

# Regulatory Program and Permit Process, Part II

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# Determining Need for a Permit

1. Does the activity take place in waters of the U.S.?
2. Is the activity regulated?
3. Is activity exempt (Section 404 only)?
4. **Does activity meet terms/conditions of a general permit?**
5. **Can activity be processed as an Letter of Permission?**
6. **If not, process with a standard permit**



# Types of Permits

- **General Permits**

- ▶ **Nationwide Permits** – valid until March 18, 2017
- ▶ **Regional General Permits** - 2 year verification

- **Individual Permits** - generally 5 years, max 10

- ▶ **Standard Permits**
- ▶ **Letters of Permission**



# General Permits

- Issued on a nationwide or regional basis for a category of activities when:
  - ▶ Activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts or;
  - ▶ The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state or local agency, provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.



# Types of General Permits

- **Regional Permits (RGPs)** – May be issued by a Division or District engineer after compliance with necessary procedures (e.g., NEPA).
- **Nationwide Permits (NWP)** – Authorizations issued by HQUSACE for certain specified activities nationwide. Can be locally/regionally conditioned, revoked.



# Regional Permits for Sacramento District in CA

- Three existing valid RGPs:
  - ▶ RGP #60 – Repair and protection work, emergency situations in CA and NV
  - ▶ RGP #1 – Minimal Impact Activities within the ECCC HCP/NCCP
  - ▶ RGP #2 – City of Elk Grove Routine Channel Maintenance

Currently in process:

- ▶ RGP #3 – Small Private Recreational Boat Docks and Associated Access







# Nationwide Permits (NWP)

- 51 categories of activities determined to have minimal impacts, individually and cumulatively.
- Majority require a Pre-Construction Notification (PCN) be submitted to the Corps.
- If Corps determines the impacts are more than minimal, may take discretionary authority and require processing of an Individual Permit for a proposed project/activity.





# Nationwide Permit Timeline

Starts on the day application (PCN) is received by the Corps. For Section 106 and Section 7, it starts when we have enough information to make a determination and/or initiate consultation.

- ▶ Completeness determination: 15 days
- ▶ NHPA Section 106 Consultation: At least 30 days
- ▶ ESA Section 7 Consultation: Up to 135 days (+)
- ▶ Section 401 water quality certification: 60 days+
- ▶ Final Mitigation & Monitoring Plan: Dependent on completeness (permit can be conditioned on having a final approved plan)
- ▶ Permit Decision: Within 60 days of complete application, *unless precluded by law or procedures* (e.g., ESA) (33 CFR 325.2).
- ▶ Within 15 days after last consultation is completed.





# Determining Need for a Permit

If the activity does not meet the terms/conditions of a general permit, process standard permit or consider a Letter of Permission (LOP).

Picture # 3 Nearby dock similar to proposed project





# Letter of Permission

- Type of Individual Permit issued with abbreviated procedures.
  
- Two types of LOPs:
  - ▶ Proposed projects subject only to Section 10 of the Rivers and Harbors Act - when the proposed work would be minor, would not have significant individual or cumulative impacts and should encounter no appreciable opposition
  - ▶ Proposed activities subject to Section 404 CWA which would result in the loss of no more than 1 acre of waters of the U.S. or 500 linear feet of streambed or bank and would have an overall minimal impact, individually and cumulatively (Sacramento District released new Section 404 LOP procedures in 2010)



# Determining Need for a Permit

## If activity can't be processed as an LOP

- ▶ Process standard permit



*Natomas Levee  
Improvement  
Project*





# Standard Permits

- Permit process includes public notice to request comments.
- Activities have more than minimal impacts.
- Full 404(b)(1) alternatives analysis – “LEDPA”
- Decision will be made to issue permit for the proposed project, issue with special conditions, or deny permit.



