

FEDERAL ENDANGERED SPECIES ACT COMPLIANCE: OVERVIEW AND PROCESS TIPS

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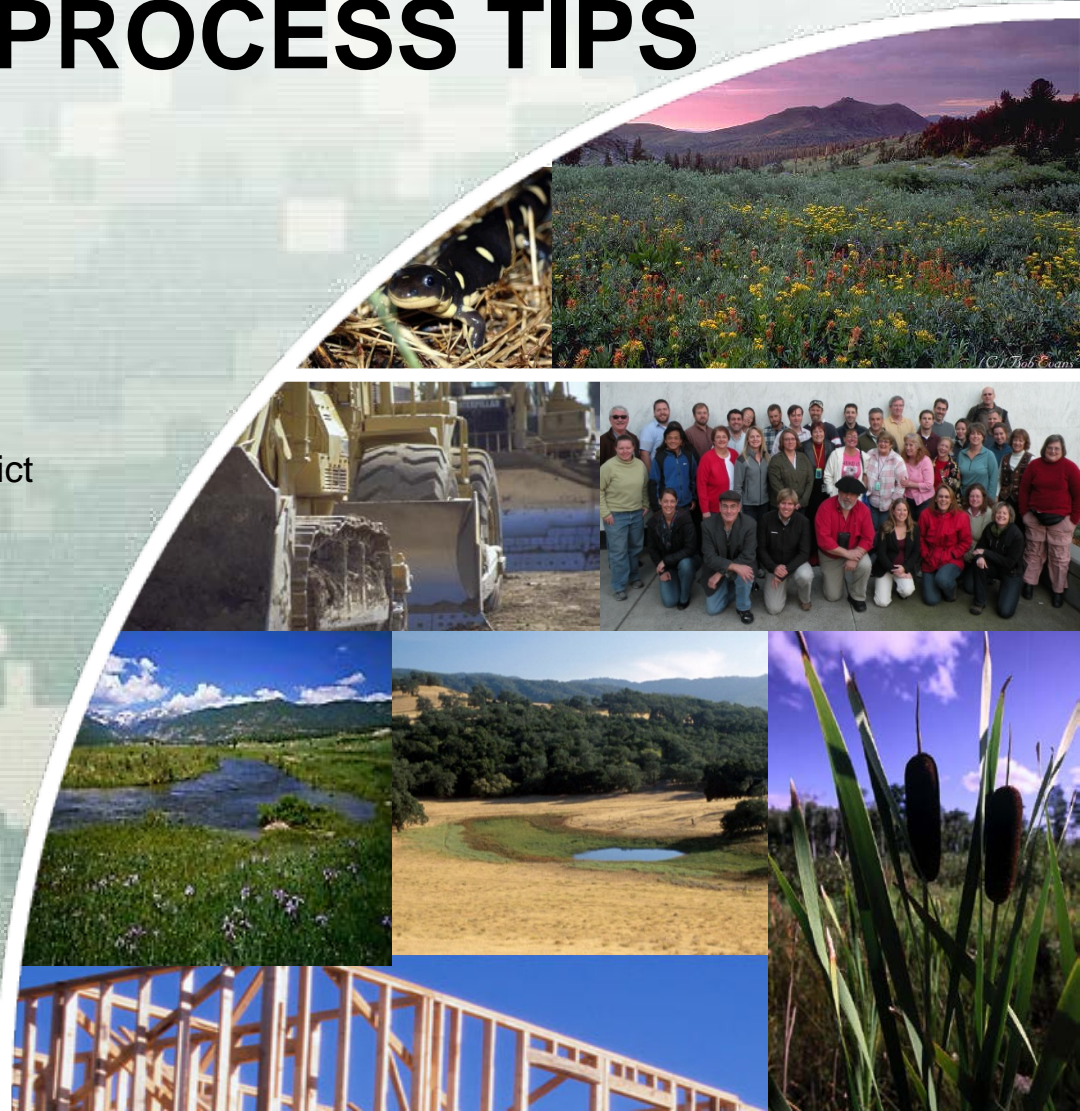
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1 April 2016



Presentation Overview

- Overview of federal agency compliance with ESA via Sec. 7.
- Consultation – what is it, what are its possible outcomes (determinations).
- Corps' scope of analysis for ESA.
- Information needs to support Sec. 7.
- Corps' use of special conditions for ESA.
- Technical and process tips...



Enhance Review Timelines



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ESA - Section 7(a)(2)

- Interagency Cooperation:
 - ▶ Each Federal agency shall ensure that any (discretionary) action it intends to authorize, fund, or carry out is not likely to jeopardize threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.



Definition of “Take”

- To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.
- *Harm* is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering.
- *Harass* is defined as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.



Source: ESA Consultation Handbook (1998)



