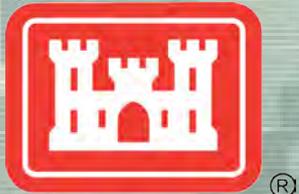


Corps Regulatory Program – Jurisdiction and Permits

Council of Texas Archeologists Meeting
Austin, TX – April 2018

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US Army Corps of Engineers
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Regulatory Program Authorities

**Construction and dredging Section 10
Rivers and Harbors Act**



**Discharge of dredged and fill material
Section 404 Clean Water Act**



**Transport and discharge of
Dredged material
Section 103 Ocean Dumping Act**

Rivers and Harbors Act of 1899

- “...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 for use to transport interstate or foreign commerce.”
- Section 9
 - ▶ Construction of dams or dikes across navigable waters
 - If interstate, requires Congressional consent
 - If intrastate, requires state legislature consent
 - ▶ Construction of bridges and causeways
 - Transferred to Secretary of Transportation in 1966
 - Corps still authorizes discharges of fill under CWA §404



Rivers and Harbors Act of 1899

- Section 10
 - ▶ Regulate the obstruction or alteration of navigable waters
 - Constructing structures in, over, under navigable waters
 - Excavation/dredging
 - Depositing material
 - Any other work that affects the course, location, condition, or capacity of navigable waters
 - ▶ Also applies to the construction of artificial islands or installations on the outer continental shelf