# Permit Application Process

1. Pre-application meetings available - first Thursday of each month
2. Complete DA Form 4345 (or, if you believe the project complies with a General Permit, complete the South Pacific Division Pre-Construction Notification form)

**\*CONTACT CORPS EARLY IN PLANNING PROCESS\***



# Permit Application Process

3. Public Notice (Standard Permit)/ Agency Notice (Letter of Permission)
4. Corps evaluates projects for:
  - ▶ Compliance with Regulations, including Mitigation
  - ▶ Endangered Species Act (**ESA**)
  - ▶ National Historic Preservation Act (**NHPA**)
  - ▶ Alternatives Information - EPA's Section 404(b)(1) Guidelines
    - 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 – with project and mitigation - Post-construction





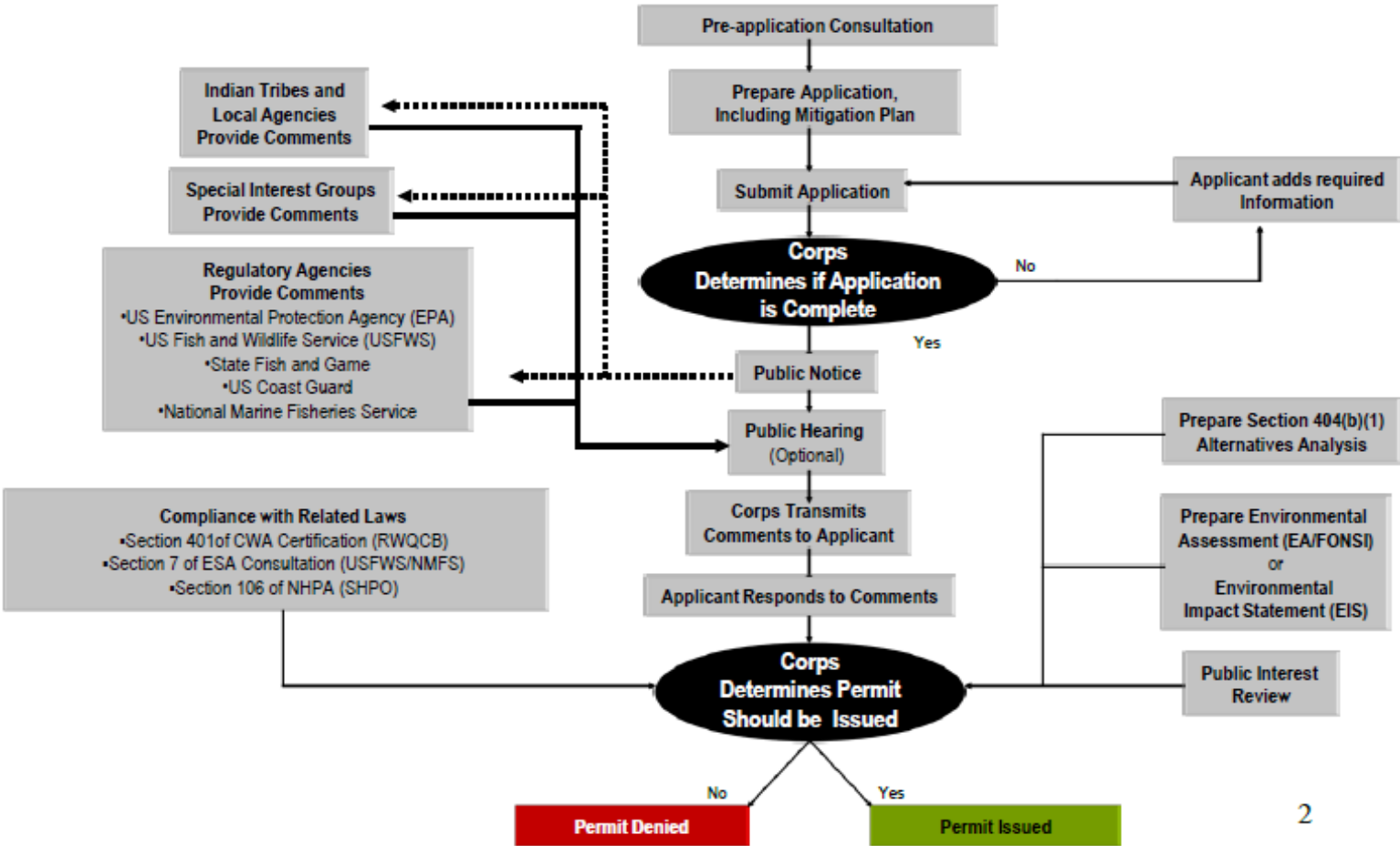
# Standard Permit Timeline

Starts on the day application package & signed ENG Form 4345 is received by the Corps.

- ▶ Completeness determination: 15 days.
- ▶ Public Notice: within 15 days of Federally Complete Application.
- ▶ Public Notice comment period: 15-30 days.
- ▶ 404(b)(1) Alternatives Analysis: Dependent on completeness
- ▶ NHPA Section 106 Consultation: Dependent on determination
- ▶ ESA Section 7 Consultation: Up to 135 days
- ▶ Section 401 water quality certification: 60 days – 1 year
- ▶ Final Mitigation & Monitoring Plan: Dependent on completeness (must be approved by Corps prior to permit issuance)
