

# Navigating Section 404 Clean Water Act Permitting

2012 Salt Lake Countywide  
Watershed Symposium  
September 26, 2012



®

US Army Corps of Engineers  
**BUILDING STRONG**®



# 99%

What does this percentile represent?

- a) Percentage of wetlands loss to development in the U.S.
- b) Percentage of wetlands protected since passage of Clean Water Act
- c) Percentage of permits issued every year by the Corps

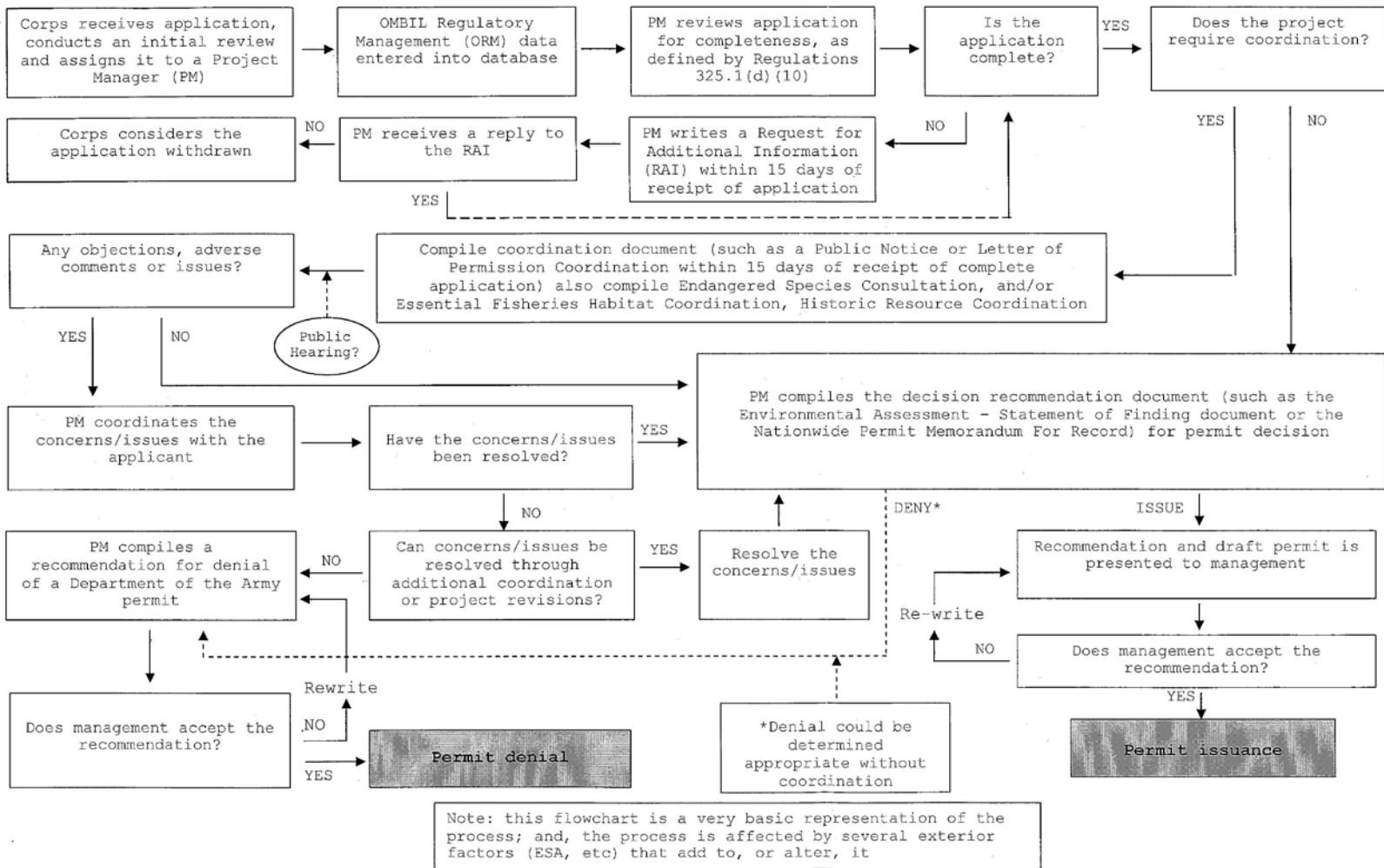


# 99%

What does this percentile represent?

