



# Section 404 Clean Water Act Letter of Permission Procedure

U.S. ARMY CORPS OF ENGINEERS

BUILDING STRONG®

## LETTER OF PERMISSION PROCEDURE FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES WITH LESS THAN SIGNIFICANT IMPACT ON THE HUMAN ENVIRONMENT

**EFFECTIVE: DRAFT**

---

The U.S. Army Corps of Engineers (Corps), Sacramento District, has established this procedure for issuing a Letter of Permission (LOP) to efficiently authorize activities that involve a discharge of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act (CWA 404) which have minimal or less than significant impacts on the human environment.

**ISSUING OFFICE:** U.S. Army Corps of Engineers, Sacramento District (office)

**ACTION ID:** SPK-2009-01291

**AUTHORITY:** 33 CFR parts 325 and 332

**LOCATION:** Sacramento District Regulatory Program Area of Responsibility which includes the Sierra Nevada, Central Valley and Delta of California and the States of Nevada and Utah (see Attachment 1).

**BACKGROUND:** In accordance with Title 33 of the Code of Federal Regulations (CFR) part 325, district engineers are authorized to use alternative procedures, including LOPs, to authorize activities under the Corps' Regulatory Program. LOPs are a type of individual permit issued through an abbreviated processing procedure which includes coordination with federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without publishing an individual public notice. In accordance with 33 CFR 325.2(e)(1), LOPs may be used in those cases subject to 404 CWA when:

1. The district engineer, through consultation with federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, and the state water quality certifying agency, develops a list of categories of activities proposed for authorization under LOP procedures.
2. The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and,
3. A CWA 401 water quality certification has been issued or waived.

And, in those cases, subject to Section 10 of the Rivers and Harbors Act of 1899 (RHA 10) when:

1. In the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

Most discharges of dredged or fill material into waters of the US with minimal impact are authorized under one or more general permits (nationwide, regional, or programmatic). Proposed discharges that could result in significant effects on the human environment require the preparation of an Environmental Impact Statement under the National Environmental Policy Act (NEPA). This procedure covers activities that cannot be authorized under a general permit but have less than significant impacts on the human environment.

Under NEPA, the lead federal agency determines whether a federal action has the potential to have significant effects on the human environment.

**PROPOSED CATEGORIES OF ACTIVITIES:** The proposed categories of activities to be authorized by this procedure include those which would result in the loss of no more than one (1) acre of waters of the U.S. or 500 linear feet of streambed and would have an overall minimal impact, individually and cumulatively, on aquatic resources and the human environment. Examples of activities to be authorized include, but are not limited to, residential, commercial, industrial, recreational, agricultural, and municipal development; renewable energy; transportation, infrastructure, and utility lines; mining; flood control and storm-water management; survey, research, testing and monitoring; environmental remediation, restoration, and enhancement; repair, rehabilitation, and maintenance; and hydropower, reclamation, and reuse facilities. However, bridges and pipelines constructed over waters covered under Section 10 of the Rivers and Harbors Act of 1899 are not authorized under this procedure and require coordination with the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899.

**COMPENSATORY MITIGATION:** Prospective permittees are responsible for including mitigation measures to ensure the LOP activity will not result in potentially significant impacts on the human environment.

For impacts to waters of the U.S., the amount of compensatory mitigation required must be, to the extent practicable, sufficient to replace lost aquatic resource functions and services (see 33 CFR 332.3(f)). Compensatory mitigation proposals must comply with the applicable provisions of 33 CFR part 332 and applicable regional guidance, such as the *Final 2015 Regional Compensatory Mitigation and Monitoring Guidelines for South Pacific Division*, or most recent update available at:

<https://www.spd.usace.army.mil/portals/13/docs/regulatory/mitigation/mitmon.pdf>

The preferred mechanism for providing compensatory mitigation that appropriately offsets impacts to waters of the U.S. is through the purchase of credits from a Corps-approved

mitigation bank. When no, or an insufficient number of, mitigation bank credits are available through a bank, compensatory mitigation may be achieved through a Corps-approved in-lieu fee program (see 33 CFR 332.3(b)(2) and (3)). If an appropriate number and type of mitigation bank or in-lieu credits are not available at the time a LOP is requested, the project proponent may submit a draft plan for permittee-responsible mitigation (PRM). A final mitigation plan will need to be approved by this office before a LOP is issued. Note that proposed activities which rely on PRM will require more review time by this office.

**DISCRETIONARY AUTHORITY:** Under this procedure, this office may exercise discretionary authority to not permit an activity under a LOP and instead require authorization under another permit type, like a standard permit. Reasons this office may use discretionary authority to not issue an LOP for an activity include potential for the proposed activity to result in significant impacts, non-compliance with the U.S. Environmental Protection Agency (USEPA) *Section 404(b)(1) Guidelines for Specification of Disposal Sites (Section 404(b)(1) Guidelines)*, public interest, appreciable opposition, or controversy. In addition, this office may use its discretion to add special conditions to a LOP to ensure impacts are mitigated to the maximum extent practicable and will not be significant.