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Federal Actions

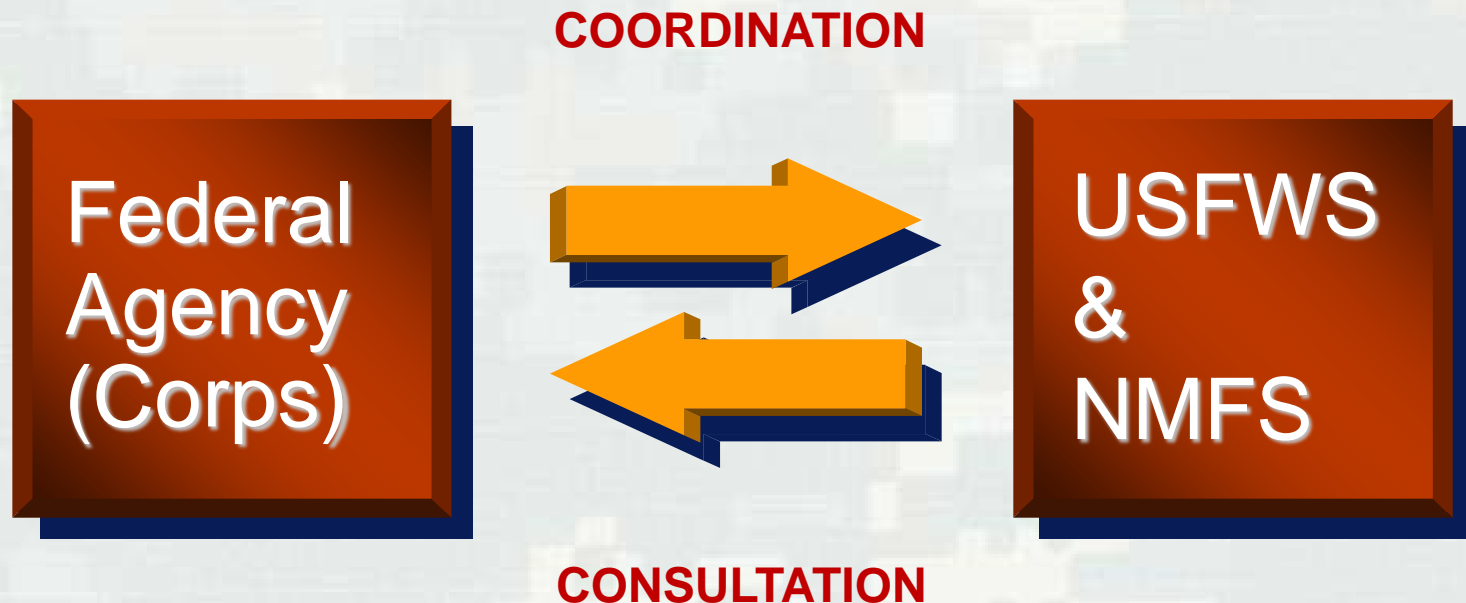
- A Federal Agency proposes to take an action:
 - ▶ Issue a permit
 - ▶ Authorize an activity
 - ▶ Fund a project or program
 - ▶ Build/Maintain/Repair/Operate something

§ 7(a)(2) APPLIES



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Endangered Species Act Section 7



To ensure actions will not jeopardize a listed species or destroy or adversely modify its designated critical habitat.



What is “Consultation”?

- a period of discussion between the parties that culminates in the assembly of a biological opinion that documents the results of the consultation.
- The section 7 regulations refer to ***formal*** and ***informal*** consultation.



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Section 7 Consultation

- Consultation Handbook (1998)
http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf
 - ▶ Time Frames
 - ▶ Biological Assessment
 - ▶ Informal/Formal
 - ▶ Letter of Concurrence/
Biological Opinion



Scope of Analysis For Sec. 7 Consultations

- **Sec. 7 applies in Corps Permit Area**
 - ▶ Work in waters of U.S.
 - ▶ Uplands affected by work in water
- **Examples**
 - ▶ Single road crossing
 - ▶ Multiple road crossings



Scope of Analysis for ESA

- Primarily informed by Corps' NEPA implementing regulations (33 CFR Part 325, Appendix B); also Regulatory Guidance Letter (RGL) 88-13
- The "Four Factors:"
 - i. Merely a link in a project corridor
 - ii. Portions of work in uplands that directly affect the location and configuration of regulated activity
 - iii. Extent of project within Corps jurisdiction
 - iv. Cumulative Federal control and responsibility

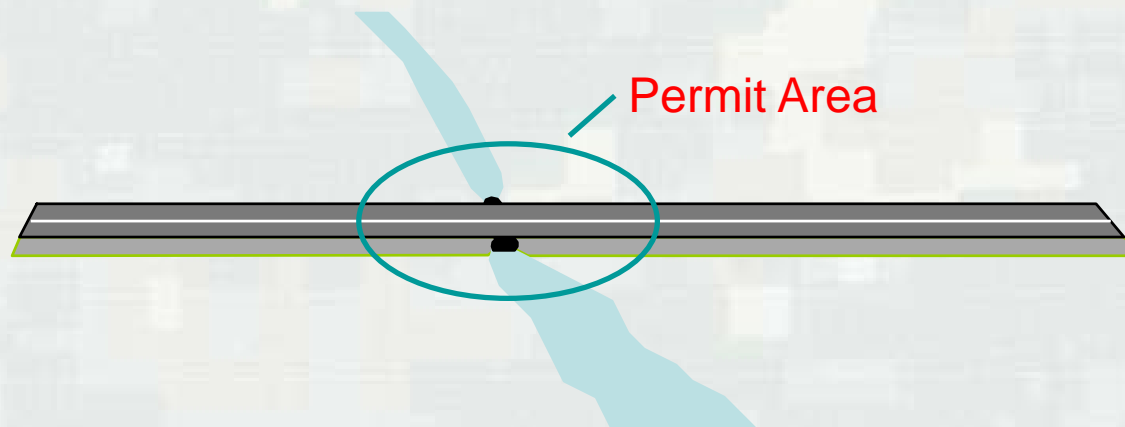


Scope of Analysis for ESA, Con't.

- **Endangered Species Act**
 - ▶ Action Area: geographic extent of environmental changes that will result directly and indirectly from the action (50 CFR 402.2)
- **Corps Permit Area: considers direct and indirect impacts. As narrow as possible; emphasis over time has become increasingly so.**