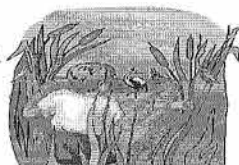
- a) Percentage of wetlands loss to development in the U.S.
- b) Percentage of wetlands protected since passage of Clean Water Act
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# Jurisdiction Review Process

Wetland Delineation  
or  
Jurisdictional Request



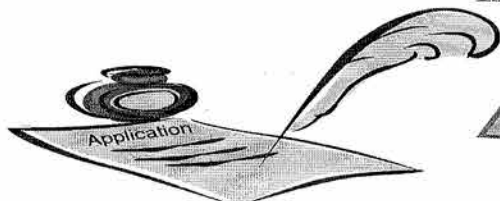
No

Have a Nice Day!



No Permit Required...

Is the project in a Waters of the US?



Submit Permit Application

Yes



Is proposed activity regulated?

No



No Permit Required...

# Permit Application Review Process



Avoidance



Minimization

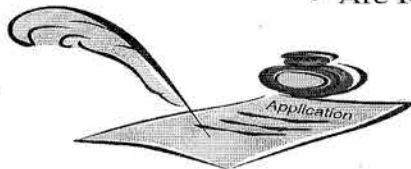


No avoidance

- Are individual and cumulative environmental impacts minimal?
  - Is area of impact less than  $\frac{1}{3}$  -  $\frac{1}{2}$  acre?
  - Are Nationwide General Permit (NWP) criteria and conditions met?
  - Will compensatory mitigation be needed to reduce impacts?
- OR
- Are Regional General Permit (GP/RP) criteria and conditions met?



No Permit Required –  
Life goes on ...



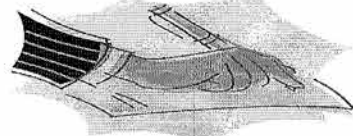
Application must be evaluated  
as a Standard (Individual) Permit  
*(see next page)*

No



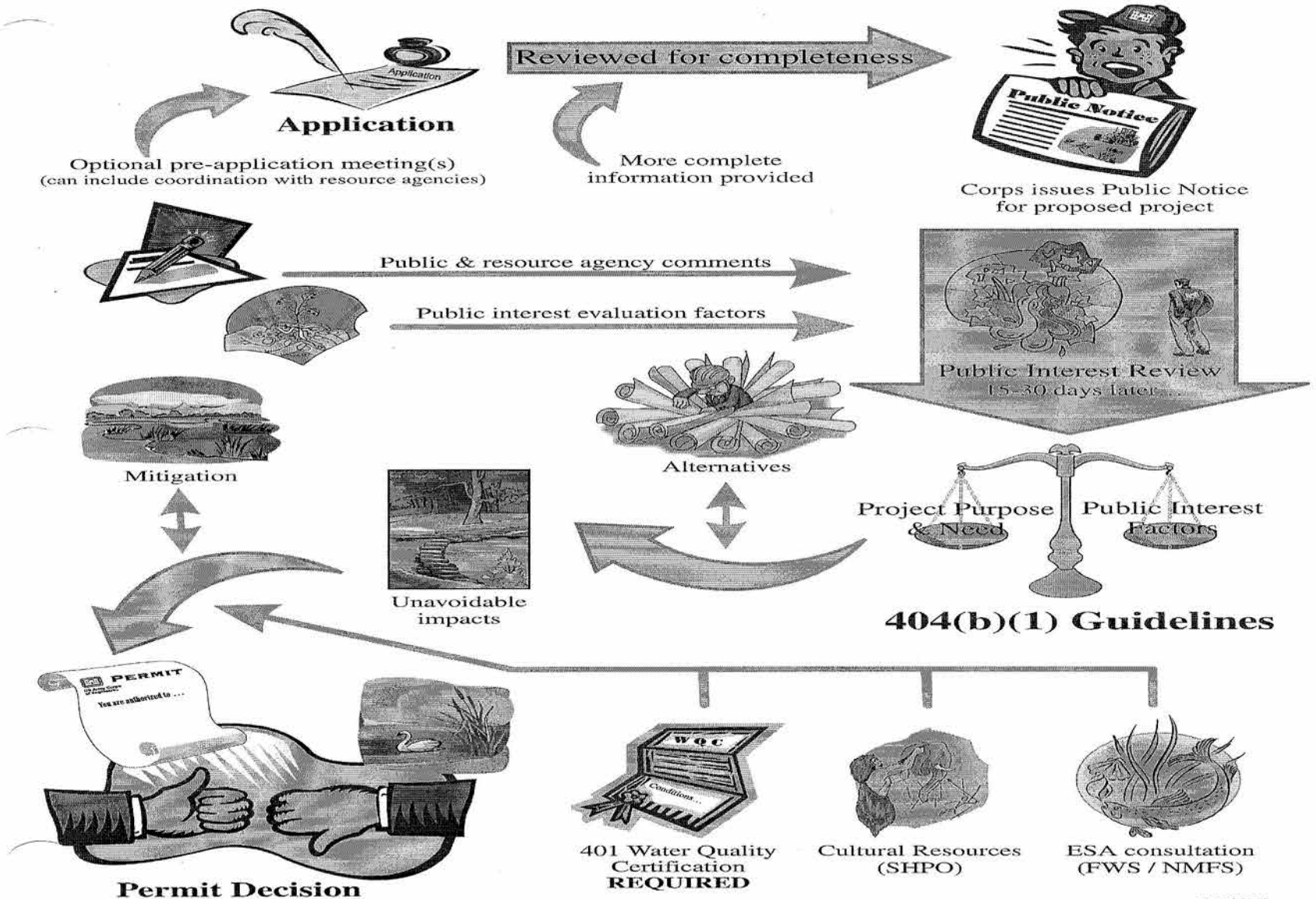
401 WQ Certification  
SHPO concurrence  
ESA consultation  
Floodplain review  
*et. al.*

