

# A Brief Preview of the Day...

- What/Who is the Regulatory Program?
- What is a wetland? Or another type of “jurisdictional” water?
- NWP? LOP? IP? Help me with jargon!
- What other regulations does the Corps need to comply with to issue a permit?
- What I really want to know: Timing



# More Preview...

- Things that affect timing:
  - ▶ Application tips – sending in a complete application, how soon in advance to send it.
  - ▶ Resources for pre-application stage – questions, meetings.
  - ▶ Verify delineation as early as possible
  - ▶ Our (and your) coordination with other agencies that influence Corps permit processing – e.g., 401 program.



# Objectives

- Overview of most applicable program areas
- Practical tips for applications and processing
- Multiple presenters & multiple WRDAs
- WRDA Program highlights
- Questions today, questions later
- Suggestions today, suggestions later



# Regulatory Program and Permit Process, Part I

WRDA Partners Outreach

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# Overview

- Corps and Regulatory Program
- When is a permit required?
- Waters of the U.S.: identifying & jurisdiction
- Types of permits
- Other laws affecting the permitting process
- Tips for complete permit applications
- Enforcement



# Introduction to the Corps

- Several Missions
  - ▶ Navigation
  - ▶ Flood Control
  - ▶ Disaster Response
  - ▶ Military Construction
  - ▶ Research and Development
  - ▶ **Regulatory**



# Corps Regulatory Mission

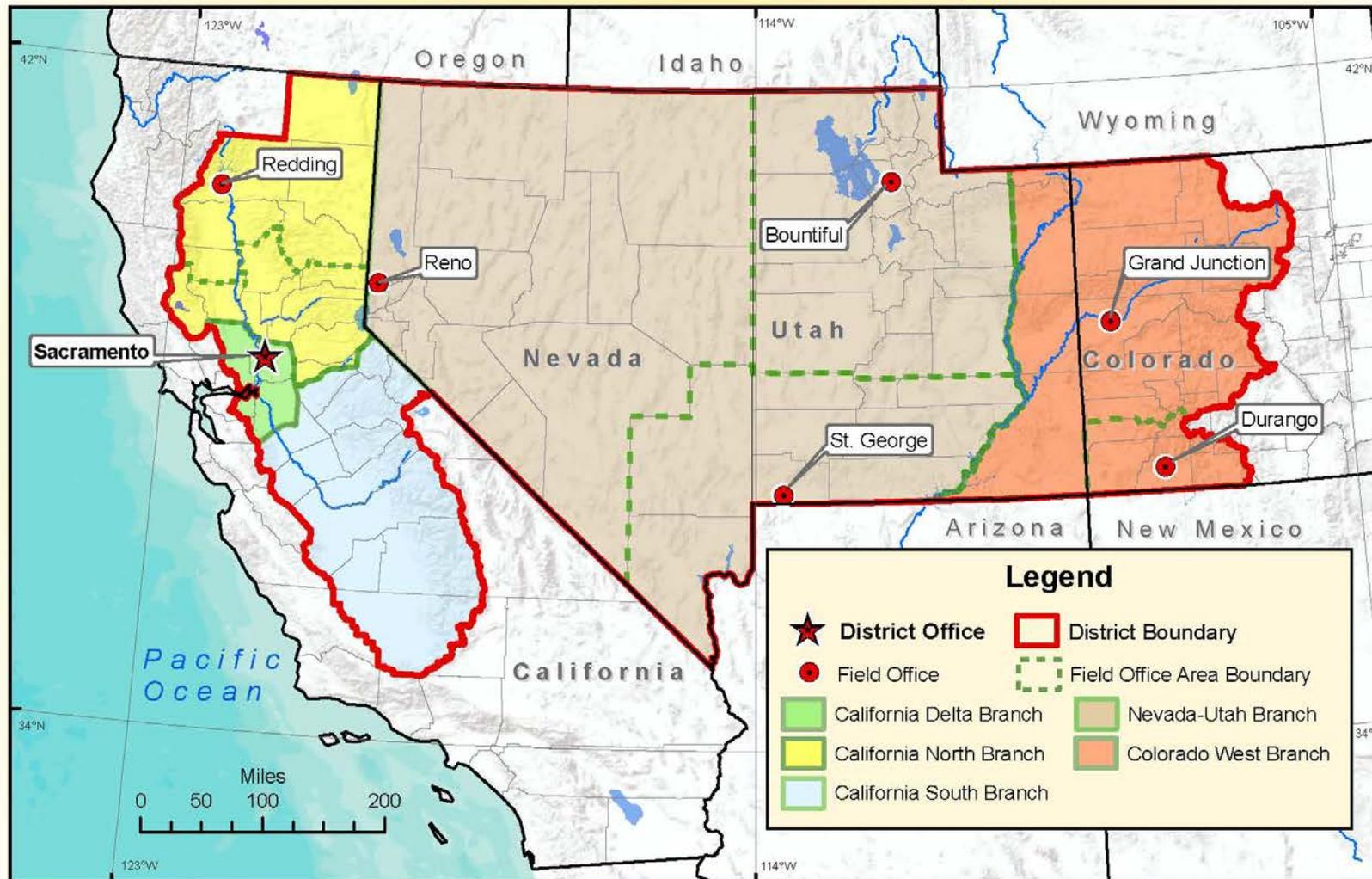
To protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions