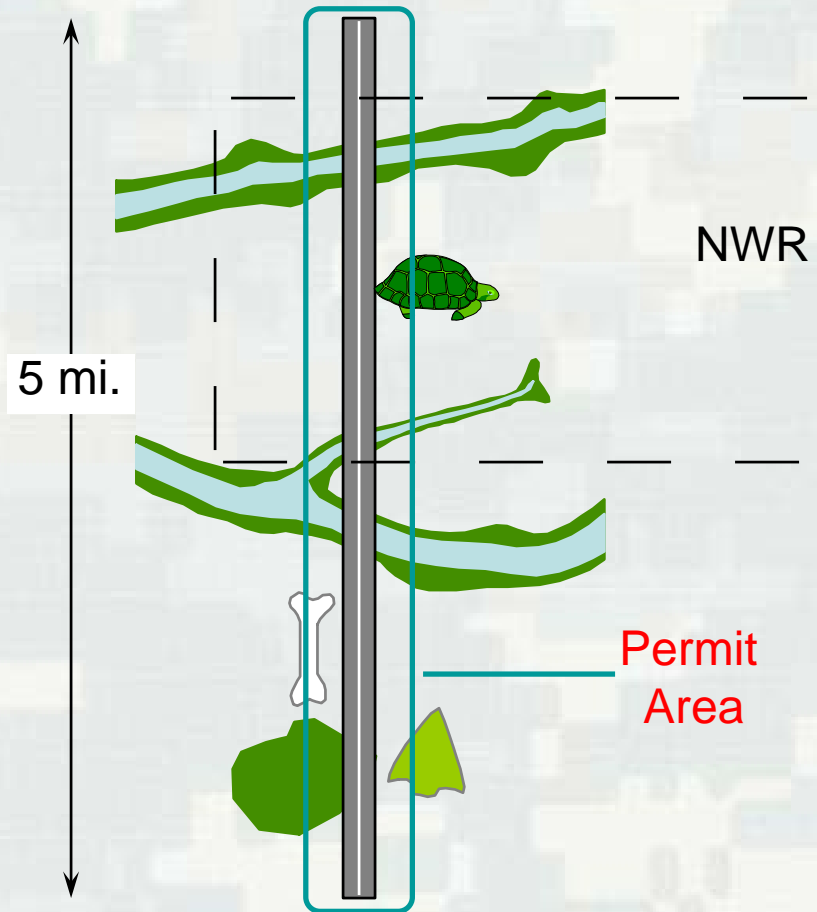
Permit Area - Simple Road Crossing



- No Federal Involvement Other Than Corps Permit
 - No Other Impacts in Waters of U.S.
- Permit Area Limited to Directly-Affected Waters of U.S., and Uplands in Immediate Vicinity Affecting/Affected by Regulated Activity
(e.g., Adjacent Road Alignments, Clearing for Staging Area, Equipment Access, etc.)



Permit Area - Multiple Crossings & Federally-controlled Resources



- Substantial Federal Control (Corps permit + NWR Land)
- Substantial Impacts (Waters of U.S., Endangered Species, Cultural Resources)
 - 1 Permit Area



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Scope of Analysis for ESA: Summary

- Regulations – Regulatory & ESA
- Guidance – RGLs, Corps HQ
- Case law and precedent
- Best judgment, case-by-case
- Advice – consider & ask us, *early*



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Information Needs for Sec. 7 Consultation

- Answer the six questions
- Use Species Lists
 - ▶ Occurrence Information (CNDDDB)
- Do the Homework
 - ▶ Recovery Plans
 - ▶ Studies & Publications
- USFWS Web Site

<http://www.fws.gov/endangered>

<http://www.fws.gov/sacramento>



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The Six Questions

The following information is included to initiate consultation (from Consultation Handbook, Sec 4.2): *(Also on our Web Site)*

1. A description of the action to be considered.
2. A description of the specific area that may be affected by the action.
3. A description of any listed species or critical habitat that may be affected by the action.
4. A description of the manner in which the action may affect any listed species or critical habitat and analysis of any cumulative impacts.
5. Relevant reports including any environmental impact statement, environmental assessment, or biological assessment prepared.
6. Any other relevant available information on the action, the listed species, or critical habitat.



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1. Description of Action

- Clearly define ALL elements of the action.
- Include a summary of impacts to waters of the U.S.
- Include maps and plans as necessary.
- Purpose and use.



2. Description of Affected Area

- Describe the action area and surrounding landscape.
- Current site conditions.
- What are the current and surrounding land uses?



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3. Description of Listed Species and Critical Habitat

- Describe ALL listed species with the potential to occur on site.
- How are they currently using the site?
- If potential species aren't there, why?
- Describe primary constituent elements (PCEs) for critical habitat.



4. Description of Effects to Listed Species and Critical Habitat

- Describe how the project would affect listed species.
- Would the action result in a take?
- Include all proposed avoidance and mitigation measures.
- Describe impacts to each PCE for critical habitat on site.

Does it affect the Recovery Plan?



5. & 6. Relevant Reports and Studies

- Include references to relevant studies and environmental reports for the site or region.
- Any additional information about the species, critical habitat, or proposed action?



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Biological Assessment

Document prepared to address effects on listed species or critical habitat

- ▶ May be prepared by designated non-Federal representative (e.g., often a consultant)
- ▶ Action agency (e.g., Corps) is responsible for the content and the findings of effects.



(Source: ESA Consultation Handbook)



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Biological Assessment

- Content of BA
 - ▶ On-site inspection data
 - ▶ Expert views on species of concern
 - ▶ Literature & information review
 - ▶ Analysis of effects on species & habitat
 - ▶ Alternatives considered
 - ▶ Avoidance and Mitigation Measures (e.g., best management practices [BMPs])

- *****Resources on our web site – BA template, BA Checklist***



Biological Assessment – Web Resources at SPK

Biological Assessment (BA) checklist:

Pursuant to 50 CFR 402.14(c), a written request to initiate formal consultation must include the following:

- ☐ A description of the action to be considered;
- ☐ A description of the specific area that may be affected by the action;
- ☐ A description of any listed species or critical habitat that may be affected by the action;
- ☐ A description of the manner in which the action may affect the listed species or critical habitat and an analysis of any cumulative effects;
- ☐ Relevant reports, including any environmental assessment, or biological assessment prepared for the action;
- ☐ Any other relevant available information regarding the action and its effects on the listed species or critical habitat.

Include the following information:

- ☐ Hard copy and CD of the BA, including the initiation package, final BA, and any supporting information, including a staging and temporary disturbance plan.