**EXCLUSIONS:** This procedure does not apply to activities that only need authorization under Section 10 of the Rivers and Harbors Act of 1899 (RHA 10). RHA 10-only activities are covered by LOP procedures at 33 CFR part 325(e)(1)(i). However, if the proposed activity needs to be authorized under both CWA 404 and RHA 10, this procedure may be used.

#### **TERMS:**

1. No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, unless the appropriate federal agency with direct management responsibility for such river has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.
2. No activity is authorized which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species, or a species proposed for such designation as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation.
3. No activity is authorized which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.
4. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

5. No activity may cause more than a minimal adverse effect on navigation. Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

6. No activity may significantly disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies must be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

7. The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the U.S. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

8. The permittee is responsible for ensuring that the activities authorized by this procedure comply with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for any LOP activity.

9. Any activity involving new bank stabilization must incorporate bioengineering techniques. Bioengineering techniques include using a combination of biological, mechanical, and ecological concepts to control erosion and stabilize soil through the sole use of vegetation, or a combination of vegetation and construction materials.

10. Any activity involving dredging, including dredged sediment discharge and placement into RHA 10 navigable waters, must use the Dredging Quality Management (DQM) system to monitor dredging equipment. The permittee's DQM system must have been certified by the National DQM Support Center (DQM Center) within one calendar year prior to the initiation of the dredging, discharge, or placement of sediments. The permittee is responsible for ensuring that the DQM system is operational throughout the dredging and discharge of sediments, and that the project data is submitted to the DQM Center, in accordance with the specifications provided at the DQM website. Questions regarding certification and/or additional information about the DQM program should be addressed to the DQM Center at (877) 840-8024 and/or <https://dqm.usace.army.mil>.

**PROCEDURES:**

For an activity to be considered for a LOP under this procedure, the project proponent must submit an application for a Department of the Army permit. The application must include all information required for a standard permit application, pursuant to 33 CFR 325.1, as well as the following:

1. A cover letter from the project proponent requesting a LOP under this procedure, providing their contact information and designated agents or primary points-of-contact, including email addresses and telephone numbers.
2. A completed and signed Department of the Army Engineering Form 4345.
3. A delineation of aquatic resources for the site of the proposed activity, conducted in accordance with this office's minimum standards. If a delineation has already been verified by this office and remains valid, provide a copy of the verification letter.
4. Site location map(s), including the site of the proposed activity, clearly outlined on USGS 7.5-foot quad sheet drawings, with latitudes and longitudes for the site(s), name of the quad sheet(s) and directions to the site, as well as all appropriate aerial and other imagery available.
5. Plan and profile views of the proposed work, relative to potential or approved waters of the U.S. (e.g., wetlands, and open waters below the Ordinary High-Water Mark), showing areas, types and acreages of waters of the U.S. to be impacted by the proposed activity. All available drawings must be provided and must show proposed impacts on appropriately scaled figures, in accordance with the South Pacific Division February 2016, *Updated Map and Drawing Standards for the South Pacific Division Regulatory Program*, or most recent update (available on the South Pacific Division website at: <http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences.aspx/>, unless specifically waived by this office.
6. The total area (acreage) and length (feet) for linear features for each type of waters of the U.S. proposed to be filled by the proposed activity, and the volume (in cubic yards) and type of material to be discharged into each type of aquatic resource.
7. A description of how impacts to waters of the U.S. and associated functions (e.g., water quality and habitat) have been avoided and minimized to the maximum extent practicable within the permit area.
8. If compensatory mitigation is proposed at a Corps-approved mitigation bank and/or ILF program, the proposal must include the name of the bank/ILF, the number and resource type of credits to be secured, and a statement on how these were determined. If a PRM is proposed, the project proponent must submit a comprehensive mitigation and monitoring plan, for review and approval by this office. The plan must include the mitigation location and design drawings, vegetation plans, and final success criteria, presented in the format of the *Final 2015 Regional Compensatory Mitigation and Monitoring Guidelines for South Pacific Division*.