**Goal: “No Net Loss of Wetlands”**



# Sacramento District Regulatory Offices



**US Army Corps of Engineers**  
**Sacramento District**

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# Three Regulatory Mission Elements

- **Permitting**: Authorize activities in waters of the U.S.
- **Compliance**: Ensure permit applicants follow permit terms and conditions
- **Enforcement**: Investigate unpermitted activities



# History of the Regulatory Program

- One of the oldest permitting programs in the Federal Government.
- To protect and maintain the navigable capacity of the nation's waters.
- Time, changing public needs, evolving policy, case law and new statutory mandates have added to the program's breadth/authority and complexity over time.



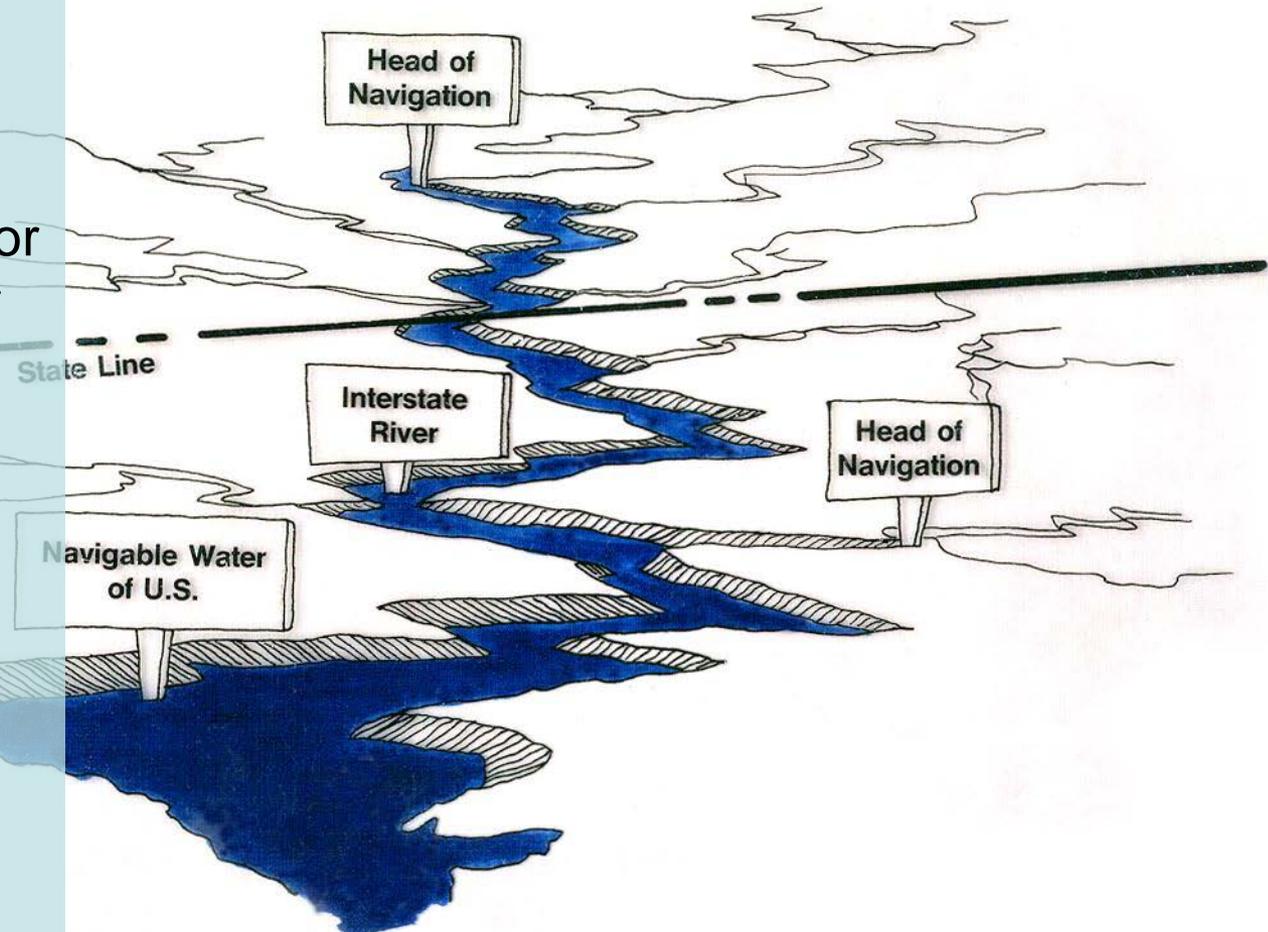
# Section 10 Authority

- **Section 10 Rivers and Harbors Act of 1899**
  - ▶ Permit is required to do any work in, over or under a “navigable water of the U.S.”
- **Primary Objective**
  - Maintain navigability



# Section 10 Navigable Waters of the United States

- Subject to the ebb and flow of the tide
- Presently used, have been used in the past or may be susceptible for use to transport interstate or foreign commerce
  - ▶ Includes ALL tidal waters and all waters listed as Section 10 waters on the Sacramento District website



# Federally Navigable Rivers

- Includes all tidally-influenced areas (e.g., Delta)
- Most major rivers
  - American (to mile 12)
  - Sacramento (to mile 246)
  - Calaveras (to mile 2)
  - Merced (to Mile 20)
  - Stanislaus (to Mile 40)
  - Tuolumne (to mile 47)
  - San Joaquin (to mile 118)
  - Mokelumne (to mile 35)



# Typical Work Requiring a Section 10 Permit



- Bridges



- Dredging



- Bank Protection / Levee Work



- Utility/Power Lines



- Marinas



# Federal Clean Water Act

- Section 404 of the Clean Water Act (1973)
- Regulations: 33 CFR Parts 320-332
  - ▶ *Purpose: to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.*



