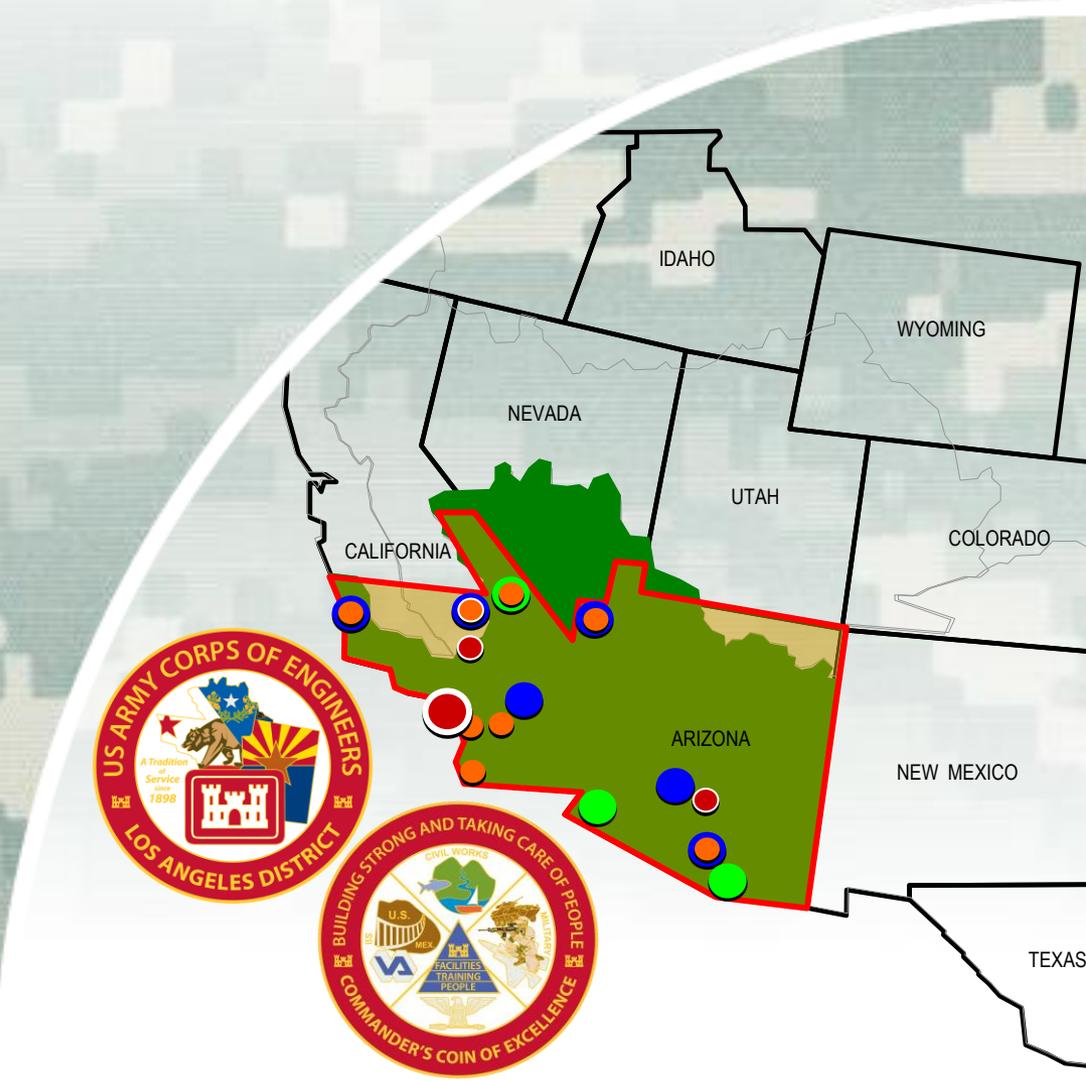


# U.S. Army Corps of Engineers Regulatory Program Overview

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US Army Corps of Engineers  
**BUILDING STRONG**





