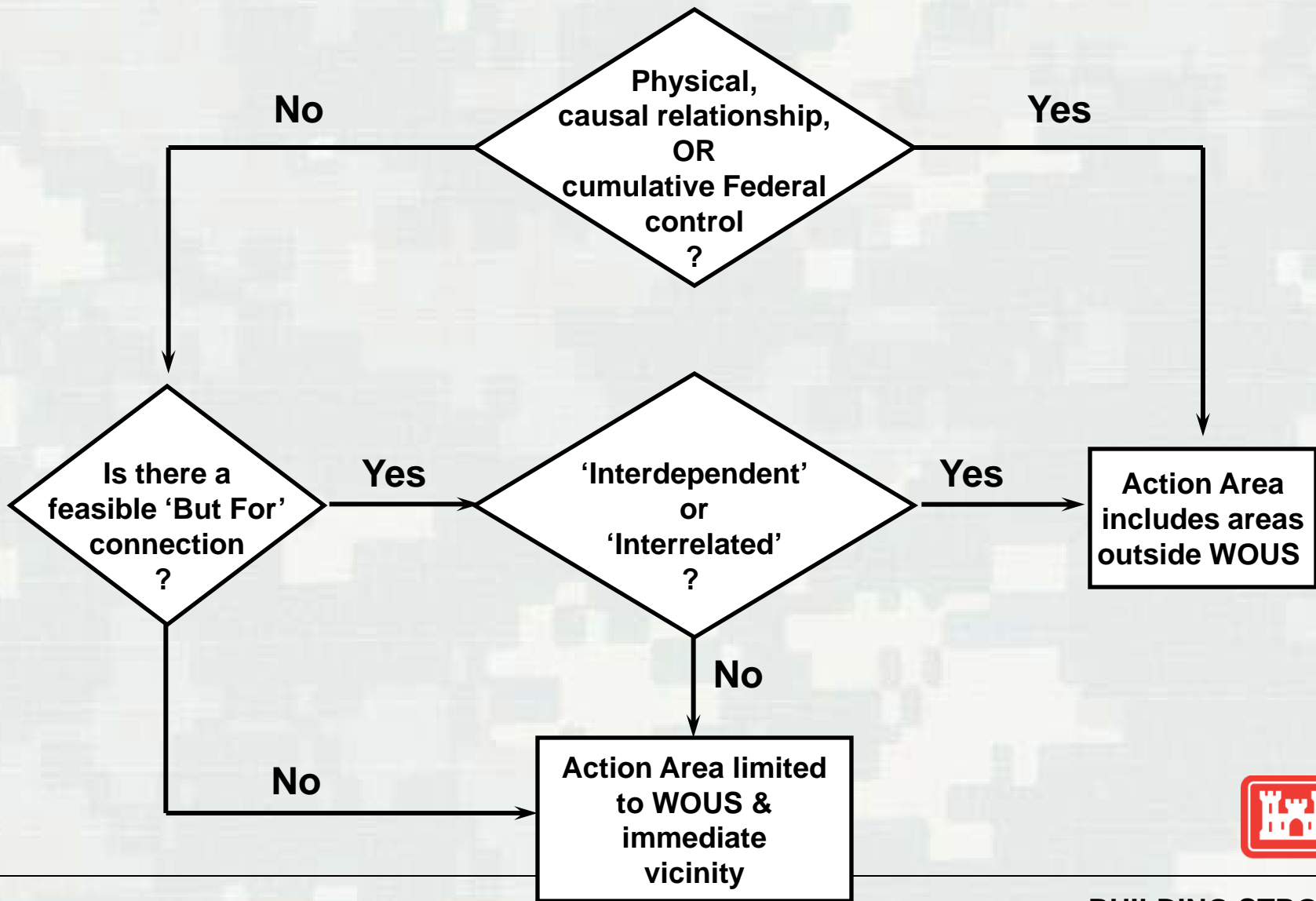
33 CFR 325 Appendix C

33CFR325.1(g) Procedures for Protection of Historic Properties

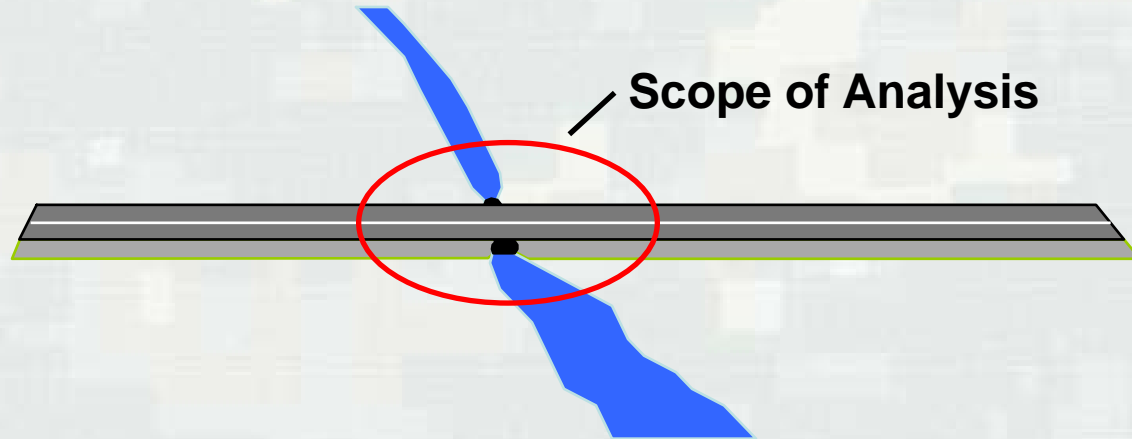
- (i)...activity would not occur but for the authorization of the work or structures within WOUS ('but for' clause **MUST** not be used in isolation!)
- (ii)...activity must be integrally related to the work or structures to be authorized within WOUS. **OR**...the work or structures authorized must be essential to the completeness of the overall project and program.
- (iii) Such activity must be directly associated (first order impact/backbone infrastructure) with the work or structures to be authorized.