Sec. 7 Consultation Template – SUBJECT TO REVISION

Template and Guidance on Preparing an Initiation Package for Endangered Species Act Consultation¹

This document is intended to provide a general template and guidance on the type and detail of information that should be provided to initiate consultation with US Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NOAA Fisheries Service). This document is formatted as a general template you can follow when preparing an initiation package. You may develop one document for projects that affect species under both NOAA Fisheries Service and USFWS jurisdiction², but it is often advisable to prepare separate documents for each agency to avoid confusion. This is not intended to be an exhaustive document as specific



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One of Three Effect Determinations is Possible

- **No Effect**
- **May Affect, Not Likely to Adversely Affect**
- **May Affect, Likely to Adversely Affect**



Effects to Analyze

Effects of the Proposed Action and Interrelated and Interdependent Actions

- Direct
- Indirect
- Beneficial
- Adverse



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No Effect to Listed Species or Critical Habitat

Means: **NO Effect**

(Not even a beneficial one)

Consultation requirement
is not triggered.



Range of the
Species

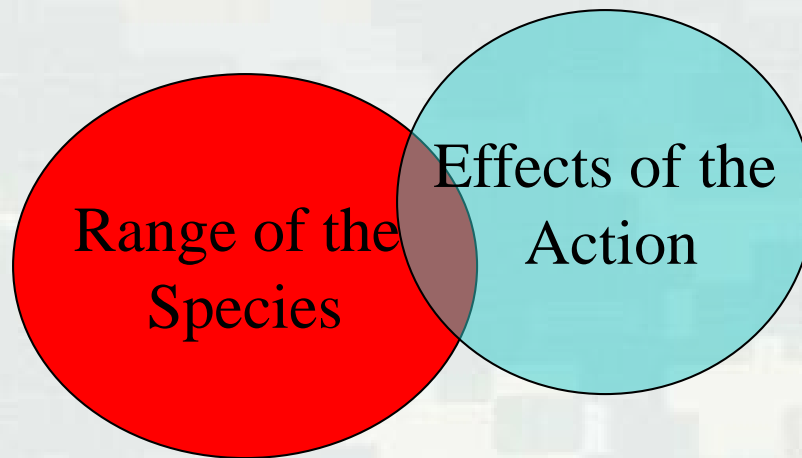


Effects of the
Action



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May Affect (NLAA and LAA)



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May Affect, Not Likely to Adversely Affect Listed Species or Critical Habitat

The appropriate conclusion when the responses by a species or its critical habitat are likely to be:

- ❖ Discountable
- ❖ Wholly beneficial
- ❖ Insignificant (does not involve take)
 - ❖ No “mitigated NLAAs”

**Written Concurrence from Service(s) required:
“Letter of Concurrence” (LOC)**



May Affect, Likely to Adversely Affect Listed Species or Critical Habitat

The appropriate conclusion when the stressors generated or caused by the action, or its interrelated and interdependent actions, are likely to **directly or indirectly** have any adverse affect (including take) to a listed species or its critical habitat.

**Formal Consultation is required:
Biological Opinion (BO)**



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May Affect

```
graph TD; A[May Affect] --> B[Not Likely to Adversely Affect  
Likely to Benefit]; A --> C[Likely to Adversely Affect]; B --> D[Informal  
ESA Consultation  
LOC]; C --> E[Formal  
ESA Consultation  
BO];
```

Not Likely to Adversely Affect
Likely to Benefit

Likely to Adversely Affect

Informal **LOC**
ESA Consultation

Formal **BO**
ESA Consultation



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Informal Consultation

Process

- ▶ Initiated by Federal agency
- ▶ Service may suggest modifications to avoid adverse effect
- ▶ Ends with LOC
- ▶ Does not provide Take Authorization
- ▶ No overall timetable
- ▶ Some timing to individual elements
- ▶ In practice...



Formal Consultation

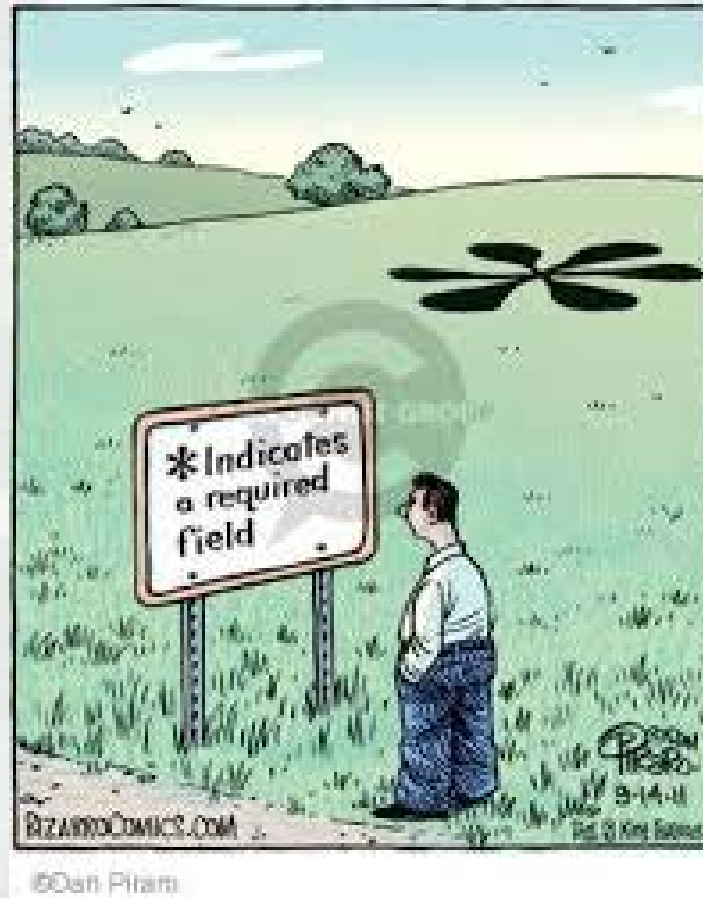
Process:

- ▶ Initiated by Federal agency
- ▶ Ends with Biological Opinion
- ▶ Includes an Incidental Take Statement
- ▶ Timing: 135 days *from when complete information* is received



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How is ESA Compliance Conveyed in DA Authorizations?



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Use of Special Conditions

- “contains **mandatory** terms and conditions to implement the reasonable and prudent measures”
- “authorization...is **conditional** upon your compliance with all of the mandatory terms and conditions”
- “terms and conditions are **incorporated by reference**...Failure to comply...where a take of the listed species occurs, would constitute an **unauthorized take**, and it would also constitute **non-compliance with your Corps permit.**”



Some Other Consultation Processes...



