

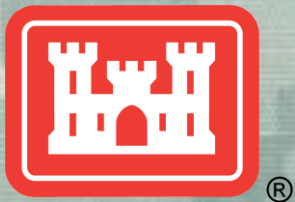
Corps Regulatory Overview

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US Army Corps of Engineers
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Agenda

Authorities

Jurisdiction

Types of Permits

Permit Process

Evaluation

Key Points

Jacksonville District Contacts



Corps Regulatory Program Goals

- Protect navigation and prevent obstructions in the Nation's waters.
- Provide strong protection of the Nation's aquatic environment, including wetlands.
- Enhance the efficiency of the Corps administration of its regulatory program.
- Provide the regulated public with fair and reasonable decisions.



Regulatory Authorities

- All structures or work in the navigable waters of the U.S. (Section 10, Rivers and Harbors Act of 1899)
- Discharge of dredged or fill material in waters of the U.S. (Section 404, Clean Water Act of 1977)
- Section 103 of the Marine Protection, Research and Sanctuaries Act - prevents dumping of trash & sewage in waters of the United States



Program Regulation

- U.S. Army Corps of Engineers Regulatory Program Regulations (33 CFR 320-331)
33 CFR Part 320 - General Regulatory Policies
- 33 CFR Part 330 - Nationwide Permit Program
- 33 CFR Part 331 - Administrative Appeal Process



Other Regulations and Laws

- 40 CFR Part 230 - Section 404(b)(1) Guidelines
- 40 CFR Part 22 - Administrative Assessment of Civil Penalties & the Revocation or Suspension of Permits
- 40 CFR Part 233 - State Program Regulations
- 40 CFR Part 233G - Tribal Regulations
- 40 CFR Part 1500 et seq - Council on Environmental Quality
- 36 CFR Part 800-899 - Advisory Council on Historic Preservation
- 50 CFR Parts 400-499 - Endangered Species Regulations
- Wild & Scenic Rivers Act
- 50 CFR Part 600 - Essential Fish Habitat Regulations
- Marine Protection Research and Sanctuaries Act of 1972 - Section 302
- Fish and Wildlife Coordination Act
- Native American Graves Protection and Repatriation Act
- Clean Water Act - Section 401
- Clean Water Act - Section 402
- Coastal Zone Management Act of 1972
- Endangered Species Act
- Marine Mammal Protection Act
- National Environmental Policy Act
- National Historic Preservation Act



Corps Jurisdiction



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Corps Jurisdiction

- Navigable Waters of the U.S. (33 CFR Part 329)
- Waters of the U.S. (33 CFR Part 328)
 - Open Waters
 - Wetlands