Scope of Analysis - Section 7 (ESA)



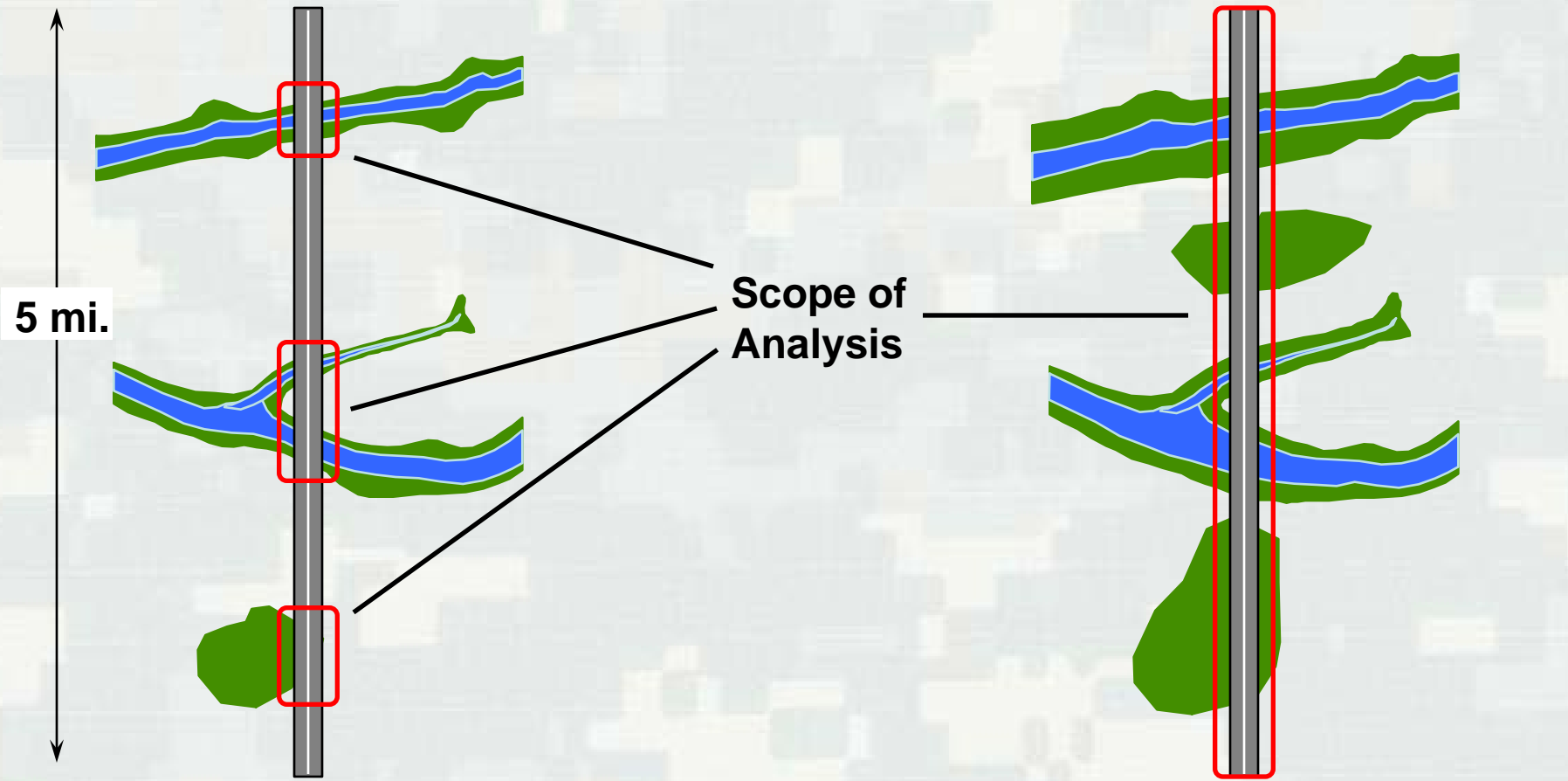
Scope of Analysis for a Simple Road Crossing



- **No Federal Involvement Other than Corps Permit**
- **No other Impacts in Waters of U.S**
- **Scope of Analysis limited to directly-affected waters of U.S., and uplands in the immediate vicinity affecting/affected by regulated activity (e.g. Adjacent road alignments, clearing for staging area, equipment access, etc.)**



Scope of Analysis for Multiple Road Crossings



5 mi.