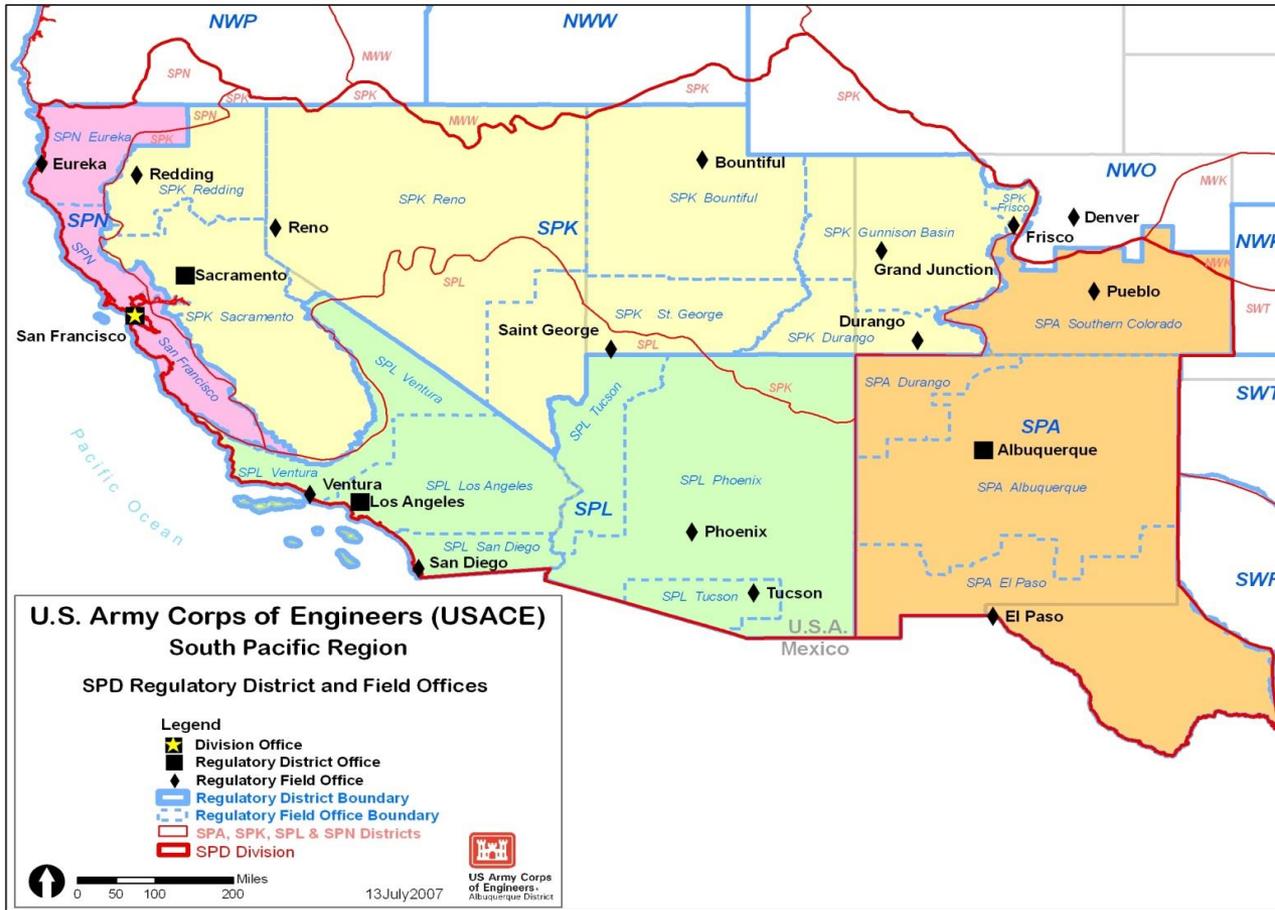
# US Army Corps of Engineers



- Other MSC Levels**
- USACE Headquarters
  - USACE Finance Center
  - Humphreys Engineer Ctr Support Activity
  - 249th Engineer Battalion/Prime Power
  - Institute for Water Resources



# Los Angeles District



Regulatory Division Boundary in Green



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# Overview

- Authorities
- Geographic Jurisdiction
- Regulated Activities
- Types of Permits
- Permit Conditions
- Exemptions
- Related Laws and Regulations
- Breaking news!
- Questions



# Authorities

- Section 404 of the Clean Water Act (33 USC 1344; 1972)
  - Goal of CWA: Protect and restore the chemical, physical and biological integrity of the nation's waters
  - Regulates the discharge of dredged or fill material into waters of the United States
  - Two tests: Location and Activity
  - Does not include "waste" discharges
  - Sections 401 & 402 are administered by other state and federal agencies



# Continued...

- Section 10 of the Rivers and Harbors Act (33 USC 403, 1899)
  - Regulates “work” and “structures” in navigable waters of the United States.
- Section 103 of the Marine Protection, Research and Sanctuaries Act (33 USC 1413)
  - Regulates the transport of dredged material for the purpose of ocean disposal at EPA designated sites.