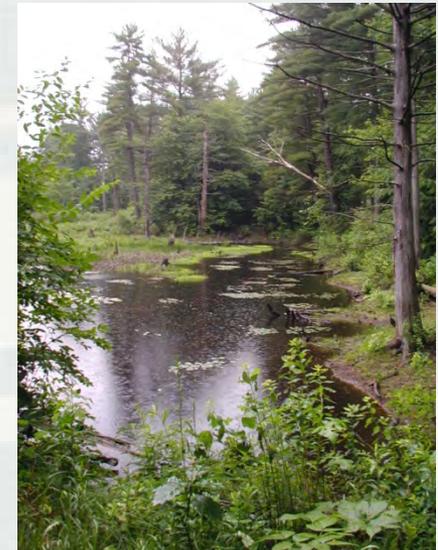
Clean Water Act Section 404

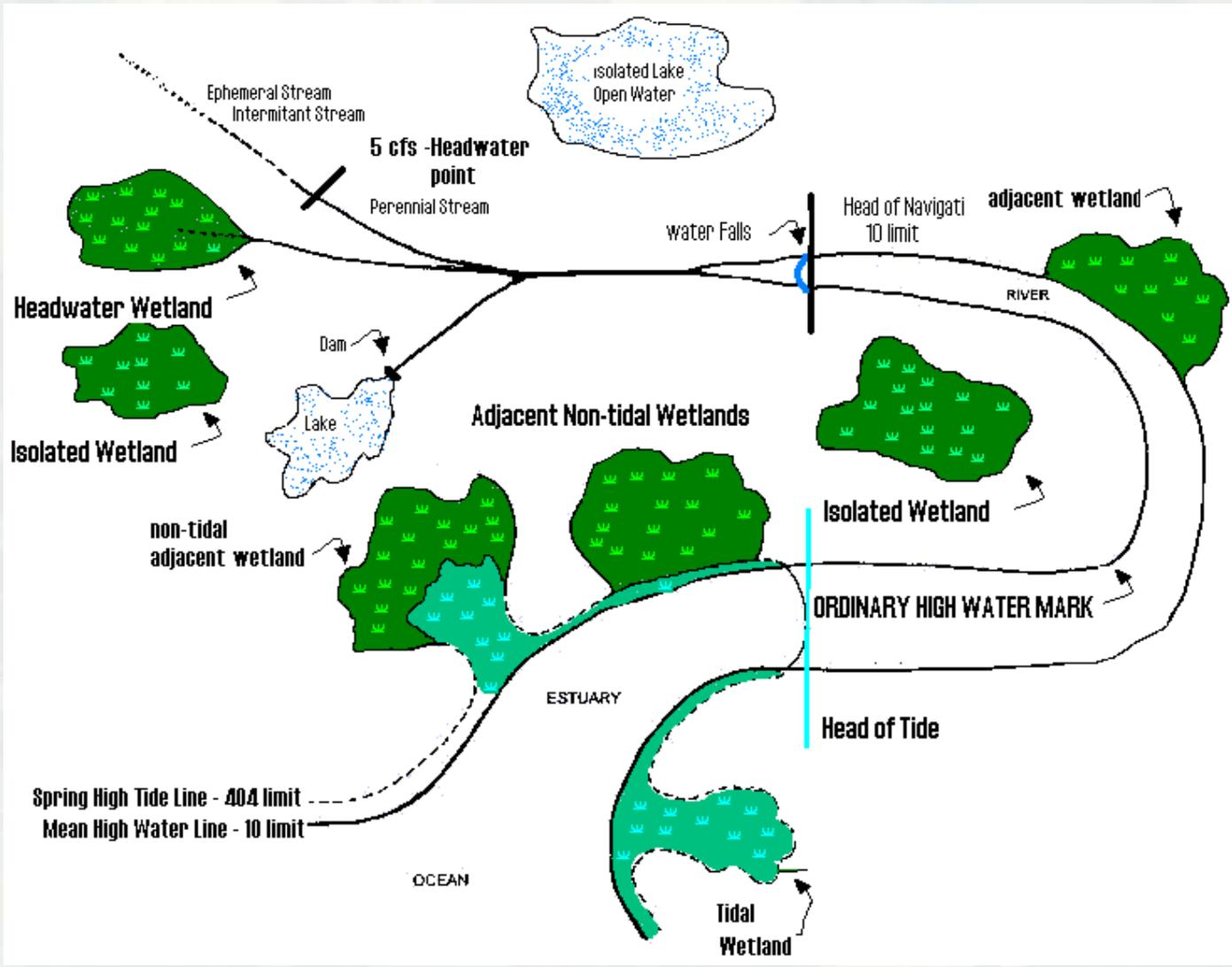
- The Corps regulates the “...discharge of dredged or fill material into the navigable waters at specified disposal sites.”
 - ▶ Fill material – replaces a water with dry land or raises the bottom elevation of a waterbody
 - ▶ Discharge of dredged material – any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, waters of the United States
- Navigable waters ≡ “waters of the United States”



Waters of the United States

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and wetlands
3. Intrastate waters where destruction or degradation could affecting interstate or foreign commerce (HQ approval required)
 - ▶ Waters used for recreation or other purposes
 - ▶ Waters with fish or shellfish sold in interstate or foreign commerce
 - ▶ Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. Wetlands adjacent to waters of the U.S.