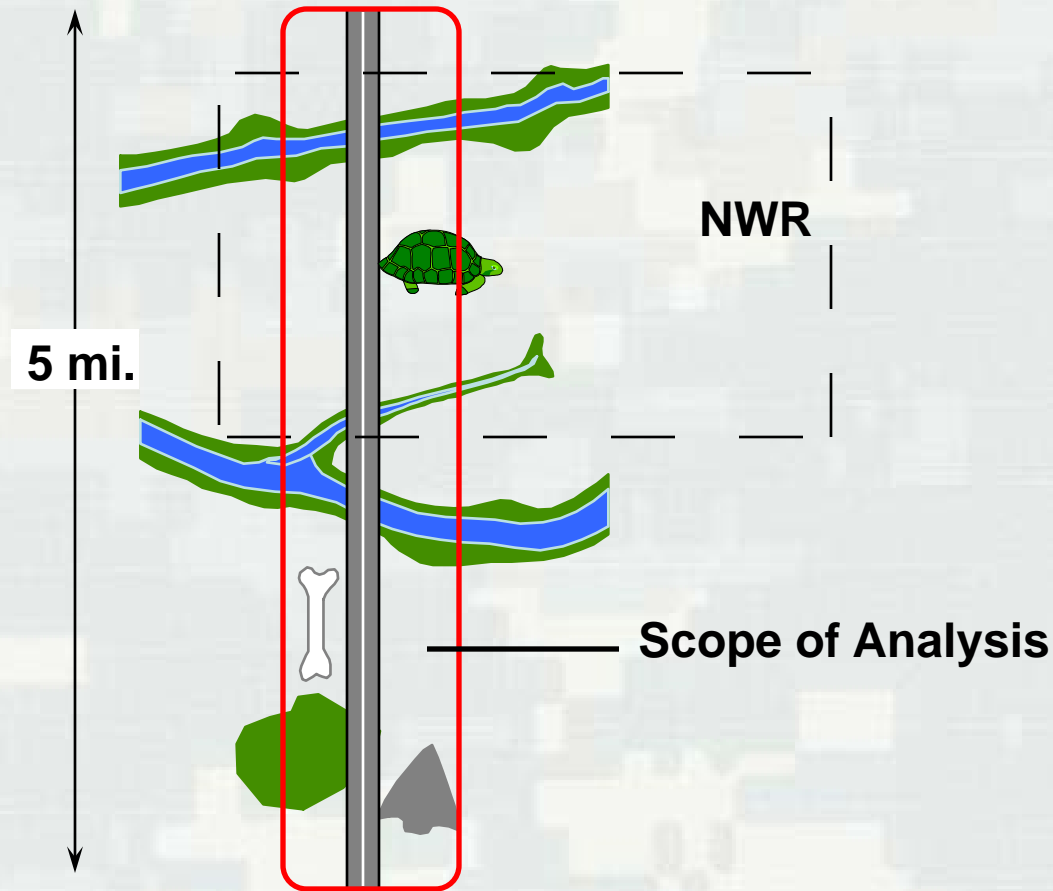
Scope of Analysis

- Waters of U.S. < 1mi., Road Segment = 5mi.
- 3 Permit Areas

- Waters of U.S. 3mi., Road Segment = 5mi.
- 1 Permit Area



Scope of Analysis for Multiple Road Crossings

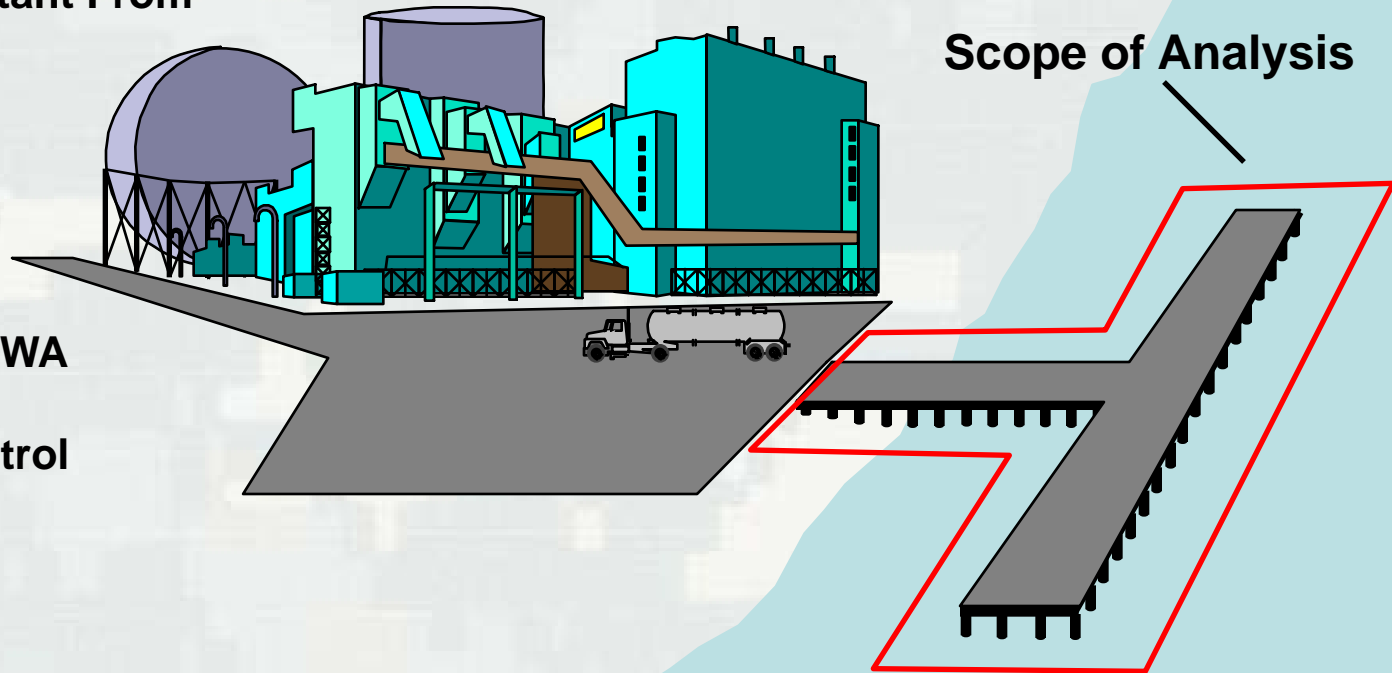


- Substantial Federal Control (Corps permit + NWR Land)
- Substantial Impacts (Waters of U.S., ESA, and cultural)
- One Permit Area