- ▶ Permit Decision: within 120 days of Federally complete application, or 30 days after final consultation complete.



# Standard Permit Process



# Considerations

- During the permit review process, in addition to evaluating the impacts of the project on the human environment and public interest, the Corps must evaluate mitigation, alternatives to the project and ensure compliance with other Federal laws.



# Mitigation - Sequence

- Avoidance, minimization and compensation of impacts to waters of the U.S.
- Projects must first avoid and minimize impacts to the extent practicable.
- Compensatory mitigation for unavoidable impacts to waters of the U.S.





# Compensatory Mitigation

- **Restoration** (re-establishment or rehabilitation),
  - **Establishment** (creation),
  - **Enhancement**, and/or
  - In certain circumstances, **preservation** of aquatic resources
- 
- ....For the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.







# Mitigation Plan Requirements

1. Objectives
2. Site selection
3. Site protection instrument
4. Baseline information
5. Determination of credits
6. Mitigation work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances
13. Other information





# Compensatory Mitigation

- No net loss of wetland function
  - ▶ Water quality
  - ▶ Habitat
  - ▶ Flood control
  - ▶ Stream protection
  - ▶ Education
  - ▶ Recreation
- 5 year minimum monitoring period
- Site's protection instruments
- Functional replacement on a watershed level