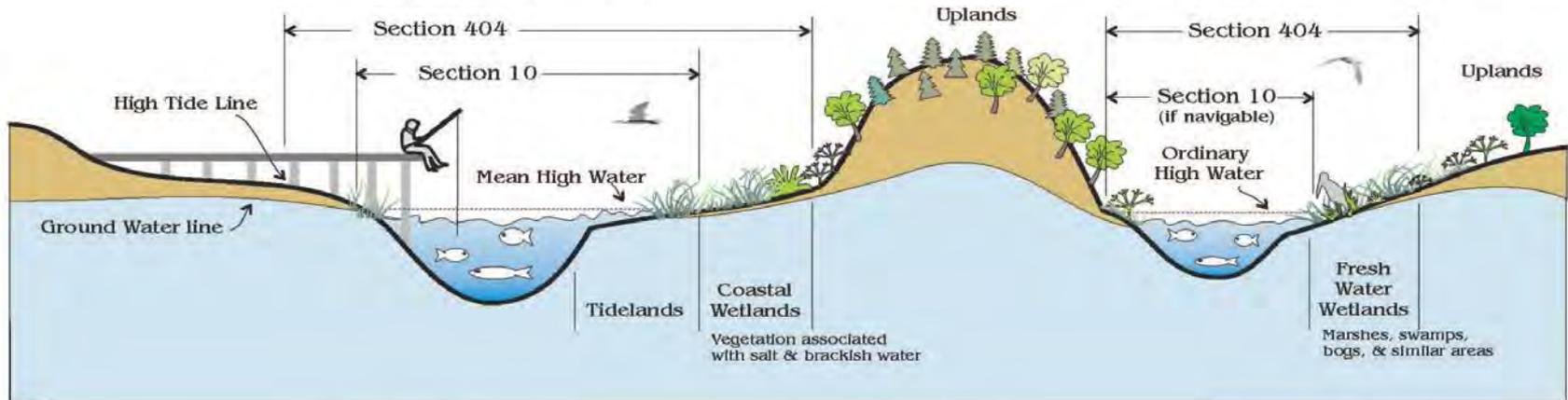




CORPS OF ENGINEERS REGULATORY JURISDICTION

Tidal Waters

Fresh Waters



Typical examples
of regulated activities

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,
pillings, bulkheads, ramps, fills,
overhead transmission lines, etc.

Landward limits of waters of the United States

- Tidal waters
 - ▶ High tide line
 - ▶ Limits of adjacent non-tidal wetlands
- Non-tidal waters
 - ▶ Ordinary high water mark, in the absence of adjacent wetlands
 - ▶ Limits of adjacent wetlands
 - ▶ If it is only a wetland, the wetland boundary



Ordinary High Water Mark

33 CFR 328.3(e) - RLG 05-05

The term *ordinary high water mark* (OHWM)

-means that line along the shore or stream 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 areas.

Ordinary High Water Mark



Changes in limits of waters of the United States

- Permanent changes in shoreline result in different limits for waters of the U.S.
- Gradual changes over time as a result of natural causes can also change those boundaries:
 - ▶ Changing sea levels
 - ▶ Land subsidence
 - ▶ Siltation
 - ▶ Change in drainage
- Man-made changes
 - ▶ Permanent changes need to be verified by the district engineer

Who makes jurisdictional determinations?

- District engineers determine waters that are:
 - ▶ Navigable waters of the U.S. (RHA §10)
 - ▶ Waters of the U.S. (CWA §404)