Yes



Corps verifies  
compliance with  
NWP or RP

# Individual Permit Review Process

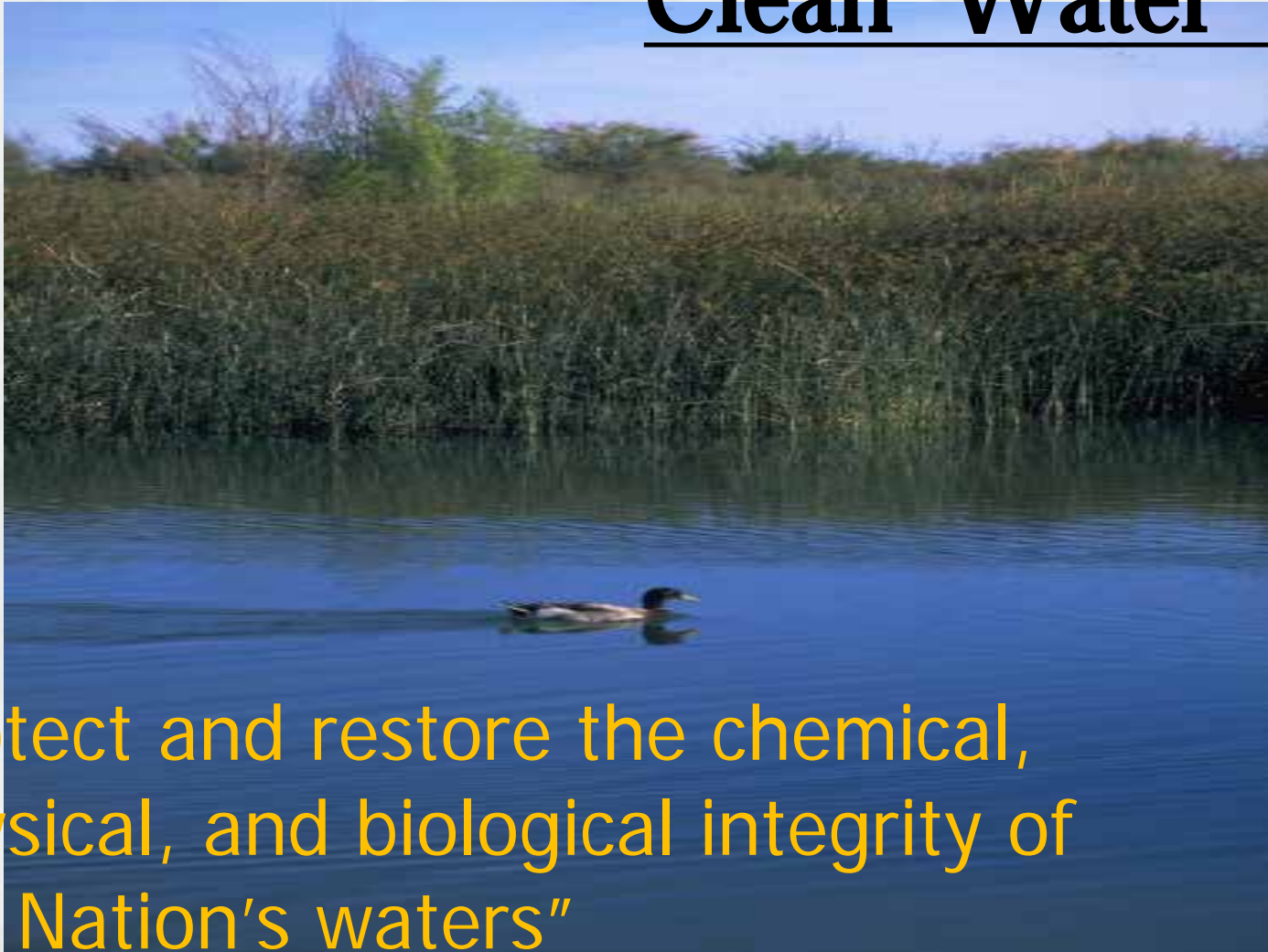


# Authorities

- Originally received authority to regulate waters for purpose of commerce. Philosophy dates back to Magna Carta and England: “All merchants should have the guarantee of safety and right of entry and exit for commerce purposes”. Therefore, the rivers could not be impeded.
- Section 10 of the Rivers and Harbors Act of 1899  
*“Work or structures in or affecting navigable waters”*
- Section 404 of the Clean Water Act  
*“Discharge of dredged or fill material into waters of the United States, including wetlands”*



# Clean Water Act



“protect and restore the chemical, physical, and biological integrity of the Nation’s waters”