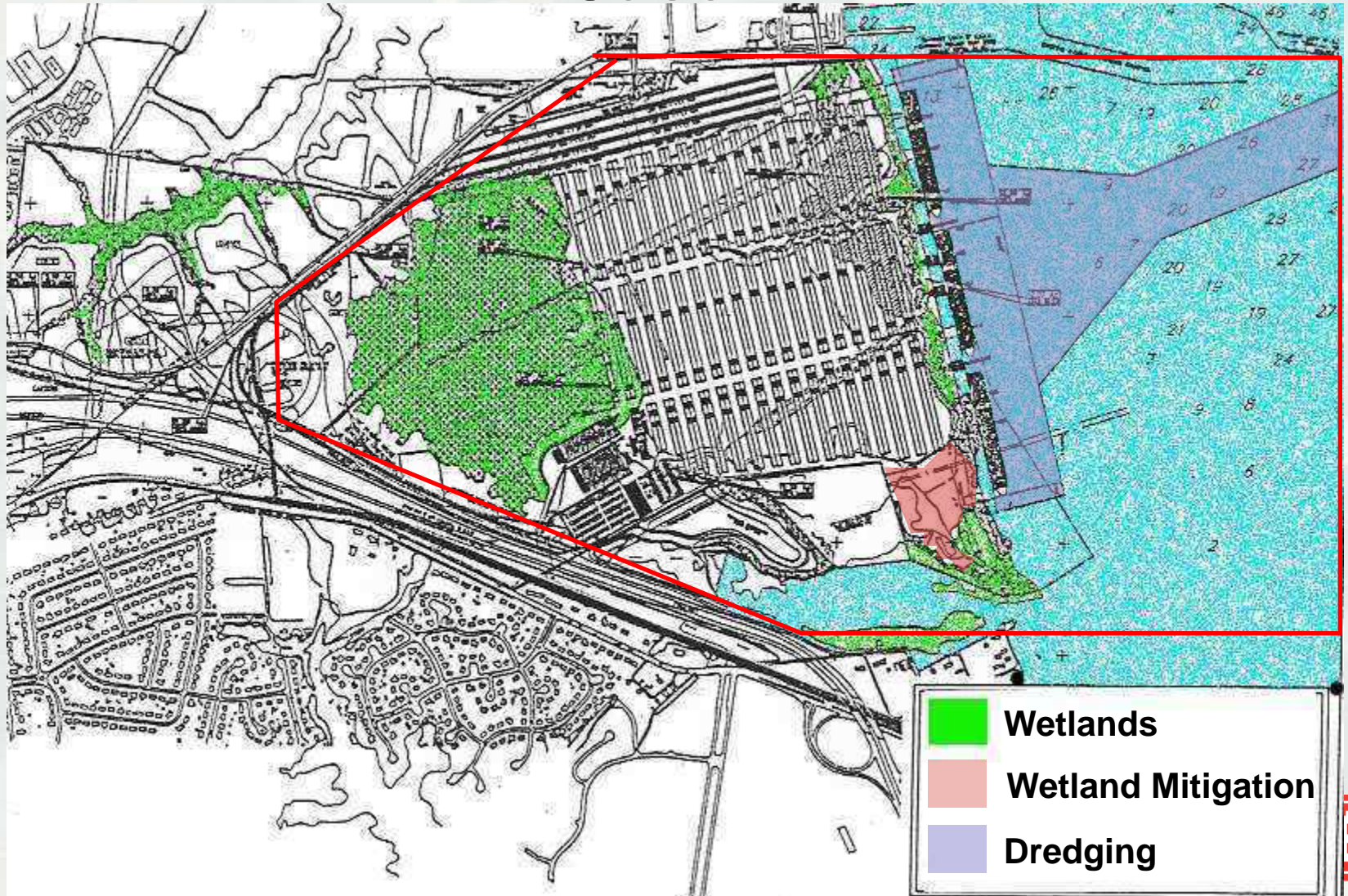


Scope of Analysis for Marine Terminal - Case A

- Limited Direct Impacts
- Indirect Impacts Distant From Permitted Activity
- Indirect Impacts Not Closely Related to CWA
- Limited Federal Control