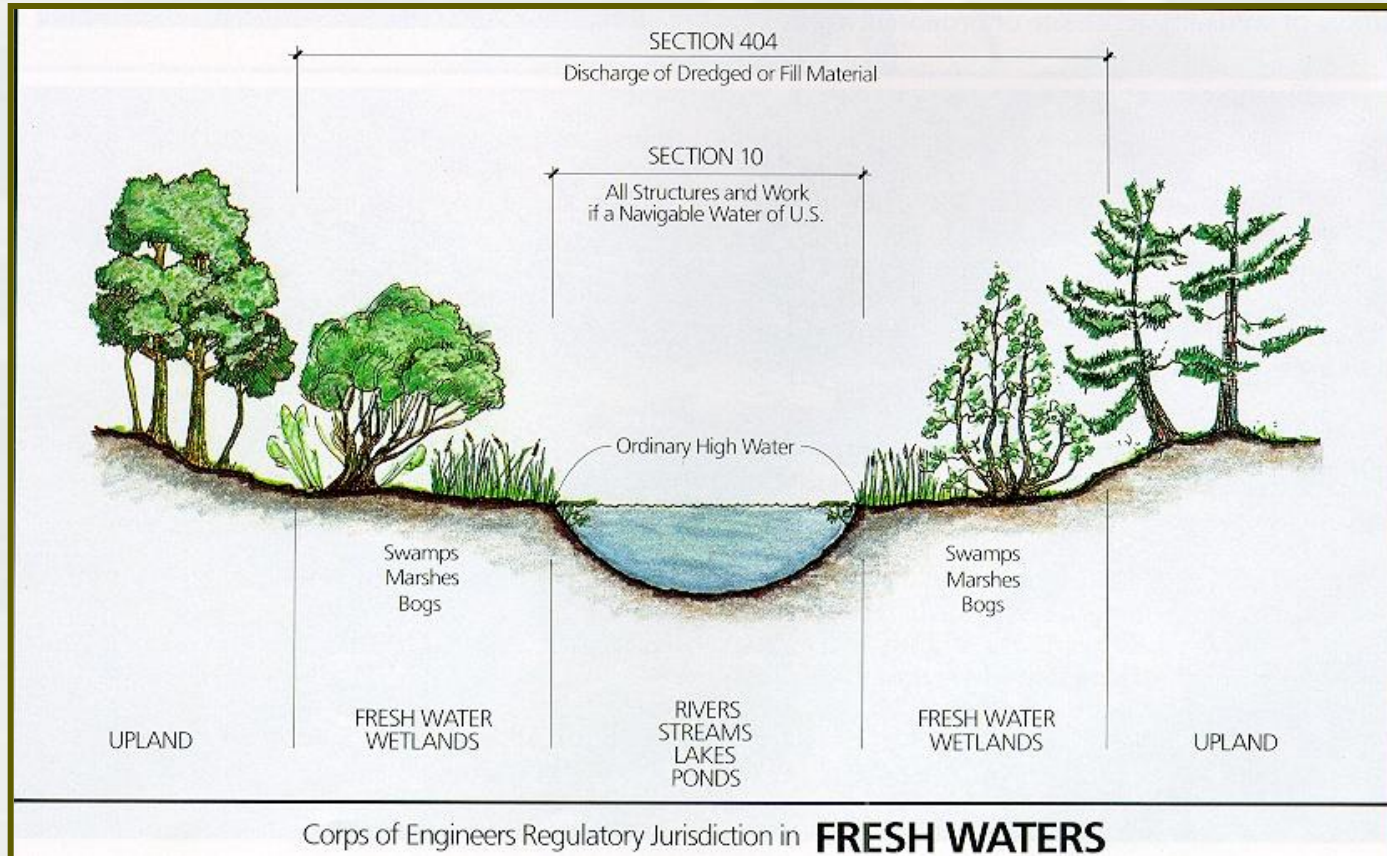


Wetland Delineation versus Jurisdictional Determination

- A wetland delineation identifies the boundaries of a wetland at a site; i.e., where is it located.
- A jurisdictional determination identifies the extent of Federal jurisdiction over waters of the United States, which can include wetlands.



Regulatory Jurisdiction in Fresh Waters



Waters of the U.S.

Waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce

Jurisdiction extends seaward to include all ocean waters within a zone three nautical miles from the coast line (the "territorial seas")



Wetlands



A wetland is an area that is inundated or saturated at a duration sufficient to support and that under normal circumstances supports a prevalence of vegetation typically adapted for life in saturated soil conditions.
(33 CFR Part 328.3)



Wetlands

Definition 33 CFR 328.3(b)

Corps uses three parameters:

- Vegetation - greater than 50% dominant species, considered hydrophytic.
- Soils - must be hydric.
- Hydrology - inundation or saturation within 12 inches of the surface for 5% of the growing season.

1987 Corps Manual – technical document
defining wetlands



Regional Supplement

ERDC/EL TR-08-30

Environmental Laboratory



US Army Corps
of Engineers®
Engineer Research and
Development Center

Wetlands Regulatory Assistance Program

Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region

U.S. Army Corps of Engineers

October 2008



Approved for public release; distribution is unlimited.



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CWA Section 404: A Short History

- 1972 Enacted
- 1974 Regulation
- 1975 NRDC vs.. Calloway. Interim regulation
- 1977 Regulation & Congressional Amendments
- 1979 Civiletti decision
- 1985 Riverside v. Bayview Homes
- 1986 Preamble on “Migratory Bird Rule”
- 1993 “Tulloch Rule”
- 1998 Overturn “Tulloch Rule”
- 2001 Supreme Court decision in SWANCC v. USACE
- 2003 ANPRM & Rulemaking
- 2004/5 GAO reports
- 2006 Rapanos & Carabell U.S. Supreme Court cases



Jurisdictional Determination

Is it a water of the U.S.?