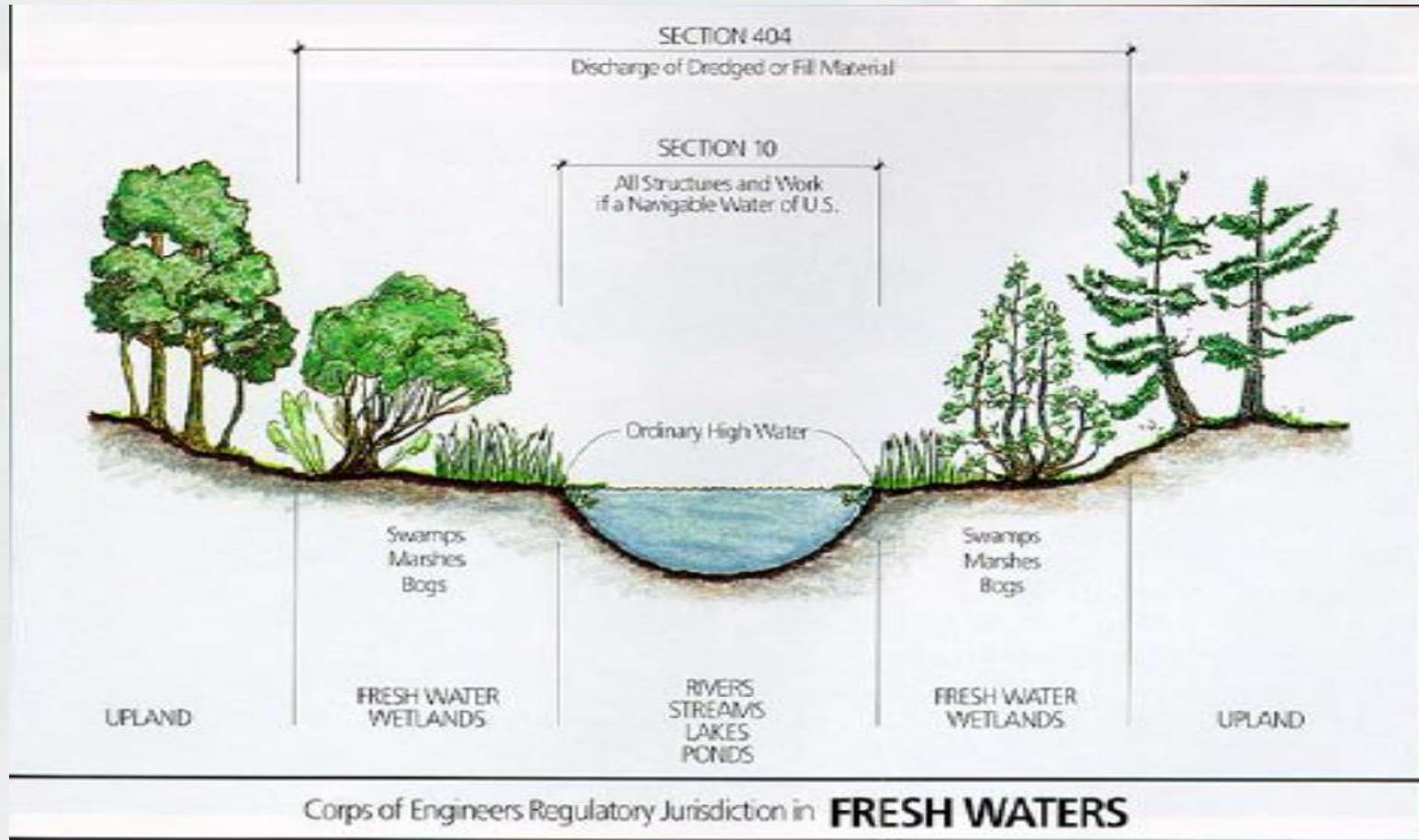


# Geographic Jurisdiction

- Jurisdictional waters of the U.S. include:
  1. Traditional navigable waters (TNW) [tidally influenced, or used for interstate commerce]
  2. Interstate waters (e.g., Colorado River)
  3. Territorial seas (high tide line to 3 miles offshore; jurisdiction extends onto OCS to 50 miles offshore, for some activities)
  4. Impoundments of jurisdictional waters
  5. Tributaries to jurisdictional waters [first 3 categories above]
  6. Adjacent waters and wetlands [adjacent to the above categories waters]
  7. Case-specific: some waters require case-specific evaluation for significant nexus to the nearest TNW (isolated, relatively permanent waters, non-relatively permanent waters)



# Geographic Jurisdiction



# Where is the OHWM?



# Ordinary High Water

“...that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.”