9. A description of potential indirect (secondary) and cumulative impacts to waters of the U.S. and the human environment in the watershed and vicinity of the proposed activity.
10. Information, in report form, concerning the practicability of on-site alternatives in accordance with 33 CFR 325.1(e) and 323.6(a). The information must address compliance with USEPA's *Section 404(b)(1) Guidelines* at 40 CFR part 230. The report should include all applicable information for this office to determine whether an alternative meets the overall project purpose and is available, practicable, would result in fewer adverse effects to the aquatic environment, or would have other significant adverse environmental consequences.
11. Documentation that a request for an individual Section 401 Water Quality Certification (WQC) was submitted to the appropriate certifying authority and this office concurrently, including the date of request. If a request for an individual WQC has not been submitted, the applicant must identify the date an individual 401 WQC is anticipated to be requested.
12. For activities which have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, pursuant to Section 106 of the National Historic Preservation Act (NHPA), the applicant must submit a cultural resources report completed in accordance with the Sacramento District's *Guidelines for Compliance with Section 106 of the National Historic Preservation Act of 1966 (NHPA)* ([http://www.spk.usace.army.mil/Portals/12/documents/regulatory/sec-106-tribal/FINAL\\_2014-03-24\\_Section-106-Guidelines.pdf](http://www.spk.usace.army.mil/Portals/12/documents/regulatory/sec-106-tribal/FINAL_2014-03-24_Section-106-Guidelines.pdf)).
13. For activities that may affect federally listed threatened or endangered species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation), pursuant to Section 7 of the Federal Endangered Species Act (ESA) the applicant must submit a biological resources report. The report must include a description of the action to be considered; the specific area that may be affected by the action; any listed species or critical habitat that may be affected by the action; the manner in which the action may affect any listed species or critical habitat; and an analysis of any cumulative effects on listed species and/or their critical habitat. The report must include copies of all references, a proposed mitigation plan, and any other relevant available information.
14. For activities that have the potential to adversely affect Essential Fish Habitat (EFH), as designated by the Pacific Fishery Management Council. The application must include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 C.F.R. § 600.920 (e) so that this office can consult, in accordance with Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA).
15. For proposed activities where the Corps is not the lead Federal agency, the applicant must provide this office with the appropriate documentation to demonstrate compliance with Section 106 of the National Historic Preservation Act (NHPA), Section 7 of the Endangered Species Act (ESA), and/or Section 305(b)(2) of the Magnuson Stevens Fishery Conservation and Management Act (MSA), and if available, documentation demonstrating compliance with

the National Environmental Policy Act, such as an Environmental Assessment or Environmental Impact Statement.

16. A statement confirming if the proposed activity will require permission from the Corps pursuant to 33 U.S.C. 408 (Section 408) because it will alter or temporarily or permanently occupy or use a Corps federally authorized Civil Works project. If yes, describe if a written request for Section 408 has been submitted. LOP decisions for activities that require Section 408 permission will not be authorized until the Section 408 permission decision is finalized.

The project proponent must submit the application package, which includes the information above, to this office in electronic format (pdf), (either through email [less than 40 MB], posting to a Corps-accessible FTP site, or submittal of a CD/DVD). Email submittal of the application should be sent to: [SPKRegulatoryMailbox@usace.army.mil](mailto:SPKRegulatoryMailbox@usace.army.mil).

#### **REVIEW AND DECISION:**

1. This office will review each application package to determine if it is complete within approximately fifteen (15) calendar days of receipt. If the application is not complete, this office will notify the project proponent within 30 calendar days of the information that is missing.
2. When this office determines an application is complete, but the activity cannot be authorized by a LOP, we will notify the applicant within 15 calendar days of the determination with guidance on a potential alternate permit type (general permit or standard permit) and the application will be withdrawn.
3. If the application is determined complete and appears to meet the terms and conditions of this procedure, this office will notify the project proponent that the proposed activity is being evaluated for a LOP.
4. This office will notify the applicable state and federal permitting agencies of the proposed application for a LOP by email and request comments within fifteen (15) calendar days of receipt of the email notice. This office may extend the comment period at the request of a reviewing agency due to extenuating circumstances, by no more than seven (7) calendar days and will also initiate consultation(s) as necessary with the permitting agencies and/or tribes. Any problems identified during the notification process with the state and federal review agencies will be resolved before a decision on the LOP application is made.
5. This office will notify the project proponent of any additional information needed to complete its evaluation, including sufficient information to initiate any required consultation(s) under Section 106 of the NHPA, Section 7 of the ESA, and/or Section 305(b)(2) of the Magnusson-Stevens Act. If the project proponent does not respond to the request for additional information within 30 calendar days, the application will automatically be withdrawn.

6. The project proponent must provide a copy of the Section 401 of the Clean Water Act (CWA 401) certification decision to this office to ensure the activity complies with CWA 401. In most cases, compliance will be demonstrated by providing a copy of the individual water quality certification.

7. This office will make a LOP decision within 30 days of completing any necessary consultation or, if no consultation is necessary, within 30 days of the end of the agency comment period. The decision will be based on whether the activity meets the terms of this procedure, complies with USEPA's *Section 404(b)(1) Guidelines* and with other applicable laws, and would not be contrary to the public interest. To ensure less than significant effects, this office may include special conditions in the LOP.