# Section 404 Authority

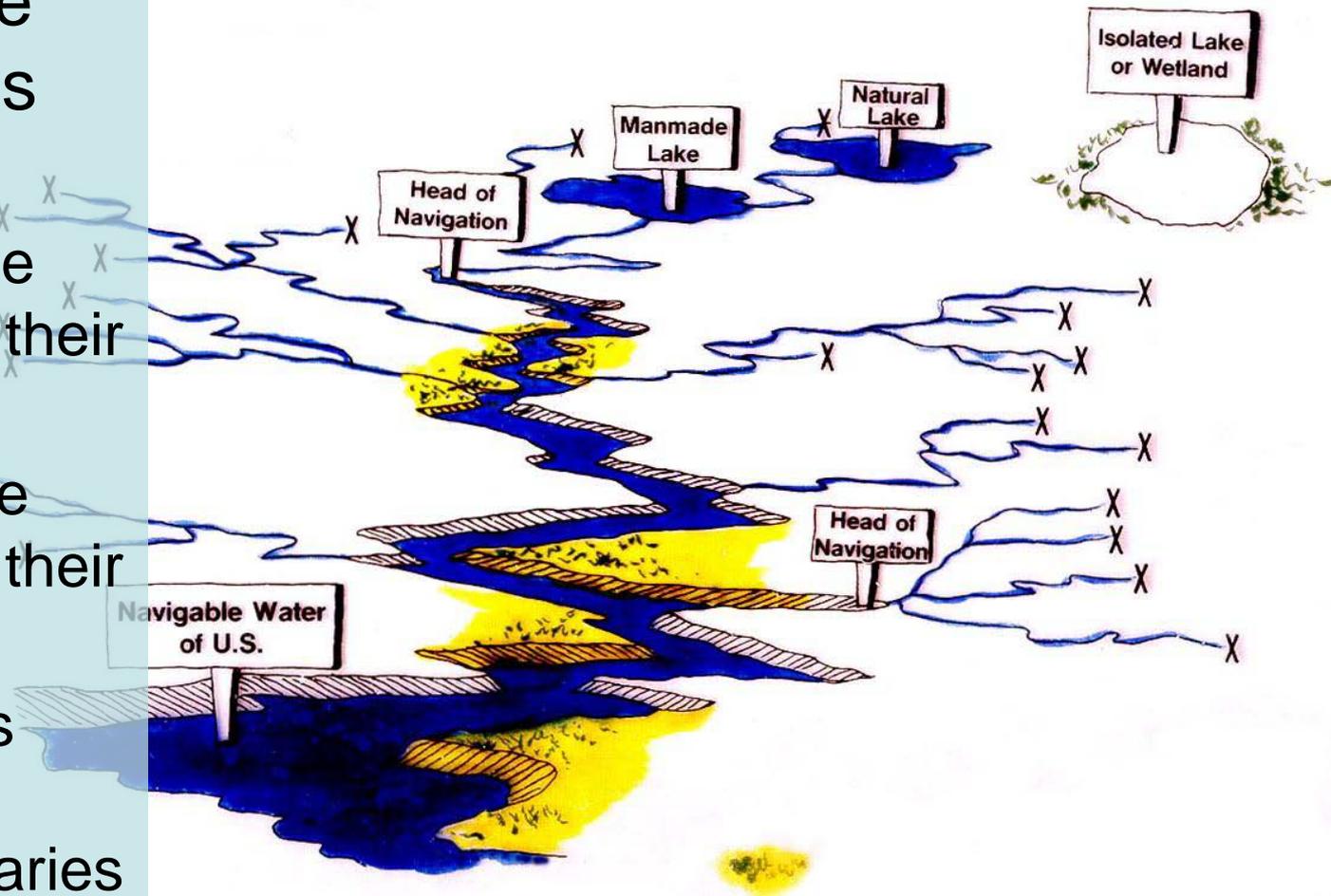
- Requires that a permit be obtained from the Corps prior to discharging dredged or fill material into “waters of the United States”



# Waters of the United States

Waters of the United States consist of:

- ▶ All navigable waters and their tributaries
- ▶ All Interstate waters and their tributaries
- ▶ All wetlands adjacent to those tributaries



# What is “Fill Material?”

- The term “fill material” means:
  - ▶ Material placed in **waters of the United States** where the material has the effect of replacing any portion of a water of the U.S. with dry land, or changing the bottom elevation of any portion of a water of the U.S



# Examples of Fill Material

- ▶ Rock, sand, soil, or clay
- ▶ Construction debris, concrete, or wood chips
- ▶ Overburden from excavation or any material used to create any structure or infrastructure in the waters of the U.S.



- Fill does not include:
  - ▶ Trash or Garbage



# Determining Need for a Permit

1. Does the activity take place in waters of the U.S.?
2. Is the activity regulated?
3. Is the activity exempt (Section 404 only)?
4. Does activity meet terms/conditions of a general permit?
5. Can activity be processed as an LOP?



# Determining Need for a Permit

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# Determining Need for a Permit

## 1. Does the activity take place in waters of the U.S.?

- Are there waters (e.g. rivers, lakes, streams, wetlands, etc.)?
- If yes, are the waters jurisdictional?
- If no, then no permit is needed\*

*\*From the Corps; Waters of the State may still be regulated by the Regional Water Quality Control Board*