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# Ordinary High Water

- Not tied to a specific recurrence interval
- Based on physical indicators
  - Eroded banks
  - Debris lines
  - Changes in vegetation
  - Scour
  - Active floodplain
- Not permanently fixed—can change over time in response to natural processes
- Use ERDC/CRREL TR-08-12 for determining OHW in the arid west.



# Adjacent Wetlands



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# Adjacent Wetlands

- Extend beyond the limits of the ordinary high water mark
- Determined in accordance with Corps of Engineers 1987 Wetland Delineation Manual in conjunction with the Arid West regional supplement (use the supplement !!)
- 3-Parameter Test
  - Wetland hydrology
  - Predominance of wetland vegetation
  - Hydric soils (e.g., riverwash is a hydric soil by definition)



# Discharge of Fill Material

## Temporary



## Permanent



# Regulated Activities (Sec 404)

- Permanent fill in waters (e.g., dams, pile supports for bridges, bank stabilization, culverts, development)
- Temporary fill in waters (e.g., surface water diversions, access ramps, falsework, most flood control maintenance)
- Does not include “clean” excavation or “incidental fallback”



# Activities Not Regulated (Sec 404)

- Above-ground vegetation removal (i.e., mowing, weed whipping)
- Effluent/waste disposal (regulated under Section 402)
- Driving across jurisdictional waters (only in the absence of a discharge of fill)



# Regulated Activities (Sec 10)

- Work (e.g., dredging, pile driving)
- Structures (e.g., wharves, bulkheads, offshore rigs, navigational or other types of buoys)



# Regulated Activities (Sec 103)

- Transporting dredged material for the purpose of ocean disposal at EPA designated sites.



# Types of Permits

- Standard Individual Permits (SIP)
  - Required for projects with more than minimal impacts to waters
  - Requires a 30-day public notice (CA + adjacent property owners)
  - Requires preparation of an EA or EIS under NEPA (analogous to MND and EIR)
  - Requires a 404(b)(1) alternatives analysis to determine “least environmentally damaging practicable alternative” (LEDPA)
  - Requires a public interest review (public notice comments, resource agency and tribal consultations)
  - May be issued for more than 5 year duration for some activities (e.g., flood control maintenance programs)



# More Types of Permits...

- Letter of Permission (LOP)
  - Used for minor projects in navigable waters (only) that have no public controversy (e.g., pile replacement or additions to wharves, maintenance dredging)
  - Requires 15-day agency only pre-construction notification and solicitation of agency comments and public interest review (like SIPs)
  - Regulations allow 120-day process (like SIPs)
  - May be issued for 1-2 years
  - Does not allow ANY discharge of fill
  - May authorize “work” and “structures” only



# Continued...

- Nationwide Permits (NWP)
  - More than 50(!) activity specific general permits issued nationally for activities with minimal impacts (usually less than ½-acre of permanent impact)
  - Examples road crossings, bank stabilization, maintenance, utility lines, restoration projects
  - Some do not require notification to the Corps
  - All are subject to the NWP General Conditions
- Regional General Permits (RGP)
  - Developed by Corps Districts to address local needs
  - Can be developed for a specific entity (e.g., City of Santa Maria's Maintenance RGP)
  - ...Or for any applicant (e.g., RGP 63 for Emergency Actions)
  - SIP-type process is used to establish an RGP
  - Allows a streamlined review, once established



# Permit Conditions

- General conditions apply to all permits
  - Each permit (SIP, NWP, RGP) includes General Conditions such as:
    - No jeopardy to threatened/endangered species
    - Historic properties
    - Use of suitable material, etc.
- Regional Conditions apply to NWPs in each Corps District
  - Example: SIP required for bank stabilization in San Luis Obispo and Santa Rosa Creek watersheds
  - Restriction on NWPs in vernal pools
- Special Conditions may be included on any permit
  - Compensatory mitigation
  - Restore pre-project contours, etc.