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Reinitiation of Formal Consultation

- Required if:
 - ▶ Amount or extent of incidental take is exceeded;
 - ▶ New information reveals effects of the action may affect listed species or critical habitat in a manner or to an extent not previously considered;
 - ▶ Action is modified and causes previously unconsidered impacts;
 - ▶ New species listed or critical habitat is designated.



Amended Consultations Require Permit Modifications or Reverifications (e.g., NWP)

- Since Sec. 7 ESA compliance is incorporated into permit decisions by special condition(s).
- Amended LOCs or BOs result in amended special conditions to permits.
- IPs – modify
- NWPs - reverify



Reinitiation of Formal Consultation, Con't

- Action is modified and causes previously unconsidered impacts – examples:
 - ▶ Project description modification – changes in impacts
 - ▶ Work window extensions, e.g.:
 - In-water work timing for listed fish
 - Work in upland habitat for giant garter snake (GGS) beyond Oct. 1st
 - *Please anticipate work extension requests as early as possible. Two weeks is not enough time!*



Two Weeks is Not Enough Time...

- Species/habitat assessment; re-initiate; Service(s)' review time; response to Corps; new DA authorization



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Emergency Consultation Process

- Expedited consultation for situations involving acts of God, disasters, casualties, national defense or security emergencies.
- In working with our office, would often be a part of Regional General Permit (RGP)-8, Emergency Actions.
- Corps would contact Service(s) and request consultation before completing a RGP-8 decision.
- Process would be guided by Ch. 8 of the ESA Consultation Handbook.



Essential Fish Habitat (EFH)

(Magnuson-Stevens Fishery Conservation Act)

- Do EFH consultations for Pacific Salmon with our ESA letters to NMFS.
- Statutory definition: “Essential fish habitat means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.”
- EFH extent of freshwater is identified as all water bodies currently or historically occupied by council-managed salmon. Except some impassible dams.



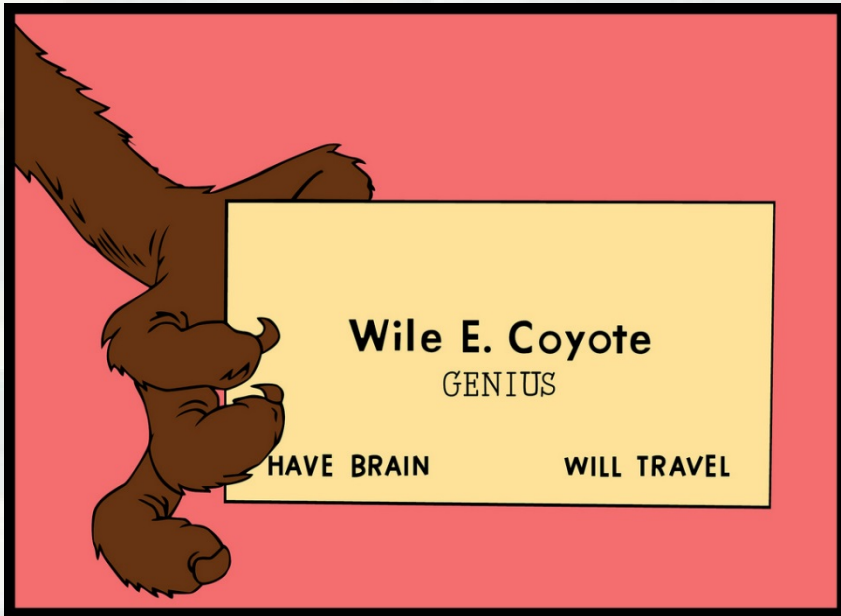
Common Pitfalls in Effects Analysis

- ▶ “Displacement”
- ▶ “Not Known to Occur Here”
- ▶ “Effects Might Happen Just Within Our Project Area”
- ▶ “Contracting Clause or We’ll Call You Later”



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“Displacement”



- They'll move out of the way during construction.
- It's just a 50 foot-wide road, and their habitat will be “mostly” avoided.
- There are plenty of other places in the area for them to go.



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“Not Known to Occur Here”

- I’ve been here for years and have never seen one.
- We haven’t surveyed, we don’t need to.
- *We have surveyed, and since we didn’t find one, it proves they’re not here (e.g., see 2015 VP species protocol).*