Scope of Analysis for Marine Terminal Case B



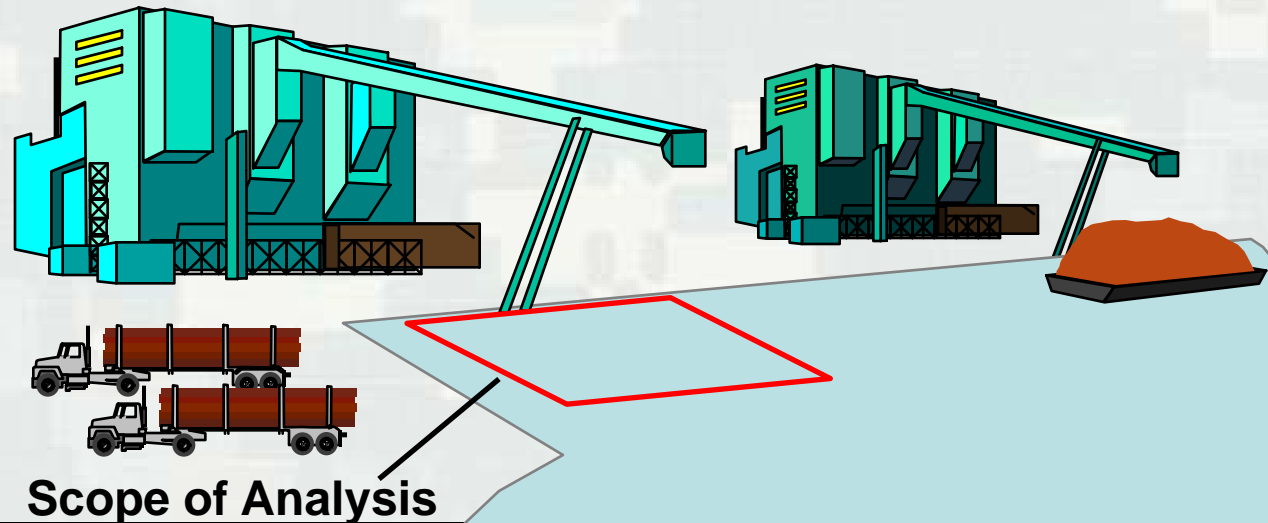
Scope of Analysis for Loading Facility - Case A

Project: Expand Existing Wood Chip Facility

Permit Action: New Chipper and Conveyor

Timber Source Area: 75-Mile Radius, Privately Owned

- Limited Direct Impacts
- Substantial Indirect Impacts, Distant From Permitted Activity
- Limited Federal Control