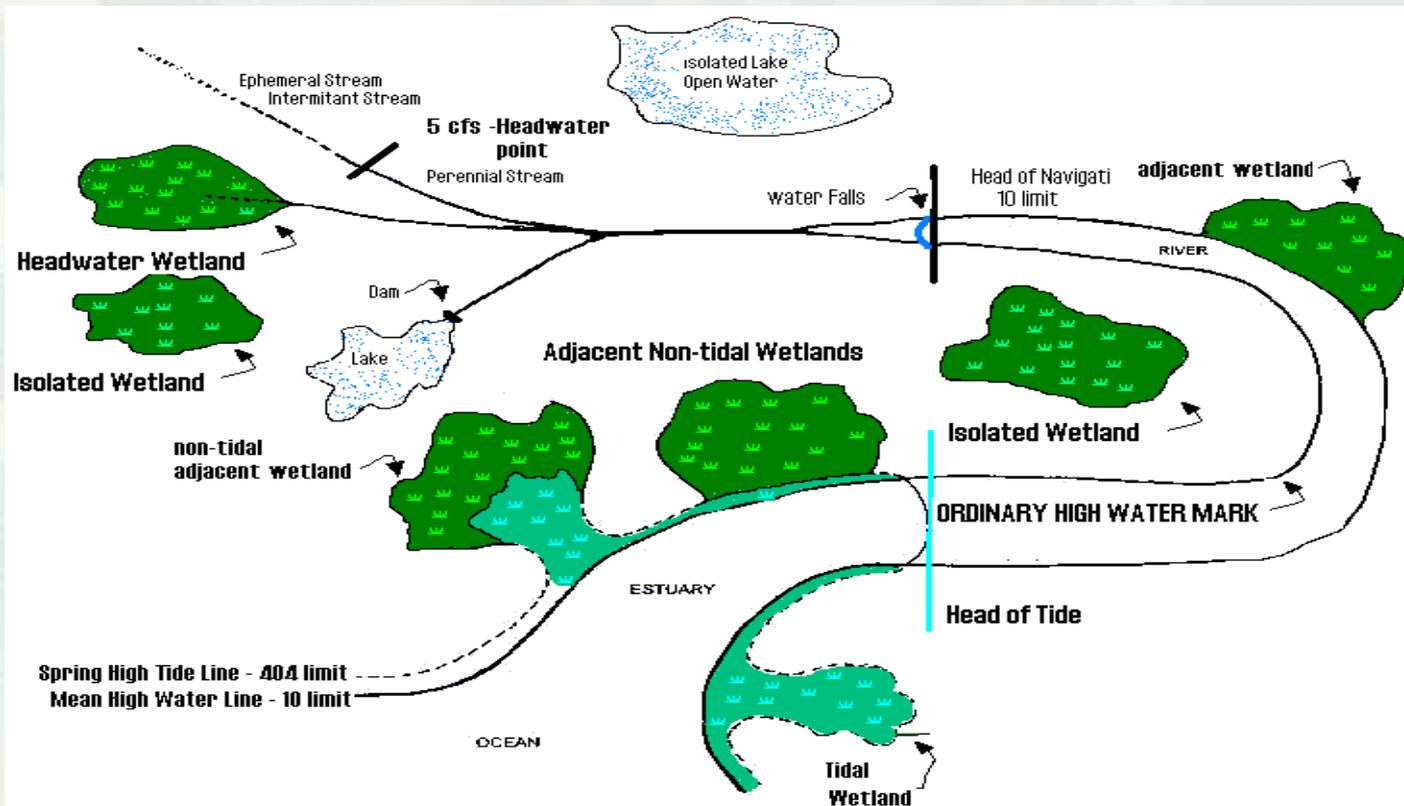
# Limits of Jurisdiction

- **Section 404 Waters of the U.S.**
  - ▶ Tidal Waters – High Tide Line (HTL) or extent of adjacent wetlands
  - ▶ Non-tidal waters – OHWM or extent of adjacent wetlands
  
- **Section 10 Navigable Waters of the U.S.**
  - ▶ Tidal Waters – Mean High Water Mark (MHWM)
  - ▶ Non-tidal Waters – Ordinary High Water Mark (OHWM)