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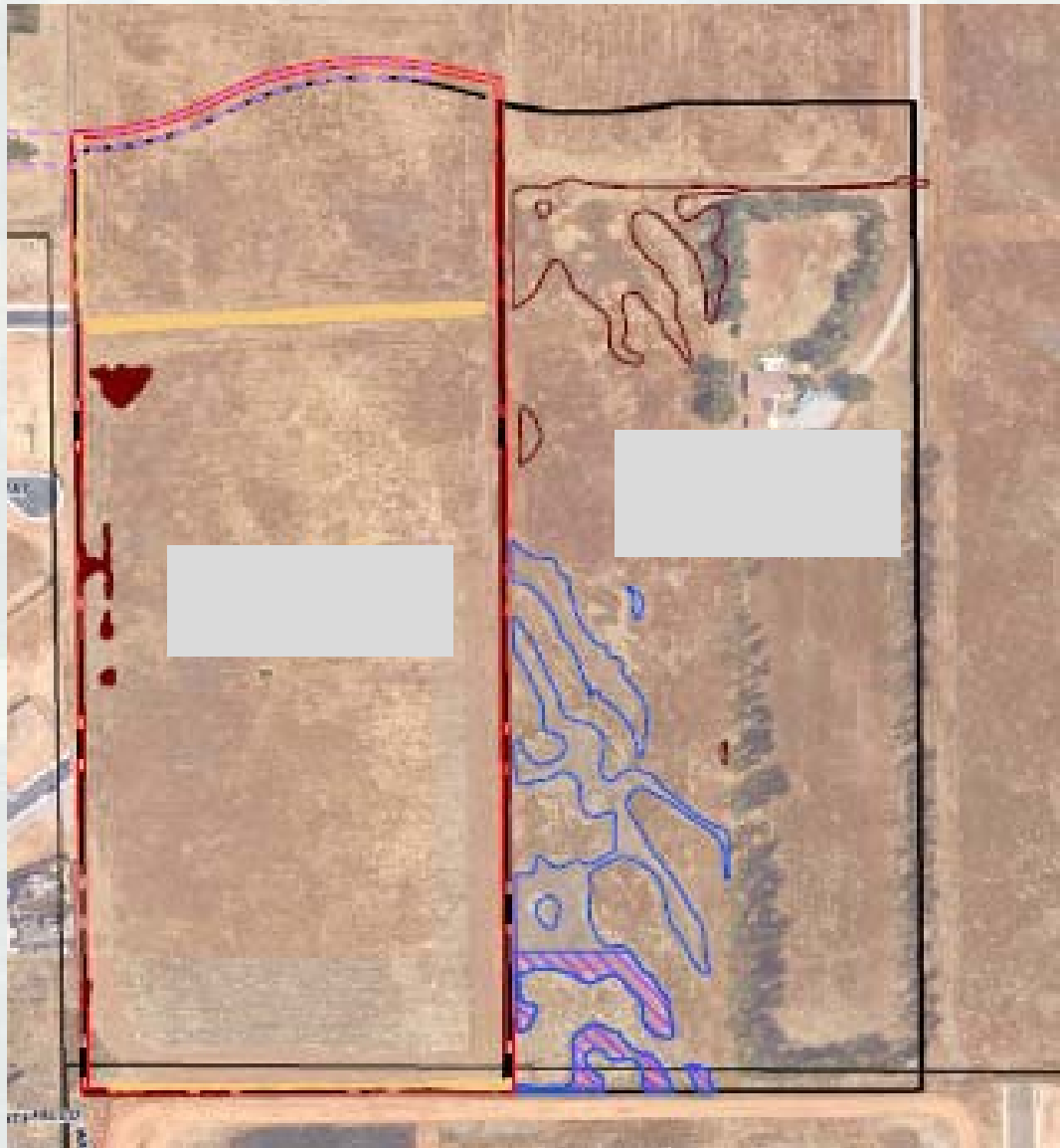
“Effects Might Happen Just in Our Project Area”

- **Several federally-listed species have associated habitat and/or areas of assumed effect.**
- **For example:**
 - ▶ **Vernal Pool Species – 250 ft. from VP habitat**
 - ▶ **Valley Elderberry Longhorn Beetle – 100 ft. from a shrub**
 - ▶ **GGs – 200 ft. from aquatic habitat (upland habitat)**



Look Beyond Project/Property Boundaries

Property on Left would be fully developed.



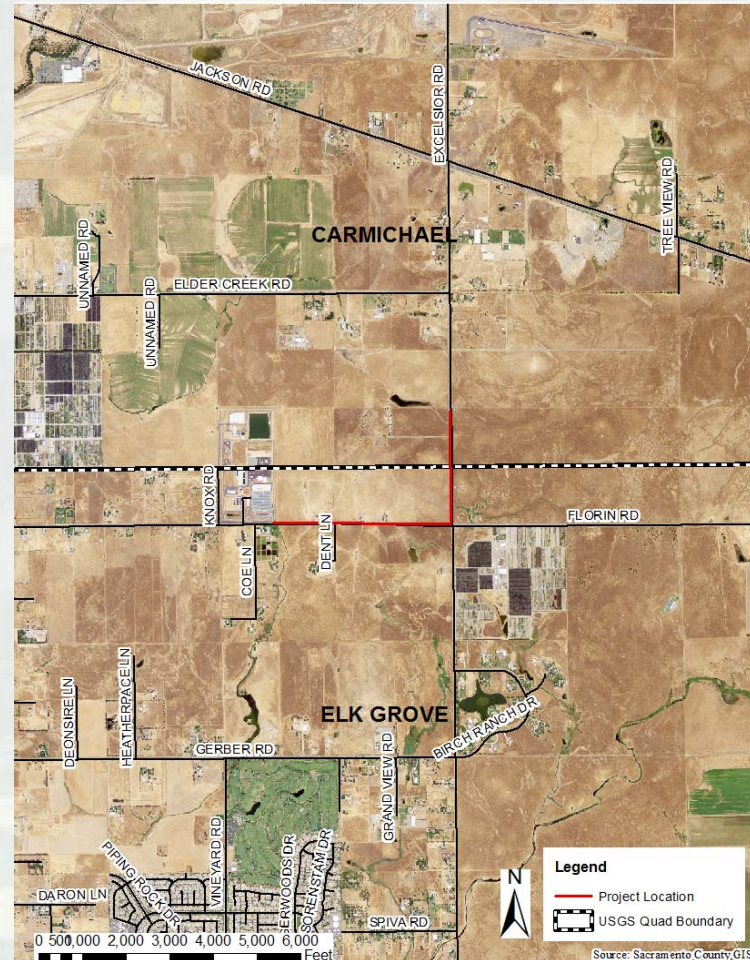
Property on right has vernal pool habitat within 250 ft. of proposed development