- Supreme Court decisions, along with statutes and regulations, make up the law that the Corps and the public are bound to follow.
- In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a “water of the United States”.



Rapanos Guidance

- New Terminology/Acronyms:
 - Traditional navigable waters (TNWs)
 - Relatively permanent waters (RPWs)
 - Non-Relatively permanent waters (non-RPWs)
 - Abutting
 - Relevant Reach/Review Area
 - Significant nexus determination (SND)



CWA Section 404 Jurisdiction

■ Waters of the U.S. include:

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

**Jurisdictional
by definition**

- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

**Significant
Nexus
Determination
required**



Rapanos Guidance

- The agencies will apply the significant nexus standard as follows:
 - A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
 - Significant nexus includes consideration of hydrologic and ecologic factors



Rapanos Guidance

- A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect
- Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a TNW, plus the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands



Corps Regulatory Program

Types of Permits



Corps Regulatory Program

Types of Permits

- **General Permits:**
 - Nationwide Permits (NWP)
 - Regional General Permits (RGP)
 - Programmatic General Permits (PGP)
- **Individual Permits:**
 - Standard Permits (SP)
 - Letters of Permission (LP)



Individual Permits

- Letter Of Permission
 - Abbreviated permit procedure
 - Coordination letter in lieu of a public notice
 - Minor Impacts

- **Standard Permit**
 - Public Notice
 - Full project review procedure



Corps Regulatory Program

The Permit Process



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An Overview of...

The Joint Application for Dredging and Filling in Waters of the U.S.