Scope of Analysis for Loading Facility - Case B

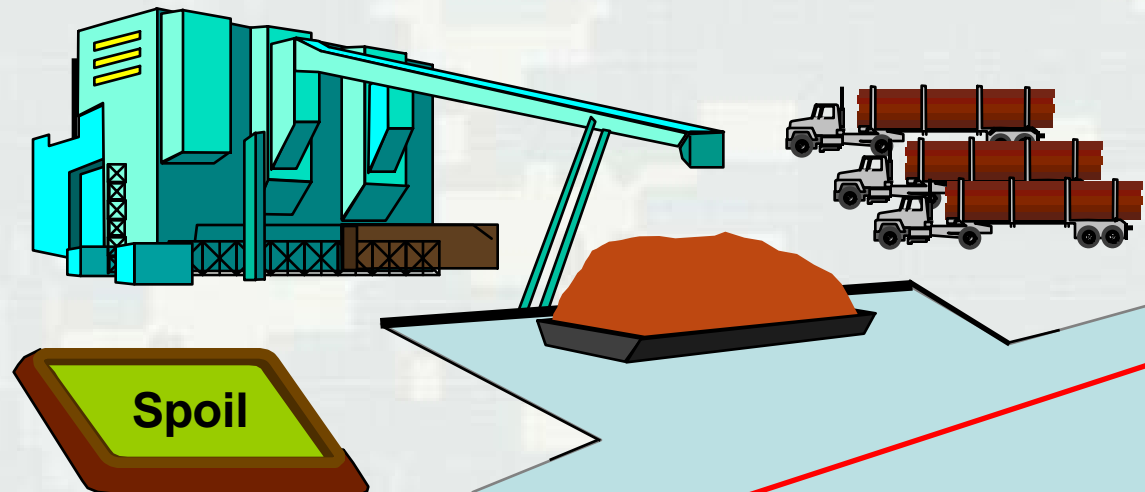
Project: New Wood Chip Loading Facility

Permit Action: Dredging of Basin; Bulkhead; Upland Disposal

Timber Source Area: Surrounding 75 Miles, Federally Owned

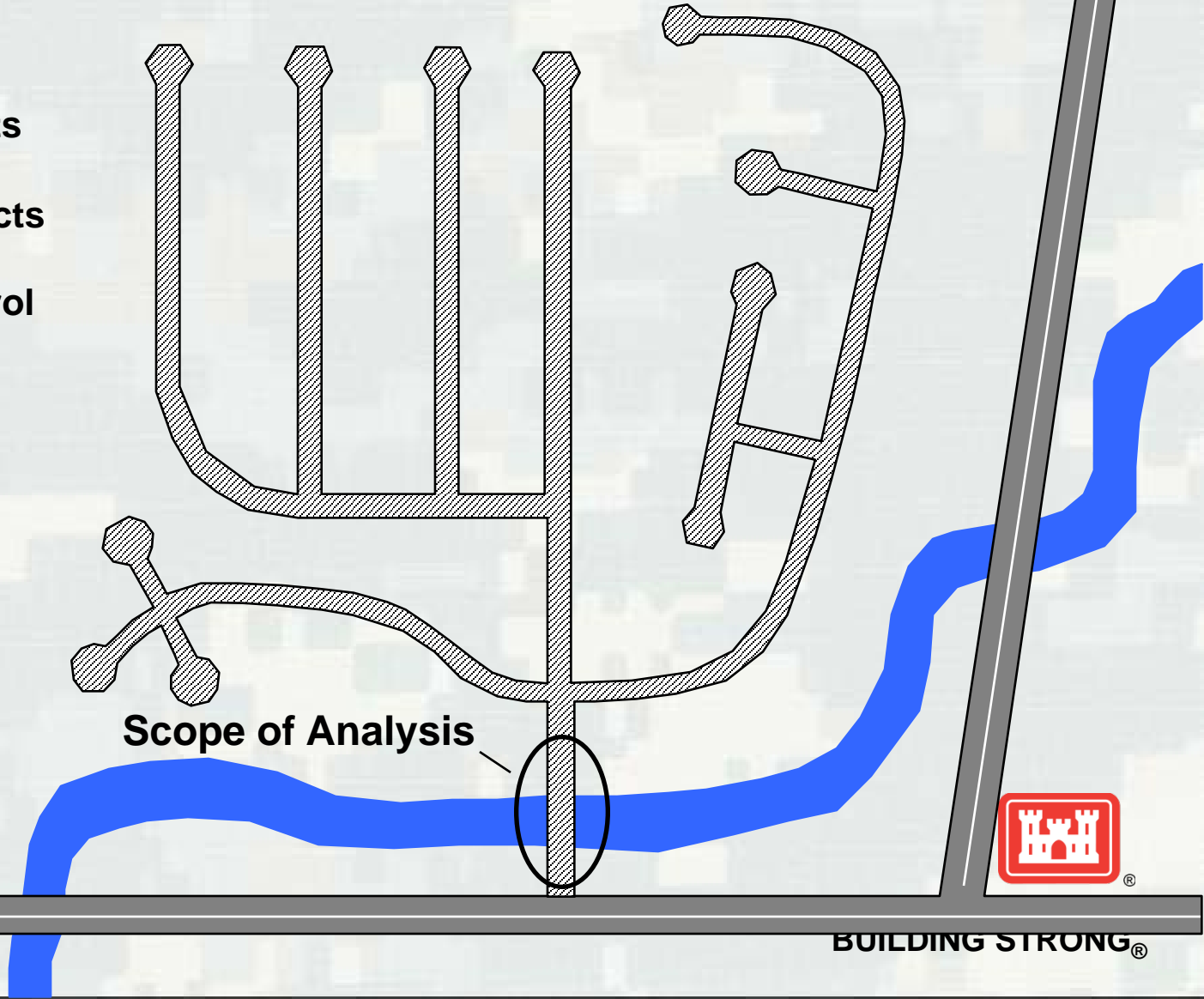