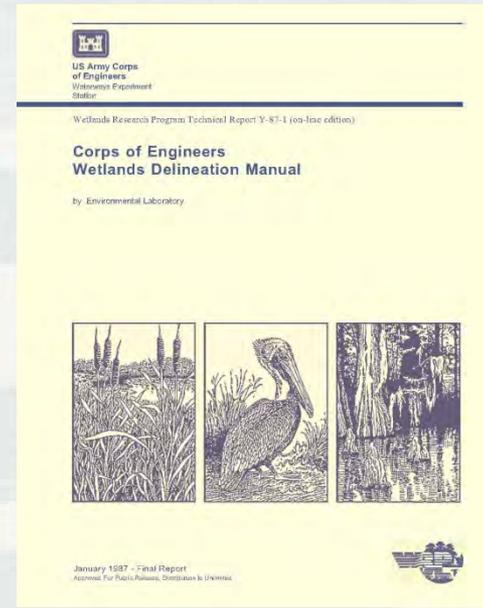


Types of jurisdictional determinations

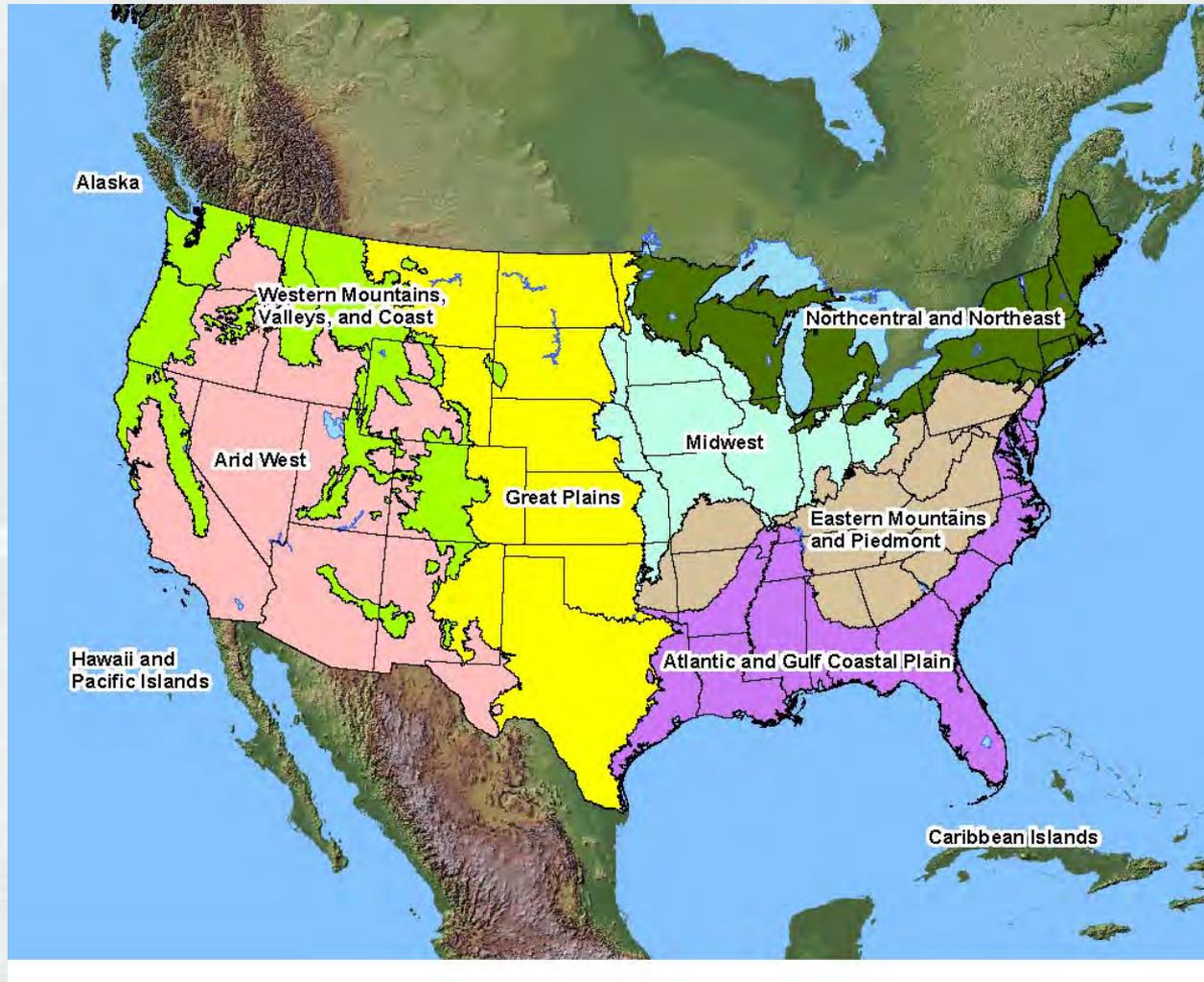
- Approved Jurisdictional Determinations
 - ▶ Official Corps determination that jurisdictional waters are present or absent on a site
 - ▶ Valid for 5 years, unless new information or changing environmental conditions warrant a revision
 - ▶ May also identify the limits of jurisdictional waters
 - ▶ Can be appealed to Division Engineer
- Preliminary Jurisdictional Determinations
 - ▶ Non-binding written indications that there may be waters of the United States on a site
 - ▶ Advisory in nature
 - ▶ Cannot be appealed to Division Engineer
 - ▶ No expiration date

Identifying wetlands

- 1987 Corps of Engineers Wetland Delineation Manual
- Applicable regional supplement
- Examine:
 - ▶ Plant community
 - ▶ Soil indicators (hydric soils)
 - ▶ Presence of water



Wetland delineation manual regional supplements



Criteria for Clean Water Act jurisdiction

- General categories of jurisdictional waters and wetlands:
 - ▶ Traditional navigable waters
 - ▶ Wetlands adjacent to traditional navigable waters
 - bordering, contiguous, neighboring
 - ▶ Non-navigable tributaries of traditional navigable waters that have relatively permanent flow
 - Perennial Streams, Intermittent Streams, and Ephemeral Streams
 - ▶ Wetlands that directly abut non-navigable tributaries with relatively permanent flow