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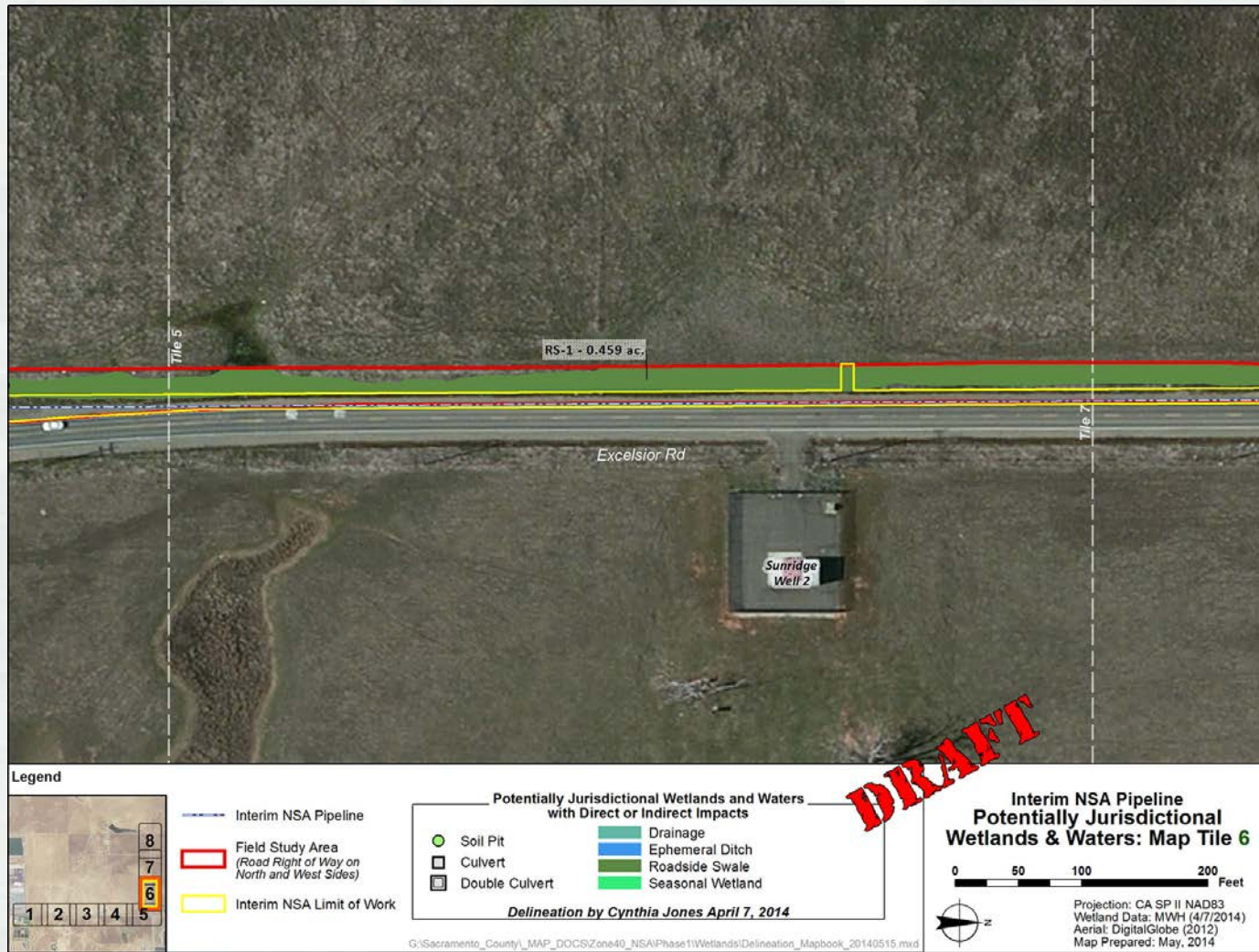
Roads and Road Shoulder Trenched Utilities

- NWP-12 for over 4,000 LF of new trenched-in water pipeline.
- Temporary impacts to 0.06 acre of roadside wetland ditches and ephemeral non-wetland ditches.



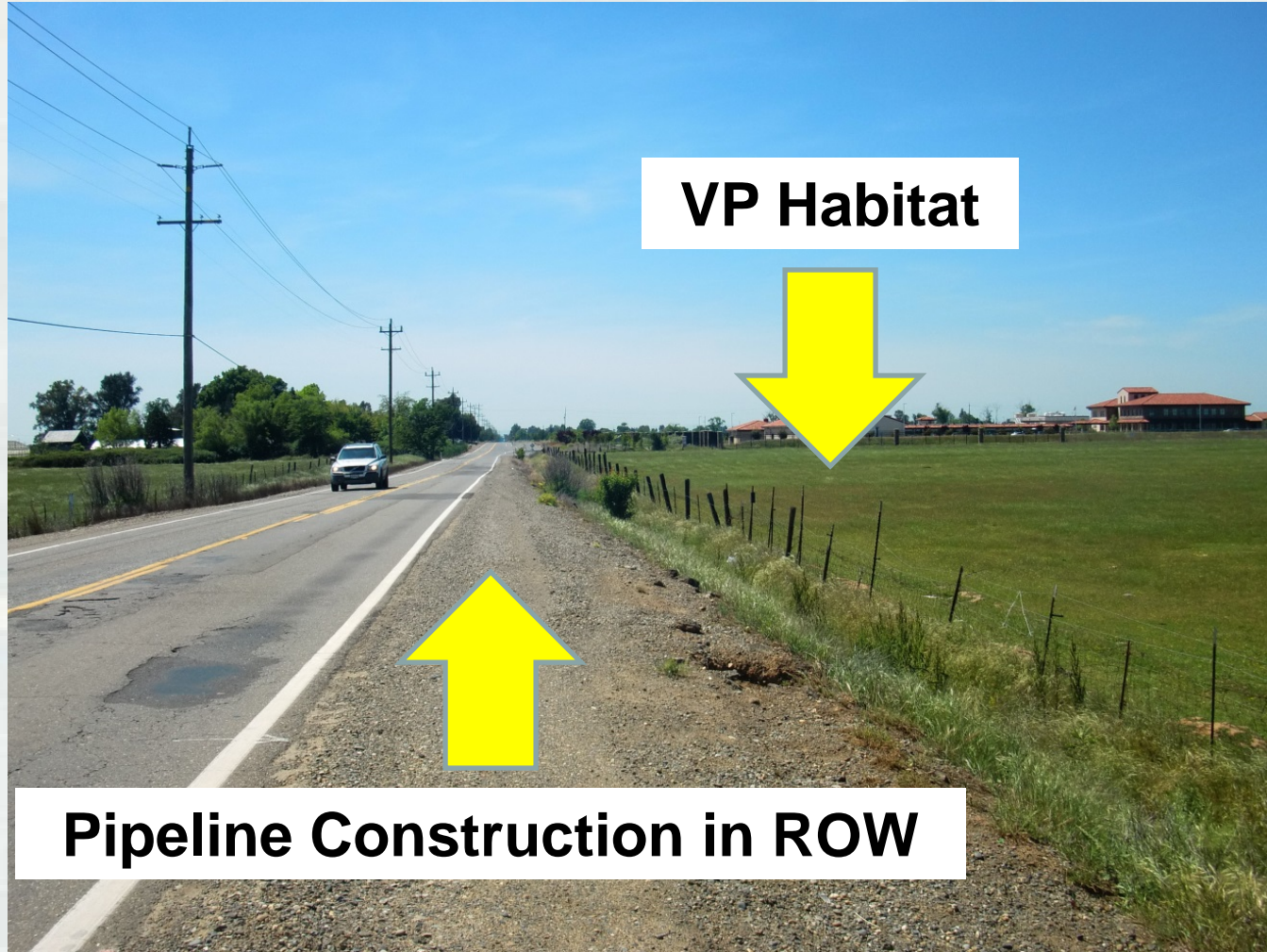
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Pipeline Example: Delineation Panel