- Limited Direct Impacts
- Substantial Indirect Impacts, Distant From Permitted Activity
- Substantial Federal Control (Corps would probably be a cooperating agency)

Scope of Analysis
(75-mile radius)



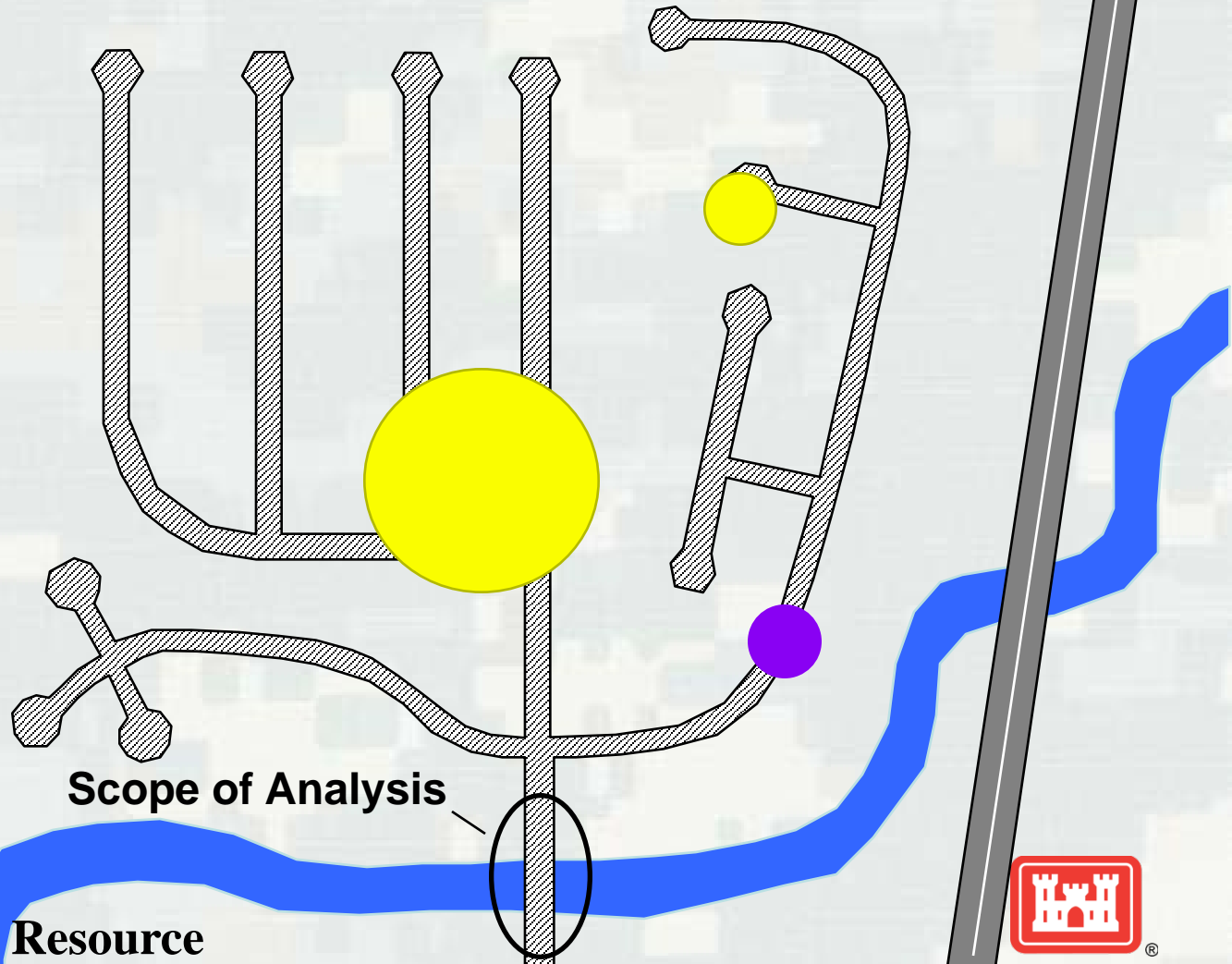
Scope of Analysis for Subdivision - Case A