**PERMIT TRANSFERS:** If the permittee sells the property associated with a LOP, the permittee may transfer the LOP to the new owner by submitting a letter to this office to validate the transfer. A copy of the LOP must be attached to the letter and include the contact information of the new owner, such as name (business included), address, telephone number and email, and the letter must contain the following statement and signature:

"When the structures or work authorized by this LOP are still in existence at the time the property is transferred, the terms and conditions of this LOP, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this LOP, and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
Date

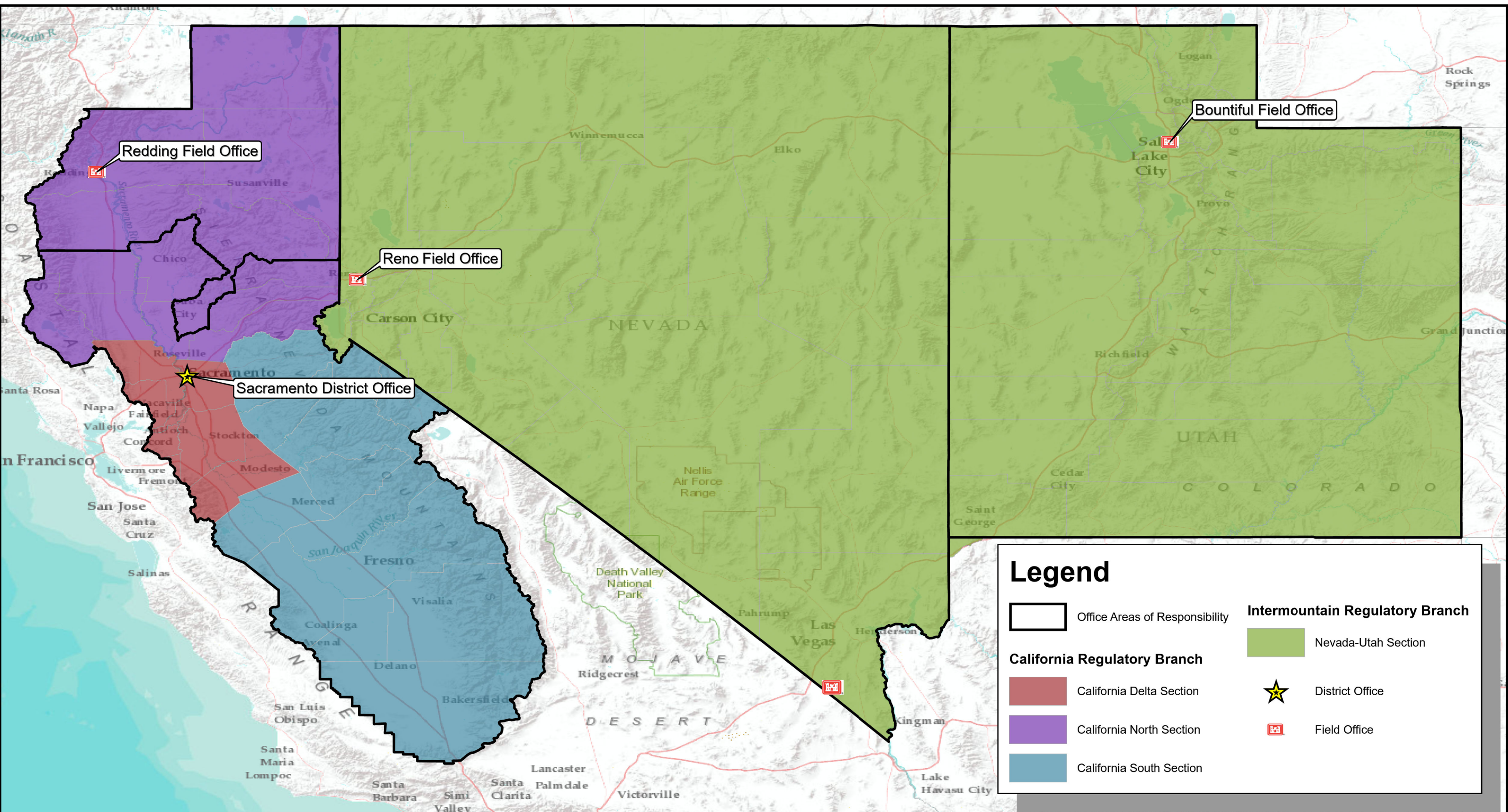
\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address, Phone Number, Email

**ATTACHMENTS:**

Sacramento District Regulatory Division Map





# US Army Corps of Engineers Sacramento District

Regulatory Branches, Sections, Offices, and Areas of Responsibility

**BUILDING STRONG®**