# Exemptions & Exclusions

- Exemptions apply to activities, exclusions apply to geographic jurisdiction
- Exemptions
  - Normal farming activities
  - Some maintenance activities
  - Construction/maintenance of farm and forest roads
  - Activities incidental to an exempted activity may require a permit
- Exclusions
  - Prior converted cropland: conversion of wetlands to cultivated ag occurred prior to December 23, 1985; an agricultural commodity was produced at least once before the above date; and as of the above date, the converted wetland does not support wetland vegetation, hydrology or hydric soils
  - Some upland ditches (beware the Scalia ditch)
  - Erosional features, gullies, swales
  - Groundwater



# Related Laws and Regulations

- Section 401 of the Clean Water Act
  - Administered by states [Regional Water Quality Control Board]
  - Section 401 certifications, certify the discharge of dredged or fill material complies with regional water quality standards
  - All 404 permits must have a 401 certification to be valid for construction in waters of the U.S.
  - May be issued on a programmatic basis
- Endangered Species Act (ESA)
  - Activities funded, undertaken or authorized by a federal agency must comply with ESA
  - Requires Corps (federal lead agency) to consult with FWS/NMFS if the activity “may effect” a federally listed species and/or designated critical habitat



# More Laws and Regs...

- National Historic Preservation Act (NHPA)
  - Section 106 of the NHPA requires the Corps to evaluate effects of the undertaking on federally listed or eligible historic properties, and tribal interests
  - “Historic properties” may be shipwrecks, buildings, middens, human remains, and culturally significant sites (e.g., sacred lands)
  - Corps coordinates with tribes and consults with State Historic Preservation Officer (SHPO)
- Coastal Zone Management Act (CZMA)
  - Applies to federal actions within or affecting the coastal zone
  - Administered by California Coastal Commission
  - Corps must demonstrate consistency with the CZMA [usually through a local or state issued Coastal Development Permit]



# Continued...

- Magnuson-Stevens Fishery Conservation and Management Act
  - Section 305 requires consultation with NMFS if a Corps permit would adversely affect Essential Fish Habitat (EFH) or managed species in the Pacific Groundfish or Coastal Pelagics Fishery Management Plan(s).
  - EFH is the water and habitat necessary for fish breeding, foraging and other life history functions at any point in the life cycle.
  - In the Los Angeles District area of responsibility, the only EFH we consult on, is tidal water.



# Breaking news

- **Two** recent decisions from the D.C. Circuit Court of Appeals. These decisions apply nation-wide; both address scope of analysis.
- Sierra Club v. U.S. Army Corps of Engineers (aka “Enbridge”; December 2015)
  - The court deferred to the Corps’ on its limited scope of analysis under NEPA for a 2,000 mile long pipeline (e.g., water crossings vs. entire project area). The court thus affirmed the Corps limited scope for Section 7 ESA consultation.
  - The FWS BO(s) and Incidental Take Statement(s) addressed the entire project area. The Corps permit(s) adopted only those BO conditions associated with water crossings.
  - The court ruled FWS should have issued a Section 10 permit/HCP if FWS wished to extend the ITS(s) to the entire project area.
  - The court affirmed the FWS BO/ITS was not sufficient grounds for the Corps to expand its scope under NEPA or consult on the entire project area.



# More...

- Standing Rock Sioux v. U.S. Army Corps of Engineers (September 2016)
  - The court affirmed the Corps limited scope of analysis and thereby a limited Area of Potential Effect with respect to compliance with and consultation with tribal representatives and the SHPO(s) under Section 106 of the National Historic Preservation Act.
  - The court concluded the Corps tribal and SHPO consultations were adequate and the outcomes substantive in areas where the Corps maintained federal control and responsibility.



# Useful web sites

- <http://www.spk.usace.army.mil/Missions/Regulatory.aspx>
- <http://www.spl.usace.army.mil/Missions/Regulatory/>
- **RECOMMENDATION:** When applying for a NWP, use the “long form” application (available on both web sites above) and front load your application package to avoid delays due to lack of information.



# A Basic Process....

- Where is the activity in relation to waters of the U.S.?  
Is your JD completed and verified/approved by the Corps?
- What is the nature of the work?  
Discharge of fill material? Permanent, temporary or both?
- Is the activity exempt or geographically excluded?
- Does it qualify for a General Permit?
- Are there T&E species in the area to be affected?
- Historic properties evaluated?
- Mitigation required?
- Section 401 certification issued? CMZA issued?
- Permit issued!



# Questions?



<http://www.spl.usace.army.mil/Missions/Regulatory.aspx>  
[Theresa.stevens@usace.army.mil](mailto:Theresa.stevens@usace.army.mil)