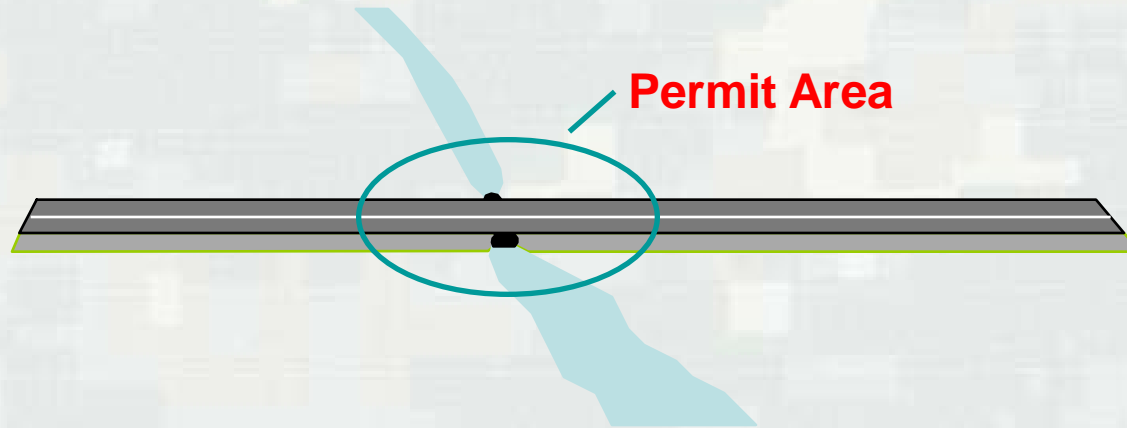


# Preference Hierarchy for Mitigation

1. Mitigation bank credits
2. In-lieu fee program credits
3. Permittee-responsible mitigation under a watershed approach
4. On-site and/or in-kind permittee-responsible mitigation
5. Off-site and/or out-of-kind permittee-responsible mitigation



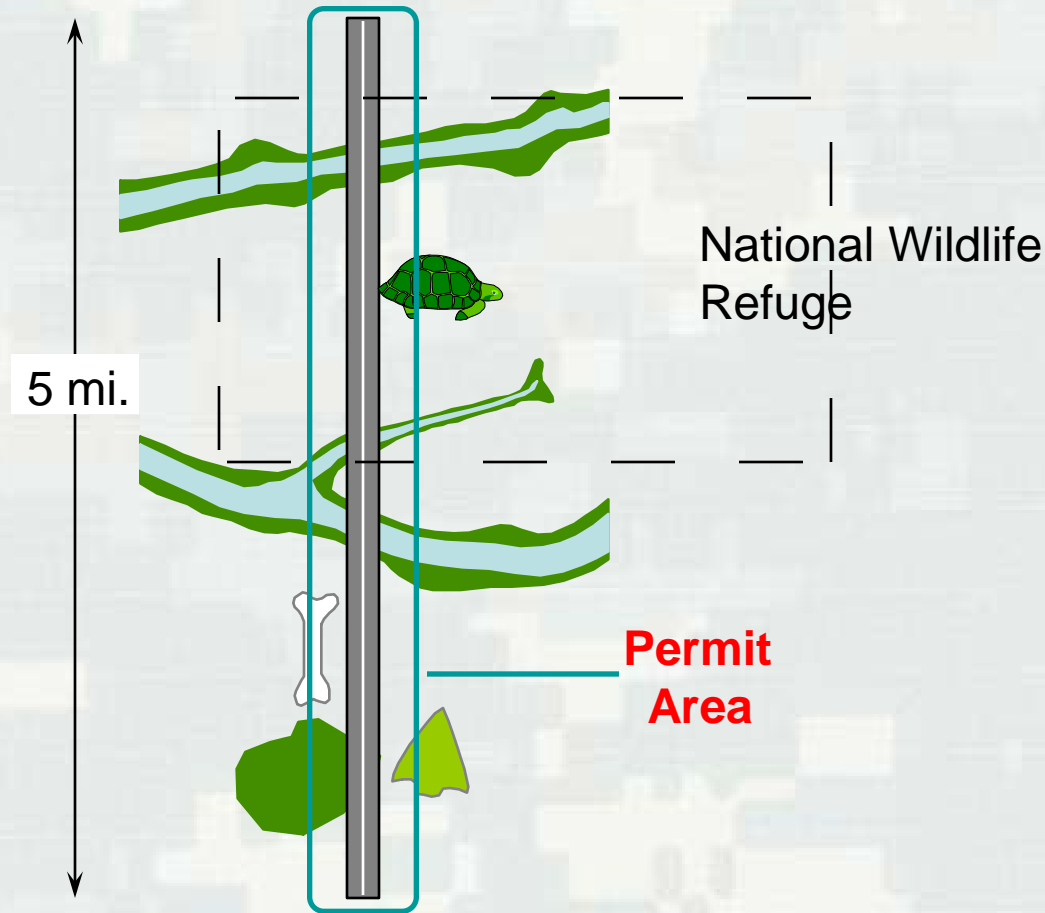
# Permit Area - Single Road Crossing



- No Federal involvement other than Corps permit
- No other impacts in waters of U.S.
- Permit Area limited to waters of U.S. & proximate areas – e.g., access, staging



# Permit Area - Multiple Crossings



- Substantial Federal Control (Corps permit + NWR Land)
- Impacts (Waters of U.S., ESA, Cultural)



# Why is “Scope of Analysis” and the “Corps Permit Area” Important?

- The Corps completes NEPA compliance and assures compliance with other federal laws only within our Scope of Analysis.
- Where this tends to affect the process most is with the Endangered Species Act – e.g., kit fox and wind power projects.
- Take-home: Case-by-case; Corps permit area may be smaller than your entire project.







