US Army Corps of Engineers
Regulatory Program Overview

DWR Workshop
January 29, 2016

Zachary Simmons
Senior Project Manager,
Enforcement and Special Projects Unit
US Army Corps of Engineers, Sacramento District
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

Tidal Waters

Section 103
Ocean Disposal of Dredged Material

Typical examples of regulated activities

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.

Fresh Waters

Uplands

Section 10
(if navigable)

Ordinary High Water

Coastal Wetlands

Vegetation associated with salt & brackish water

Ground Water line

Tidelands

High Tide Line

Mean High Water

Fresh Water Wetlands

Marshes, swamps, bogs, & similar areas

Building Strong®
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
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 form 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

Zachary Simmons: 916-557-6746
Zachary.M.Simmons@usace.army.mil