Criteria for Clean Water Act jurisdiction

- Waters that require a case-specific finding of a significant nexus to a traditional navigable water:
 - ▶ Non-navigable tributaries that do not have relatively permanent flow (ephemeral and intermittent streams)
 - ▶ Wetlands adjacent to non-navigable tributaries that do not have relatively permanent flow
 - ▶ Wetlands adjacent to, but do not directly abut, a non-navigable tributary with relatively permanent flow

Significant nexus: Do the waters significantly affect the chemical, physical or biological integrity of downstream traditional navigable waters?



Waters generally not jurisdictional under CWA

- Isolated features such as upland stock ponds that are not on-channel, and isolated wetlands that do not exhibit connectivity
- Upland swales or gullies
- Ditches (including roadside ditches) excavated in and draining only uplands and that do not carry a relatively permanent flow of water
- Prior converted cropland
- Existing waste treatment facilities constructed in waters to satisfy Clean Water Act requirements
- Water-filled depressions created incidental to construction activity
- Ornamental ponds constructed in uplands

Common JD Problems

- Inconsistent Data
- Wetland Delineation Only (No Streams)
- Stream Delineation Only (No Wetlands)
- Unclear Maps and Exhibits
- Incorrect Coordinates
- Wrong Form; Missing Data; Incomplete Form
- Misapplying Dominance Test
- Wrong or No Stream Classification
- No Photographs; No Date on Photographs

Stream Classification

72 FR 11196

- An **ephemeral** stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Ephemeral Stream



Stream Classification

- An **intermittent** stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow

Intermittent Stream



Stream Classification

- A **perennial** stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Perennial Stream





Types of Permits

General Permits

- Nationwide Permits
- Regional General Permits

Individual Permits (IP)

- Letters of Permission
- Standard IP
 - Project-specific evaluation and authorization
 - Process involves public notice, public comment period, potential for hearings
 - Public Interest Review Factors
 - Alternatives Analysis/404(b)(1) Guidelines
 - Mitigation

Nationwide Permits (NWP)

- Issued for a particular category of activities (e.g. NWP 12 for Utility Lines).



- Issued nationally for a five-year period
 - NEPA conducted by HQ during reissuance
- There are 54 activity-specific nationwide permits
- Corps issues authorization letter that states proposed project meets terms and conditions of a NWP. This can include special conditions for Section 106.

Commonly Used NWP's

- NWP 3–Maintenance of Existing Structures
- NWP 12–Utility Lines
- NWP 13–Bank Stabilization
- NWP 14–Linear Transportation Projects
- NWP 29-&-39–Residential & Commercial Developments
- NWP 37–Emergency Watershed Protection/Rehabilitation
- NWP 43–Stormwater Management Facilities



What is a PCN?

- Pre-construction notification (PCN) is the requirement of an Applicant to notify the Corps prior to construction in waters of the U.S. through a NWP application for authorization.
- A PCN is required for NWP activities that:
 - ▶ Exceed the non-reporting NWP threshold for impacts to waters of the U.S. (e.g. >300 lf/0.10 acres of impacts).
 - ▶ Impact special aquatic sites (e.g. wetlands)
 - ▶ May have the potential to effect ESA habitat or species (General Condition 18 of the NWPs)
 - ▶ May have the potential to effect cultural resources (General Conditions 20 and 21 of the NWPs)