# Corps Regulatory Mission

To protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.



**“No Net Loss of Wetlands”**



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# 3 Components of Permitting Process:

§ Jurisdiction

§ Permit Issuance

§ Compliance



1.

# JURISDICTION

(Does the Corps have jurisdiction of the aquatic resource?)



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# Determining Jurisdiction

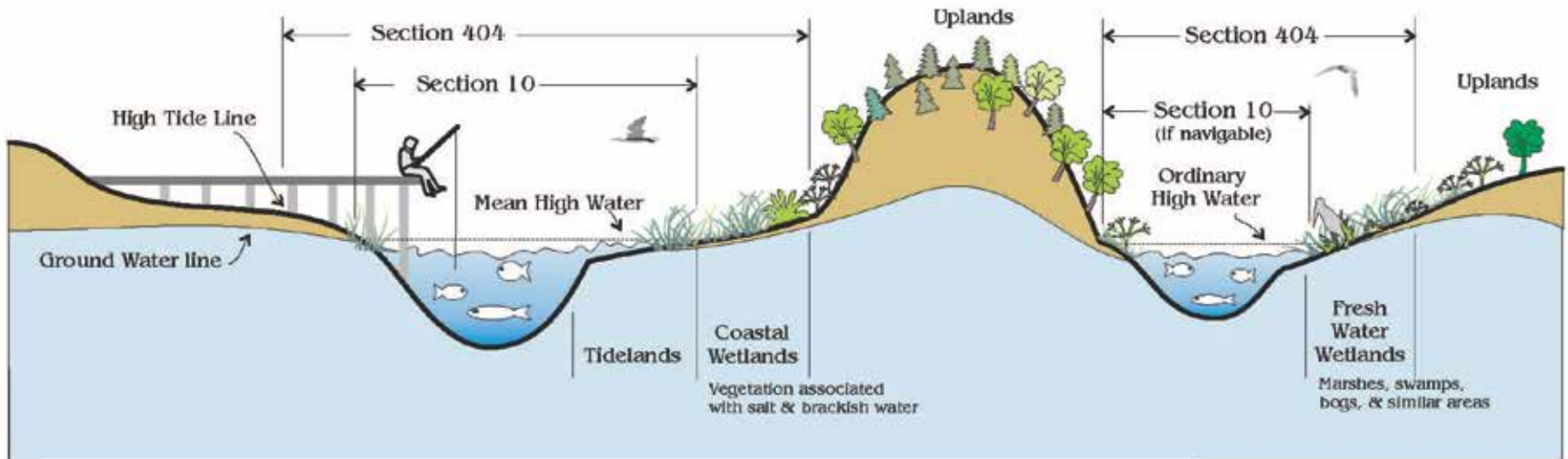
- Must determine whether Corps has jurisdiction before taking an action
- Two step process:
  1. What is extent of wetlands and other waters that may be subject to Corps jurisdiction
    - Delineate wetlands and/or ordinary high water mark
  2. Does the Corps regulate these areas?
    - Regulations, USSC court decisions, Rapanos Guidance