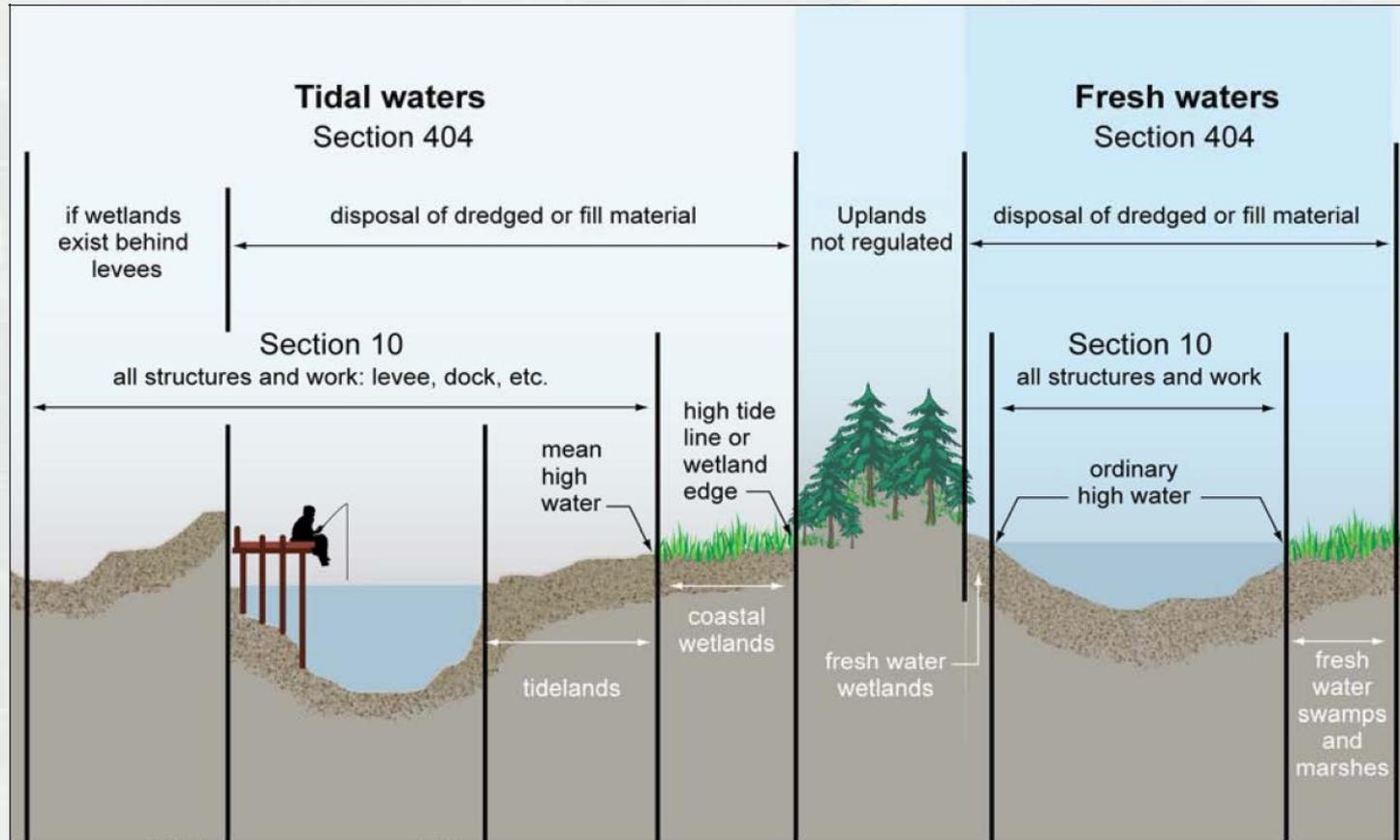


# Waters of the United States

- Waters of the United States consist of:
  - All navigable waters and their tributaries
  - All adjacent wetlands to those tributaries



# Corps Jurisdiction



# Defining Wetlands

- Definition

- ▶ Those areas that are inundated or saturated sufficiently to support, and under normal circumstances do support, a prevalence of wetland vegetation.