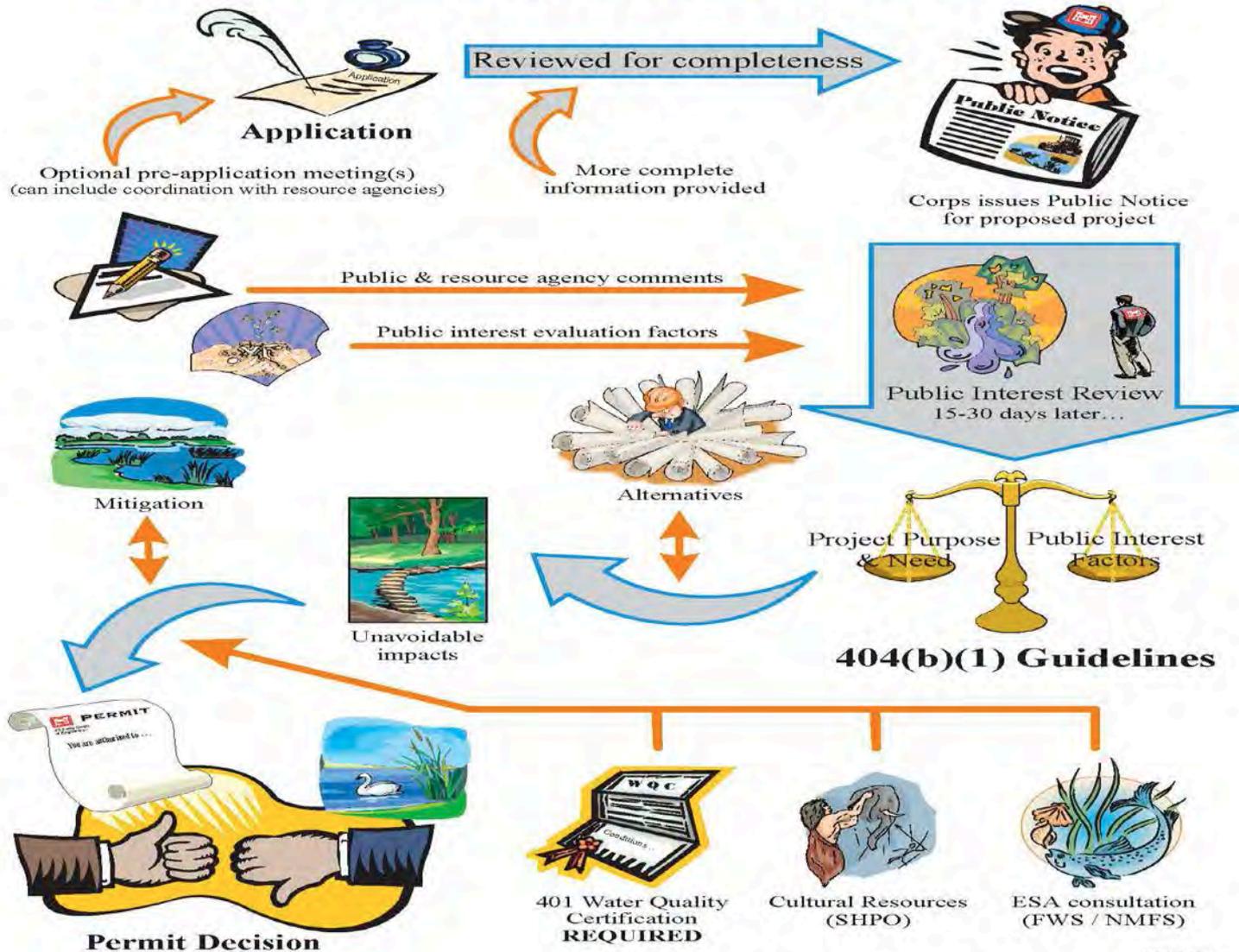


Individual Permits

- When an activity cannot be authorized by general permit an individual permit is required
- Evaluation process involves:
 - Pre-application Coordination/Consultation
 - NEPA process and Public Interest Review (e.g. public notice, public meetings)
 - Alternatives Analysis (CWA 404(b)(1) Guidelines)
 - Environmental Assessment
 - ▶ Aquatic resources
 - ▶ Endangered/Threatened Species (Endangered Species Act)
 - ▶ Cultural Resources (National Historic Preservation Act)
 - ▶ Other environmental factors (Fish & Wildlife Coordination Act, Migratory Bird Treaty Act, etc)
 - Mitigation = Avoidance > Minimization > Compensation
 - Decision

Individual Permits

Individual Permit Review Process



Jurisdiction and Permits Questions?

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