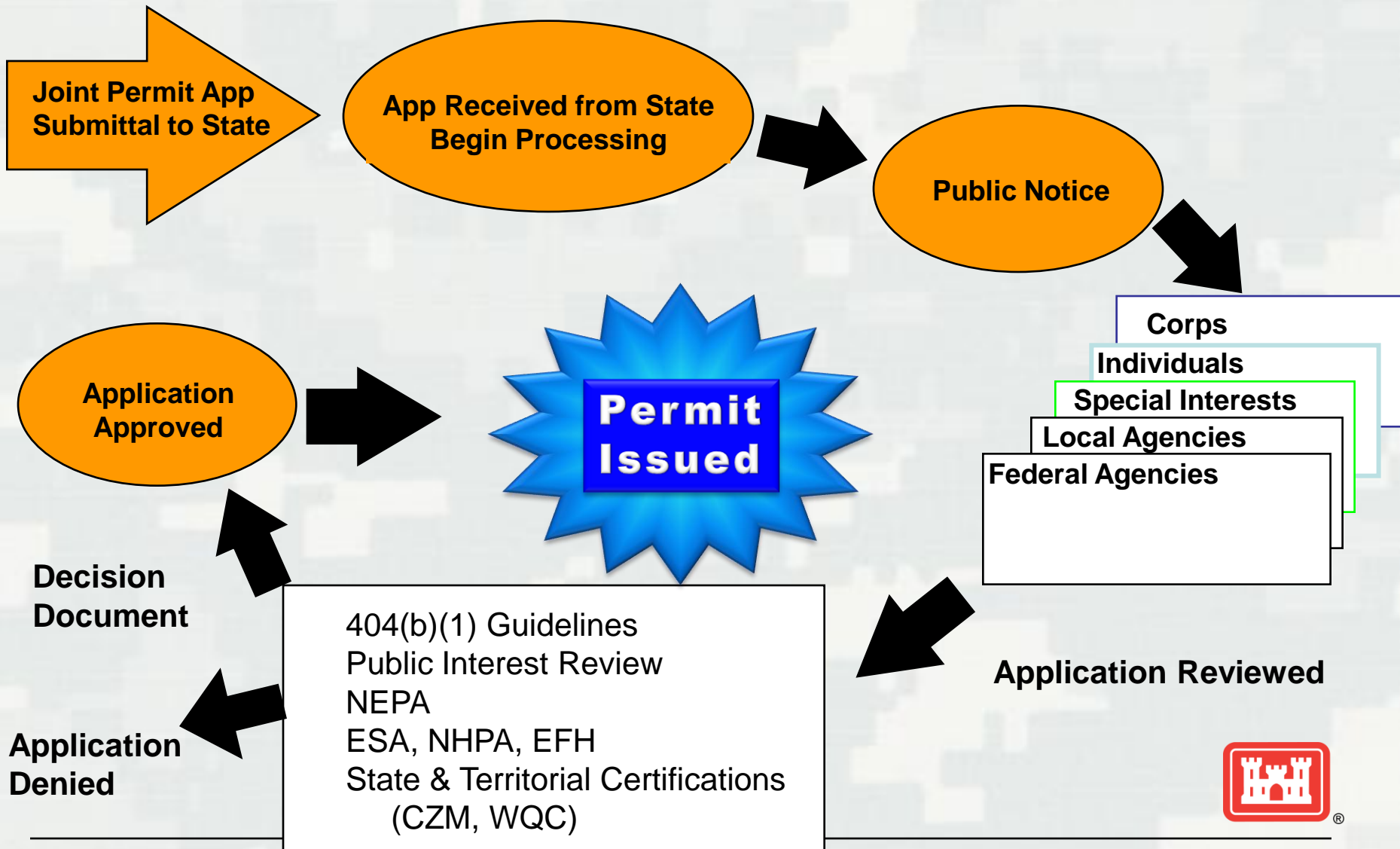
Items for a Complete Application

Items to include in submittal package to generate a Public Notice (PN)

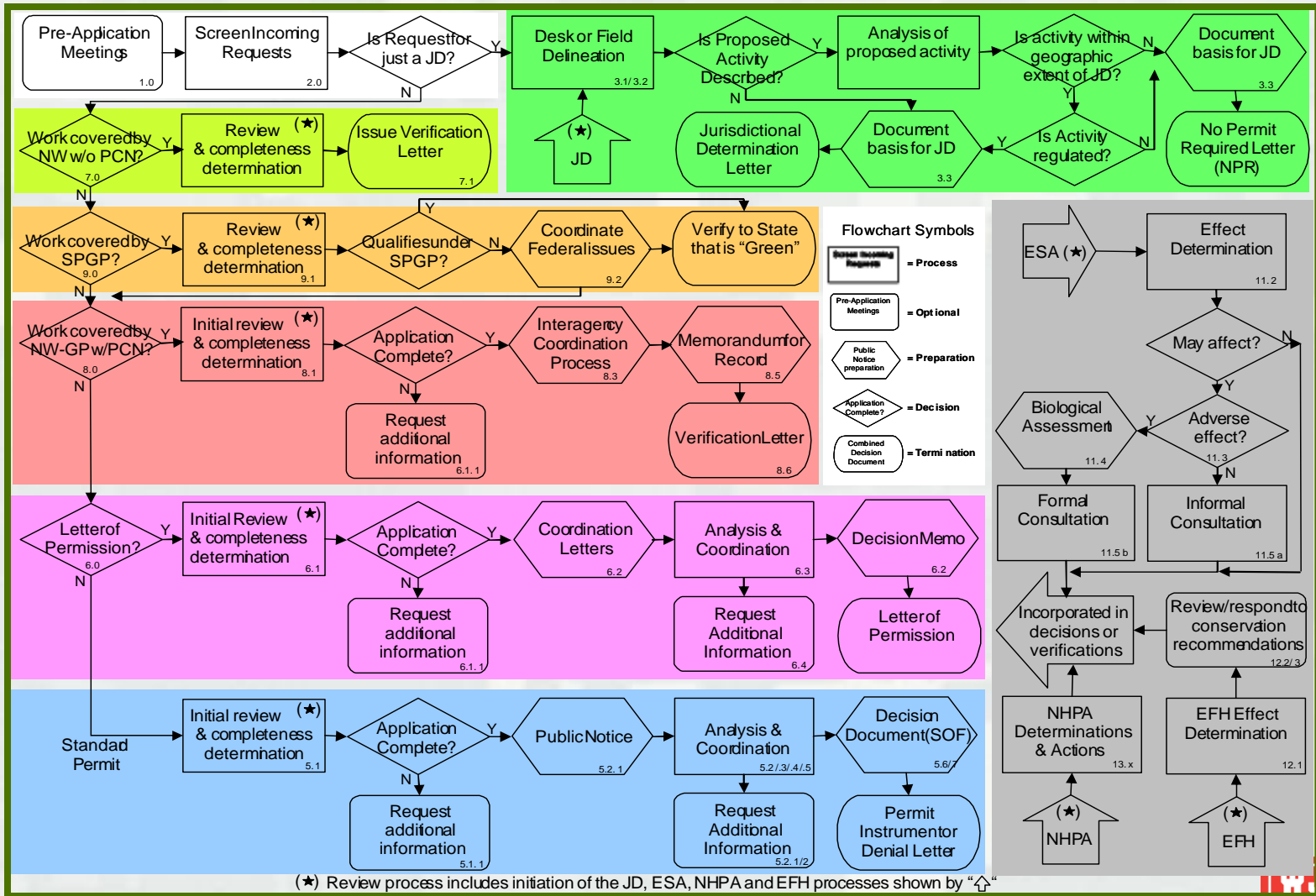
- Signed Application (agent letter)
- Project Description
- Adjacent Property Owners Addresses
- Statements on the Avoidance and Minimization of Wetland Impacts
- Statement on Compensatory Mitigation, or why mitigation is not offered
- One set of 8.5" x 11" drawings which include: a vicinity/ location map, overall site plan, plan with limits of wetlands and proposed wetland impact, and a cross section
- PN posted