*(33 CFR Section 328.3(b))*

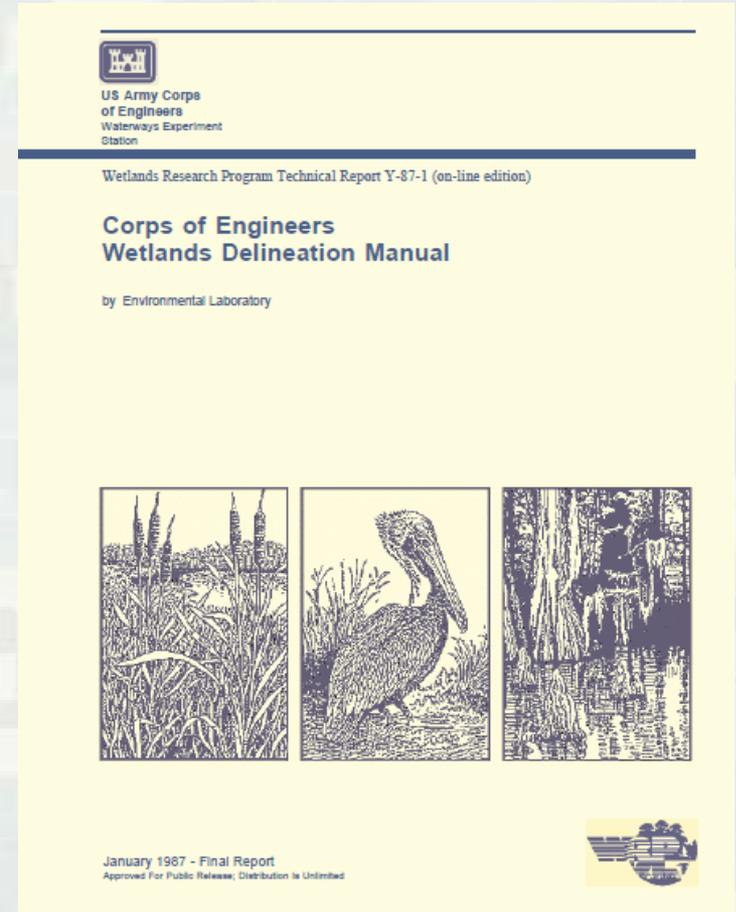
- 3 parameter test

- ▶ Wetland vegetation
- ▶ Hydrology
- ▶ Wetland soils



# Wetland Delineation

- 1987 Manual
- Arid West Supplement
- Consultants often perform
- Corps verifies in writing
- Sacramento District Guidance



# Boundaries of Other Waters of the U.S

- **Ordinary High Water Mark (OHWM):** The line on the shore established by the fluctuations of water and indicated by physical characteristics such as 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.
- **High Tide Line (HTL):** line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. (33 CFR 328.3 (d))
- **Mean High Water Mark (MHWM):** Line on the shore reached by the plane of the average high water. Precise determination must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is need of the line reached by the mean high water.



# Determining Jurisdiction

## 1) Scientific

- Determine extent of wetlands (wetland delineation)
- Determine extent of other waters of U.S.

## 2) Legal and Administrative

- U.S. Circuit & Supreme Court decisions (e.g., SWANCC and Rapanos)
- Connectivity, Significant Nexus, Navigable waters, etc.

- **Complex, can be time-consuming – Call us with any questions and *start early***



# Jurisdictional Determinations

- Regulatory Guidance Letter 08-02 allows the use of Preliminary Jurisdictional Determination (JD) to show that waters “may be” jurisdictional
- Approved JD is required to state there are or are not jurisdictional resources.
- *Preliminary JDs are less resource-intensive.*



- The proposed project involves the placement of dredged/fill material and the material will be placed into waters of the U.S.

**NOW  
WHAT?**



# Determining Need for a Permit

1. Does the activity take place in waters of the U.S.?
- 2. Is the activity regulated?**
3. Is the activity exempt (Section 404 only)?
4. Does activity meet terms/conditions of a general permit?
5. Can activity be processed as an LOP?



# What Activities are Regulated?



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# What Activities are Regulated?



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# Determining Need for a Permit

## 1. Is the activity regulated?

- Does the activity involve the placement of fill material (for Section 404)
  - ▶ Does the activity involve excavation with no more than incidental fallback?
  - ▶ Does the activity involve the placement of pilings that do not have the effect of fill material?
  - ▶ Does the project involve cutting or removing vegetation above ground?
- If the activity is not regulated, no permit needed
- Jurisdictional determination (JD) not needed



# Vegetation Removal

Activities that involve only the cutting or removing of vegetation above the ground (*e.g., mowing, rotary cutting, and chainsawing*) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

“Tulloch II Conforming Rule”

FR – December 30, 2008 (p. 79641)



# Determining the Need for a Permit

## 1. Is the activity regulated?

- Is the activity regulated under Section 10?
  - ▶ Is it being done in, under or over the jurisdictional water?
- If the activity is not regulated, no permit needed
- Jurisdictional determination (JD) not needed



# Determining Need for a Permit

1. Does the activity take place in waters of the U.S.?
2. Is the activity regulated?
- 3. Is the activity exempt (Section 404 only)?**
4. Does activity meet terms/conditions of a general permit?
5. Can activity be processed as an LOP?



# Determining Need for a Permit

- Is the activity exempt (Section 404 only)?
- 33 CFR 323.4(a)
- Examples:
  - ▶ Normal farming, silviculture and ranching activities.
  - ▶ Maintenance, including emergency reconstruction of currently serviceable structures or fills.
  - ▶ Construction or maintenance of farm or stock ponds or irrigation ditches, or the **maintenance** (but not construction) of drainage ditches.
  - ▶ Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into WOUS.