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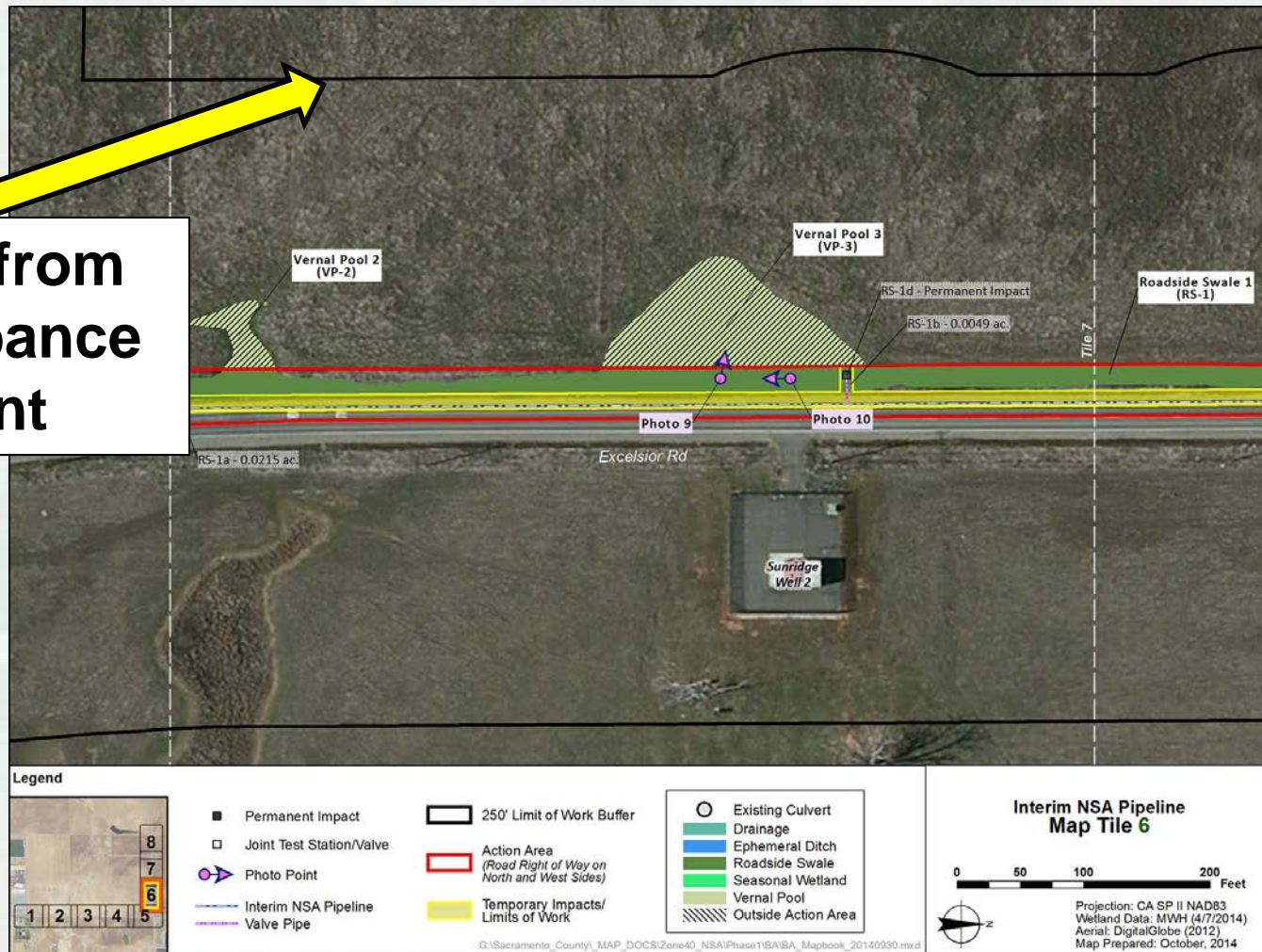
ROW to Fence; VP Habitat Abuts Fence



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Pipeline Example: BA Panel

250 ft. from
disturbance
footprint



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“Contracting Clause or We’ll Call You Later”



- The contractor will figure out where to locate staging later.
- We’ll stop construction and call you if any are discovered.
- If found during construction, we’ll propose avoidance measures.



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ESA Process Tips

- Use Section 7 guidance on our web site.
- For National Marine Fisheries Service, NOAA has a template available on-line.
- Address all species in U.S. Fish and Wildlife Service's query (quads, county).
- **The Six Questions**
- Make a preliminary effects determination(s); provide basis, and...

...avoid pitfalls in effects analysis.



ESA Process Tips, Con't

- ***Before we initiate consultation***, you can contact USFWS / NMFS directly for technical assistance.
- Send two *double-sided* paper copies, unbound (3 if USFWS/NMFS in same BA), and same # of CDs with PDF and Word copies.
- Begin early; formal consultation has 135 days from complete information; informal has no designated timing goals.
- Consider species work windows in timing.



Have Questions? We're Here!



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Thank You!

Contact Information:

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FAX: 916-557-7803

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

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