- Limited Direct Impacts
- Limited Indirect Impacts
- Limited Federal Control
- No Other Impacts to Waters of U.S.



Scope of Analysis for Subdivision - Case B

- Limited Direct Impacts
- Indirect Impacts Distant From Permitted Activity
- Indirect Impacts Not Closely Related to CWA
- Limited Federal Control
- Limited geographic distribution of WOUS (small federal scope of analysis)



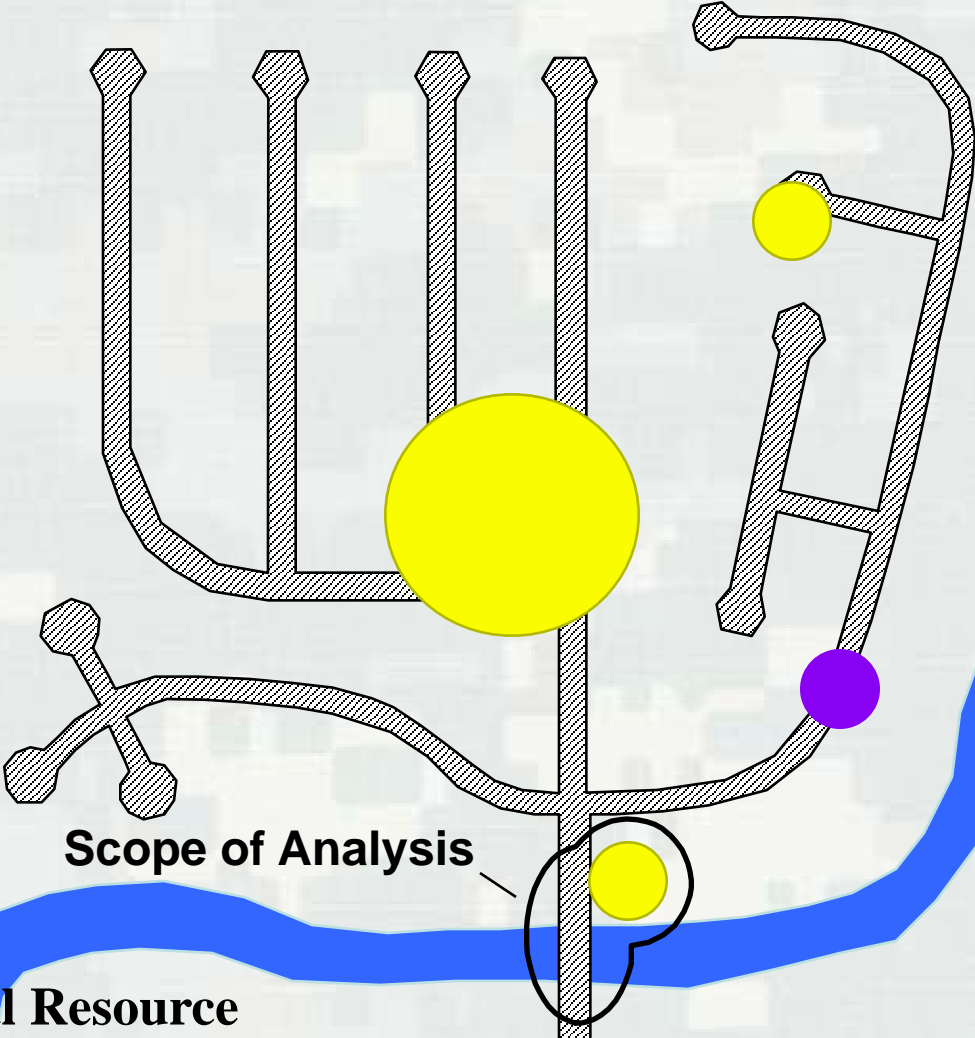
 = Historical/Cultural Resource

 = T/E Species/Critical Habitat



Scope of Analysis for Subdivision - Case C

- Limited Direct Impacts
- Indirect Impact Adjacent to Permitted Activity



 = Historical / Cultural Resource

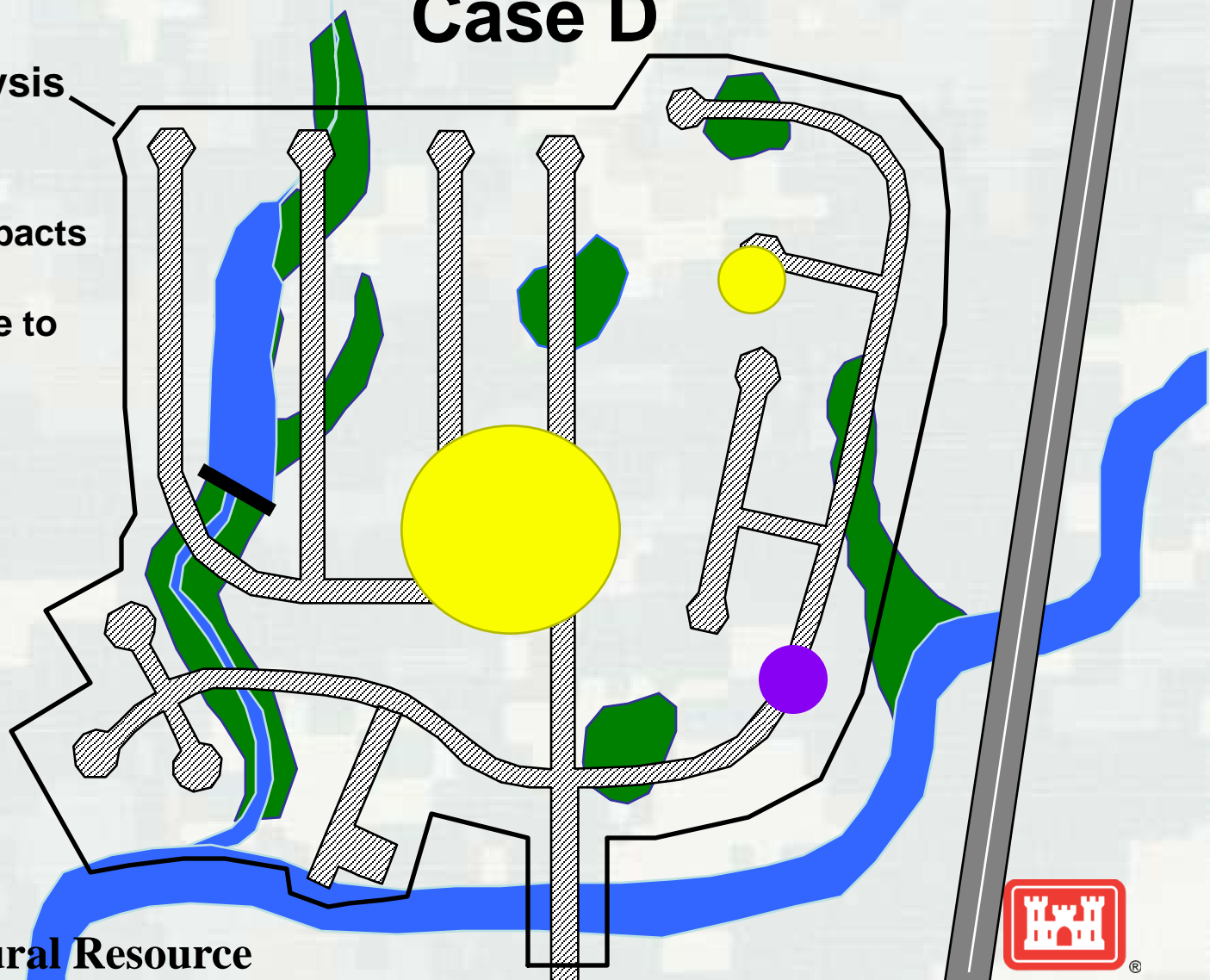
 = T/E Species / Critical Habitat



Scope of Analysis for Subdivision - Case D

Scope of Analysis

- Substantial Direct Impacts
- Indirect Impacts Close to Permitted Activities
- Several Activities Require Permits
- Federal Control Over Much of Project



 = Historical/Cultural Resource

 = T/E Species/Critical Habitat

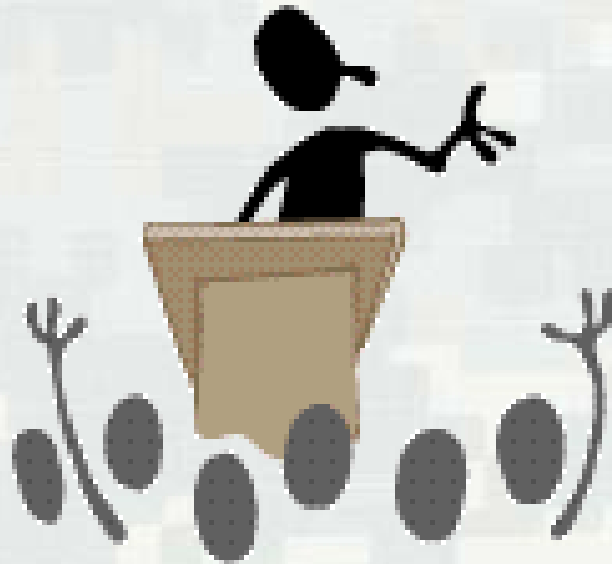


Issues to Consider:

- The scope of analysis is always fact-specific. No bright line rules.
- Typically, the activity in WOUS requiring a Corps permit is merely one component of a larger non-Federal project (small handle)
- Focus on specific activity requiring a Corps permit **AND** those portions over which the Government has sufficient control and responsibility to warrant Federal review (what can the Corps regulate [authorize and enforce]?)
- Judicious use of the “No Federal Action” alternative to help identify the extent of federal control and responsibility over upland/non-jurisdictional areas (use as part of the application of the four factors)
- Consistency with other Corps actions



Thank You. Questions?



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