# Maintenance Exemption

- ▶ **Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures or fills.**
  - ▶ In order to qualify for this exemption, there cannot be a change in the materials used or in the size of the structure or fill that was originally constructed.
  - ▶ Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.
  - ▶ This exemption is challenging to meet, as new technology generally leads to alternative design standards and construction methods.



# Ditch Exemption

- ▶ **Regulatory Guidance Letter (RGL) 07-02 provides guidance on this exemption**
- ▶ **Construction or maintenance of irrigation ditches, or the maintenance (but not construction) of drainage ditches**
  - ▶ **Irrigation Ditch**
    - ▶ man-made feature and/or upland swale that either conveys water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water
    - ▶ May include the distribution system or parts thereof, consisting of manmade canals, laterals, ditches, siphons and/or pipes or pipe systems
    - ▶ Where a natural or man-altered water body is used as part of an irrigation ditch system, such as where the waterbody is used to transport irrigation water between manmade ditches, that segment is generally not considered an irrigation ditch
  - ▶ **Drainage Ditch**
    - ▶ Ditch that conveys water (other than irrigation related flows) from one place to another



# Ditch Exemption

- ▶ **Construction or maintenance of irrigation ditches, or the maintenance (but not construction) of drainage ditches**
  - ▶ **Construction**
    - ▶ Includes new work or work that results in an extension or expansion of an existing structure
    - ▶ Ditch relocation
    - ▶ Ditch conversion into pipe
    - ▶ Lining
    - ▶ Placement of new control structures
  - ▶ **Maintenance**
    - ▶ Excavation of accumulated sediments **back to original contours**
    - ▶ Re-shaping of side slopes
    - ▶ Bank stabilization to prevent erosion where BMPs are used
    - ▶ Armoring, lining and/or piping only where a previously armored, lined or piped section is being repaired and all work occurs within the footprint of the previous work
    - ▶ Replacement of existing control structures where the original function is not changed and original approximate capacity is not increased



# Sedimentation Basin Exemption

- ▶ **Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S.**
  - ▶ Construction site refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures



# Recapture Provision

## ▶ 33 CFR 323.4(c)

- ▶ Any discharge of dredged or fill material into waters of the U.S. incidental to any of the exempt activities **must** have a permit if it is part of an activity whose purpose is to convert an area of the waters of the U.S. into a use to which it was not previously subject, where the flow or circulation of waters of the U.S. may be impaired or the reach of such waters reduced.
- ▶ Where the proposed discharge will result in significant changes to flow or circulation, it is presumed that flow or circulation may be impaired by the alteration
- ▶ Example: a permit would be required to convert a wetland into a non-wetland. However, a project that raises the bottom elevation of a water without converting it to dry land does not reduce the reach of the water, although it may alter the flow or circulation of waters of the U.S.
- ▶ **Two part test** – must meet both parts for the recapture provision to apply



# Recapture Provision

- ▶ **Activity purpose is to convert an area of waters of the U.S. into a use to which it was not previously subject**
  - ▶ Conversion of a section 404 wetland to a non-wetland
  - ▶ Conversion of a wetland from silviculture to agricultural use
  - ▶ Conversion of a cypress swamp to some other use
  - ▶ Irrigation ditch that cuts through (or across) a natural or man-altered water body
  
- ▶ **Activity impairs the flow or circulation of waters of the U.S. or reduces the reach of such waters**
  - ▶ Made on a case-by-case basis
  - ▶ Does the discharge harmfully sever or fragment the waterbody
  - ▶ Does the discharge alter flow or circulation or reduce reach through sidecasting into waterbody
  - ▶ Does discharge harm the waterbody by substantially increasing or decreasing water levels
  - ▶ What is the size of the ditch compared to the waterbody
  - ▶ Will BMPs be employed to ensure there is not a significant discernable alteration of flow or circulation or reduction of reach



# Determining Need for a Permit

1. Does the activity take place in waters of the U.S.?
2. Is the activity regulated?
3. Is the activity exempt (Section 404 only)?

## *Regulatory Program Part II:*

4. Does activity meet terms/conditions of a general permit?
5. Can activity be processed as an LOP?



# Thank You



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