# CORPS OF ENGINEERS REGULATORY JURISDICTION

## Tidal Waters

## Fresh Waters



### Section 103 Ocean Discharge of Dredged Material

Ocean discharges of  
dredged material

### Section 404 Disposal 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.

Typical examples  
of regulated activities

# Wetland Definition



Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that, under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.



# Three-Parameter Test

ü Wetland Vegetation



ü Hydrology



ü Hydric Soils



# What is a Waters of the US?

- § Waters used (currently or historically) for interstate or foreign commerce Interstate waters
- § Intrastate waters in which destruction would cause an impact to interstate commerce
- § Impoundments of waters of the US
- § Tributaries to waters described above (significant nexus)
- § Wetlands adjacent/abutting a waters of the US (significant nexus)





# 2.

# PERMIT ISSUANCE

(Once activity is determined regulated, can the proposed activity qualify for a permit?)



# Permitting

- Department of Army permit usually required for any:
  - Discharge of dredged or fill material (404) into a wetland
  - Work or structures in, over or under that affect navigable waters
- Some Exemptions (404 only)
  - Some agricultural activities
  - Repair/maintenance of existing structures
  - Each defined with limits
  - May not impair flow/reduce extent of waters



# Typical Activities Requiring Section 10/404 Permits

- ∅ Depositing fill material in waters of the United States (below OHWM) or adjacent wetlands.
- ∅ Fills for residential, commercial, or recreational developments.
- ∅ Construction of levees, dams, dikes and weirs, boat ramps.
- ∅ Placement of riprap and road fills.
- ∅ Mining, channelization, ditching activities, disking, grading, deep ripping, some excavations.



# Permitting

§ First things first:

- ▶ 1<sup>st</sup>, have a delineation conducted of your property and verified by the Corps
- ▶ 2<sup>nd</sup>, design project that avoids wetlands
- ▶ 3<sup>rd</sup>, if cannot avoid, design project to minimize impacts to wetlands
- ▶ 4<sup>th</sup>, then the Corps can consider mitigation to offset impacts to wetlands

**\*\*\*Must follow this sequence\*\*\***



# Permit Types

## § General Permits

- ▶ For activities that are common across the country and are considered minimally impacting to the resource
- ▶ Impacts to waters less than 0.5 acre
- ▶ 2 types of GP's in Utah:
  - Nationwide Permit (NWP)
  - Programmatic General Permit 40 (PGP 40)



# Permit Types

## § Standard Permit

- ▶ Impacts greater than 0.5 acre
- ▶ Impacts that could be significantly controversial or have a significant impact to the nations aquatic resources
- ▶ 2 types in Utah:
  - Letter of Permission (LOP)
  - Individual Permit (IP)



# Nationwide Permits

- § 52 Different Nationwide Permits issued
- § For activities that occur on a regular basis nationwide and have minor impacts
- § Re-issued every five years after review
- § Verified individually for 2 years-must complete authorized work within this 2 years.
- § Authorizes impacts up to 0.5 acre



# Nationwide Permits

- § Requires mitigation for impacts greater than 0.1 acre (~4356 sq ft)
- § Majority of NWP's requires Pre-Construction Notification (PCN) to the Corps if impacts will be > 0.1 acre or discharging fill material into wetlands
- § Even if no PCN required, must still comply with conditions of program