# Compliance with Other Federal Laws

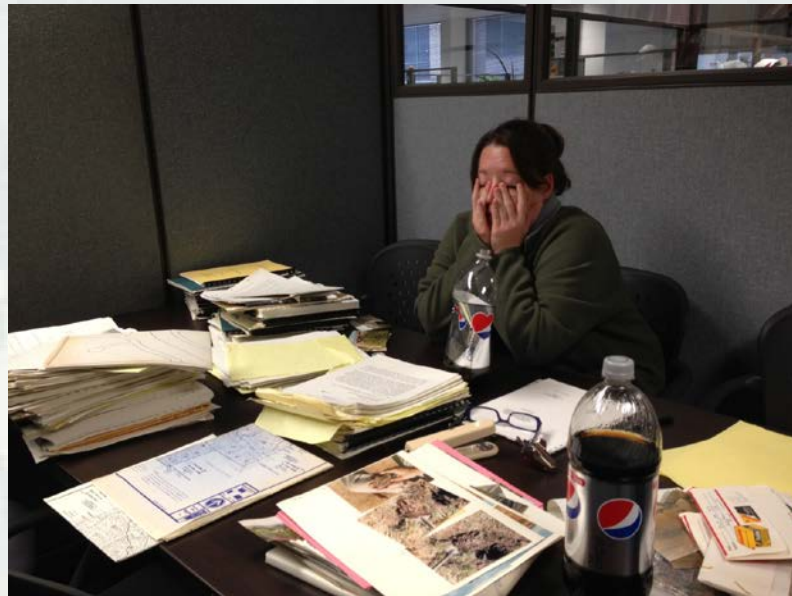
- ❖ **National Environmental Policy Act (NEPA)**
- ❖ **Section 401 Water Quality Certification**
- ❖ **Section 7 of the Endangered Species Act (ESA)**
- ❖ **Section 106 of the National Historic Preservation Act (NHPA)**



# Regulatory Actions: NEPA Compliance

- Under NEPA, the Corps must assess the direct, indirect, and cumulative effects of the federal permit application in either an EA or an EIS (direct and indirect impacts subject to the Corps **scope of analysis (SOA)**)

Sometimes this can be straightforward, but other times...



# Why is “Scope of Analysis” and the “Corps Permit Area” Important?

- The Corps completes NEPA compliance and assures compliance with the other federal laws mentioned earlier just within our Scope of Analysis.
- Where this tends to come up the most is with the Endangered Species Act – e.g., kit fox and wind power projects.
- Take-homes: Case-by-case; Corps permit area may be smaller than your entire project.



# Section 401 Water Quality Certification

- **Section 401 of the Clean Water Act:** Requires applicant for a Federal license or **permit** to conduct an activity that *may result in a discharge of a pollutant into waters of the U.S.* to obtain a certificate from the state in which the discharge originated or would originate.
- A permit cannot be issued under Section 404 of the Clean Water Act without a Section 401 Certification or Waiver - usually from the Regional Water Quality Control Board.
- Provisional authorization of general permits.



# Getting to the Permit Decision

- There are steps and coordination along the way.
- Very few permits are denied, although often projects are modified during the process.
- Majority of permits issued include special conditions.
- Take-homes: Plan ahead! Allow for potentially multiple reviews by different agencies. Start thinking about avoiding and minimizing impacts early in process.





# *Questions?*



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