Permit Review Process



Permit Review Process



Overview of SP/LP Permit Process

- Pre-application consultation
- Application received
- Initial review for completeness:
 - Additional information request (RAI)
 - Application considered complete
- Public notice (SP) or coordination letter (LP)
 - 21 day comment period:
 - Public notice coordinated with EPA, FWS, NMFS, local agencies, adjacent property owners, and public mailing list
- Comments received and permit evaluation



Overview of SP/LP Permit Process Continued

- Comments provided to applicant or agent:
 - Copies of public notice comments received
 - Corps recommendation for project modification
 - Corps requests for specific additional information
- Receipt of applicant's response
- Corps evaluates modifications and will coordinate with commenting agencies
- Corps evaluation of agency comments



Overview of SP/LP Permit Process Continued

- Final evaluation of all pertinent information
- Decision document:
 - Environmental assessment
 - Compliance with guidelines
 - Public interest factors
- Final decision



Overview of Permit Process

Evaluation



Evaluation

404(b)(1) Guidelines

- Project purpose
 - Sequential process:
 - Avoidance
 - Minimization
 - Compensation - Mitigation
- Corps determines least environmentally damaging practicable alternative
- Corps reviews mitigation proposal (No net loss of wetland acreage and function)



Evaluation

Public Interest Review

21 Public interest factors:

- **Conservation** use vs. preservation
- **Economics** cost of project; cost of alternatives, tax gain, employment gain, private vs. public gain;
- **Wetlands** – unnecessary alternation or destruction is contrary to the public interest
- **Fish and wildlife values** comments from FWS, NMFS
- **Flood plain values & flood hazards** - no increased flooding potential up or down stream
- **Water supply and conservation** – surface & ground water quality & quantity
- **Land use** – zoning & general compatibility w/need & welfare of the people



Evaluation

Public Interest Review

- Navigation – protect navigational channels
- General environmental concerns
- Safety – avoid hazards to health, life and property
- Historic and Cultural resources – State & National register
- Shore erosion and accretion – prevent increased erosion
- The Corps issues a permit unless the Corps determines that the project is contrary to the public interest



Evaluation

National Environmental Policy Act (NEPA)

- Procedural
- Ensures consideration of environmental impacts and alternatives for federal actions
- Documentation
 - Environmental Assessments (Determine Significance)
 - Environmental Impact Statements



Evaluation

Other Applicable Federal Laws

- Endangered Species Act (ESA)
- Magnuson-Stevens Act (Essential Fish Habitat - EFH)
- National Historic Preservation Act (NHPA)
- Coastal Zone Management Act
- Section 401 Of The Clean Water Act



Permit Process Tools

- Pre-Application meetings
- Regulatory Sourcebook
- RGL 08-03
- Pending permit status search



Corps Regulatory Key Points

- Protect important aquatic resources
- Majority of permits issued with revised footprint
- Mitigation does not make an unpermittable project permittable
- Corps fully mitigates unavoidable impacts
- No net loss of aquatic functions and services
- Large number of projects involve T&E Species, Historic Properties, and EFH issues, which add to the complexity of project evaluation



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