# PGP 40

- § Joint Permit with Utah State Stream Alteration Program
- § Authorizes impacts to rivers, streams, creeks
- § Does not apply to springs, lakes, fens, pool and riffle areas, wetlands, and some ephemeral waterbodies



# PGP 40

- § For perennial and intermittent waters, authorizes impacts up to 300 linear feet or 500 linear feet with bio-engineering methods incorporated into design
- § For ephemeral waters, authorizes impacts up to 500 linear feet, or 750 linear feet with bio-engineering methods
- § Work must be completed within 2 years



# PGP 40

## § Covers activities such as:

- ▶ Culvert installation and replacement
- ▶ Bridges
- ▶ Low water crossings
- ▶ Bank stabilization
- ▶ Diversion structures
- ▶ Outfall structures
- ▶ Boat ramps
- ▶ Docks



# Letter of Permission

- § Authorizes impacts up to 1 acre of wetlands, or does not exceed 500 linear feet of perennial, intermittent or ephemeral streambed or bank
- § Applicant must attend a pre-application meeting with the Corps and other resource agencies
- § Requires public notice to the resource agencies for 15 days
- § Expiration date depends on the project



# Letter of Permission

§ Must submit at least two weeks prior to pre-application meeting:

- ▶ Corps verified delineation of wetlands
- ▶ Maps showing project site
- ▶ Complete description of proposed activity
- ▶ Draft information concerning off-site and on-site practicable alternatives and the relative environmental impacts of those alternatives compared to proposal
- ▶ Explanation of avoidance, minimization and compensation proposal
- ▶ Documentation of Water Quality Certification coordination



# Individual Permit

- § Authorizes impacts > 0.5 acre or for activities that do not qualify for an LOP. No acreage limit.
- § Does not require pre-application meeting, although highly encouraged
- § Requires a Public Notice issuance for 15-30 days
- § Requires documentation of an off-site practicable alternatives analysis
- § Requires compensatory mitigation
- § Issued for 5 years



# Requirements for all Permit Types

- ▶ Corps can only authorize the amount of acreage impacts for what is “needed” to accomplish activities purpose
- ▶ Compensatory mitigation for impacts > 0.1 acre
- ▶ Statement of avoidance and minimization efforts
- ▶ Mitigation proposal (except PGP 40)
- ▶ Mitigation can be offset by creating new wetlands or purchasing credits from a bank



# Requirements for all Permit Types

- ü Must comply with Endangered Species Act:
  - A qualified person needs to assess the properties habitat for listed threatened and endangered species.
  - Cannot jeopardize species or their critical habitat





# Requirements for all Permit Types

- ü Must comply with Section 106 of National Historic Preservation Act:
  - A qualified archaeologist needs to conduct a Level 1 survey of the property:
    1. literature review
    2. pedestrian survey
  - Assess impact/mitigate effect on historic properties, listed or eligible



# Requirements for all Permit Types

- ü Section 401 of Clean Water Act:
  - Water quality certification issued by State
- ü Corps is responsible for making a determination of effect on ESA and NHPA resources
- ü Corps can only issue a permit for the Least Environmentally Damaging Practicable Alternative (LEDPA)



# Processing Times

§ If application is received complete and the Corps has everything it needs to make a permitting decision:

- ▶ PGP 40's generally take about 30-60 days
- ▶ NWP's generally take about 60 days
- ▶ LOP's generally take about 90 days
- ▶ IP's generally take about 120 days



# 3.

# COMPLIANCE

(Once project is built, does it comply with the permit conditions? Was it built according to permit application?)



# Compliance

- ü Much forgotten component of permitting
- ü For mitigation, applicant must ensure success of created wetland
  - ü Entails yearly monitoring
- ü Also, compliance with the conditions of permit



# Compliance

If out of compliance with permit conditions:

- ü Corps may revoke the issued permit
- ü Require additional mitigation for temporal losses
- ü Pursue administrative penalties or other legal actions



# In Summary:

1. If you can avoid, No Permit Required
2. If you impact wetlands, PCN required
3. If impacts > 0.1 acre, mitigation required

Keep your costs low: AVOID!

Location, Location, Location IS everything!



# Contact the Corps:

Sacramento District  
Utah Regulatory Office  
533 West 2600 South, Suite 150  
Bountiful, Utah 84010  
801-295-8380

Web Page:

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



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