

Tribes & The Regulatory Program

Construction and dredging
Section 10 Rivers and Harbors Act (RHA)



Discharge of dredged and fill material
Section 404 Clean Water Act (CWA)



Transport and discharge of
dredged material Section 103
Ocean Dumping Act (ODA)

Army Civil Works Value to the Nation

Recreation areas
376 M Visitors/yr
Generate \$15 B in
economic activity,
500,000 jobs



¼ of Nation's
Hydropower:
\$500 M + in
power sales



11,000 miles of
Commercial Inland
Waterways:
½ the cost of rail
1/10 the cost of
trucks

299 Deep
Draft
Harbors



400 miles of
Shore protection
Destination for
75% of U.S.
Vacations



850 Miles of
Levees



627 Shallow
Draft
Harbors

Emergency
Operations



Stewardship of
11.7 Million Acres
Public Lands



Environmental
Restoration



Regulatory
Responsibilities

- US Ports & Waterways convey > 2B Tons Commerce
- Foreign Trade alone creates > \$160 B Tax Revenues

Army's Regulatory Program Goals

The Regulatory Program strives to be fair, flexible, and efficient, providing technical assistance to the public, objective project evaluations, and timely permit decisions. Environmental restoration and protection responsibilities are achieved by working with applicants to produce permittable projects and by implementing the least environmentally damaging practicable alternative, and by avoiding and minimizing impacts to aquatic resources.

Regulatory Program Principles

- District Engineers make permit decisions.
- Strive for fair, flexible, timely, and efficient permit decisions.
- Spectrum of small-routine to large-highly visible, complex or controversial projects.
- Balanced, transparent, multi-perspective, and timely permit evaluations constitute sound public service.
- Integrate consultation requirements with Regulatory timeframes and OMB-established performance standards.

CUSTOMER SERVICE FOCUS!

Annual Program Facts

- 70,000 written authorizations affecting waters of the U.S., including wetlands
 - 75% private property
 - Property under control of other agencies, NGOs
 - Tribal lands
- 100,000 jurisdictional determinations
- 2,000 enforcement cases
- 60 appeals cases (denials, JDs)

OASA(CW) Involvement in the Regulatory Program

- General Order #3 – “Develop policy and guidance for and administer the DA regulatory program to protect, restore, and maintain waters of the U.S. in the interest of the environment, navigation, and national defense.”
- Budget development, defense, testimony.
- Coordination with Congress and senior leaders from all Federal and State agencies, and Tribal governments.
- Dispute resolution.
- Fact finding to respond to inquiries, or to develop information to inform policymaking.

Examples of OASA(CW) Involvement

- Nationwide Permits 2012 – reissued/revised/new thru rulemaking.
- Clean Water Act Jurisdiction (draft Guidance; draft Rule; tool and model implementation).
- MOU and Interagency Action Plan.
 - ERDC Stream Assessment Protocol (impacts & mitigation)
 - Cumulative Effects Analysis with new IWR EMDS Model/Tool
 - Draft Stream Mitigation Guidance
 - Integration of regulatory & environmental compliance processes
- Integration of 404 and 408 Evaluations (workload increasing significantly).

Examples of OASA(CW) Involvement

- Mountaintop Surface Coal Mining in Appalachia.
- Conoco Phillips CD-5 Energy Project, AK.
- PCS Phosphate 404q (EPA).
- Via Verde – pipeline across Puerto Rico; EA/EIS; former Corps employees are consultants.
- Riego Road – jurisdictional issues for rice fields where a decision on 33 acres could affect 53,000 acres, CA.
- Guam – relocation of 8,000 Marines and their dependents; plus new carrier berthing facility.

Regulatory Challenges

- Regional variations in aquatic ecosystems, climatic regimes, cultural fabrics, economies, development pressures all affect program consistency, fairness and predictability.
- Designating where jurisdictional waters begin and end is far from obvious – not a precise science.
- What constitutes a significant nexus for headwater aquatic resources?
- Other controversial issues tied to jurisdiction: property rights, wetland “values”, environmental conservation vs. preservation.
- Increasing Regulatory Program workload and complexity of work (jurisdictional issues, ESA, EFH, 106, NEPA scope, 408/404 integration).
- Litigation.
- How to better think in terms of “Watersheds”, what does “adaptive management” mean, and how to consider climate change & sea level rise.



The Players & How They “Play”

CWA	Regulate WOUS/Wetlands
Congress	Enacted CWA
Courts	SWANCC, Rapanos, 402/404 cases, NEPA & Scope
Regulated Community	Customer Service – Fair, Objective, Predictable Decisions
Interested Parties	Resource Protection Facilitate Development
Corps	Asserts Jurisdiction; Fair, Timely, Balanced Decisions
EPA	Shares CWA, Civiletti, 404 q/c
FWS, NMFS, ACHP	Narrowly focused on resource protection
USDA	Conservation activities, farming/ditches, etc.
States	Related Regulations – 401 & CZM certifications, State-issued verifications like UT, MI, NJ)

Tribal Issues with Regulatory Program

- Scope of Analysis/Permit Area/Undertaking (106, ESA, NEPA).
- Private Lands and Federal Permit.
- Extent of Trust responsibility for non-Corps activities.
- Permits on Tribal Lands/unauthorized activities.
- Time frames for commenting on Public Notices or responding to letters perceived as insufficient.
- Appendix C – developed in 1990; out of date, inconsistent with 36 CFR 800, no role for Tribes. Interim guidance is a stop gap measure.
- NWPs – reduced comment period, some NWPs are non-reporting, “so how can we comply with Federal statutes?”
 - Minimal effects
 - Local procedures
 - Programmatic consultation

“Undertaking”

- From 36 CFR 800.16: “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, those requiring a Federal permit, license or approval and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal Agency.
- DEs determine whether a potential project, activity, or program meets the definition of an undertaking.
- If not, the historic preservation review process is complete and the administrative record should document this.
- In the context of the Corps Regulatory Program the undertaking is the structure or fill (activity) requiring a DA permit, that is, the discharge of dredged or fill material into waters of the United States, plus a reasonable upland buffer area.

No Universal Scope of Analysis Rule

Each project analyzed on its specific facts, case-by-case considering:

- How much cumulative federal control/responsibility?
- Do the regulated activities comprise a substantial portion of the project.
- How much entire project is within Corps jurisdiction.
- Does the independent utility test apply to project phases?
- Is the regulated activity a link in corridor-type project
- Do the upland aspects directly affect the location and configuration of the regulated activity?
- Upland resources (106, ESA) outside the scope of analysis for the undertaking/permit area --- evaluate as indirect effects, consider, but no requirement to mitigate.

When to Consider “*Expanded*” NEPA Scope of Analysis

- When no development could occur in uplands without a 10/404 permit.
- When construction of the overall project is dictated by the inextricable interconnectedness of activities within and outside of jurisdictional waters.
 - Lines on graph paper
 - Like capillaries
 - Braided throughout

Appendix C and 36 CFR 800

Appendix C

- Undertaking limited to aquatic
- Resources/buffer
- Permit Area
- Limited Federal Handle
- Time Frames for consultation

36 CFR 800

- Definition of Undertaking unlimited
- Area of Potential Effects
- Potentially broader scope of analysis
- No Time Frames for consultation

Permit Area and 106 APE

General Permits (GPs)

Broader Federal Handle – Potentially More Than Minimal Effects

NHL →



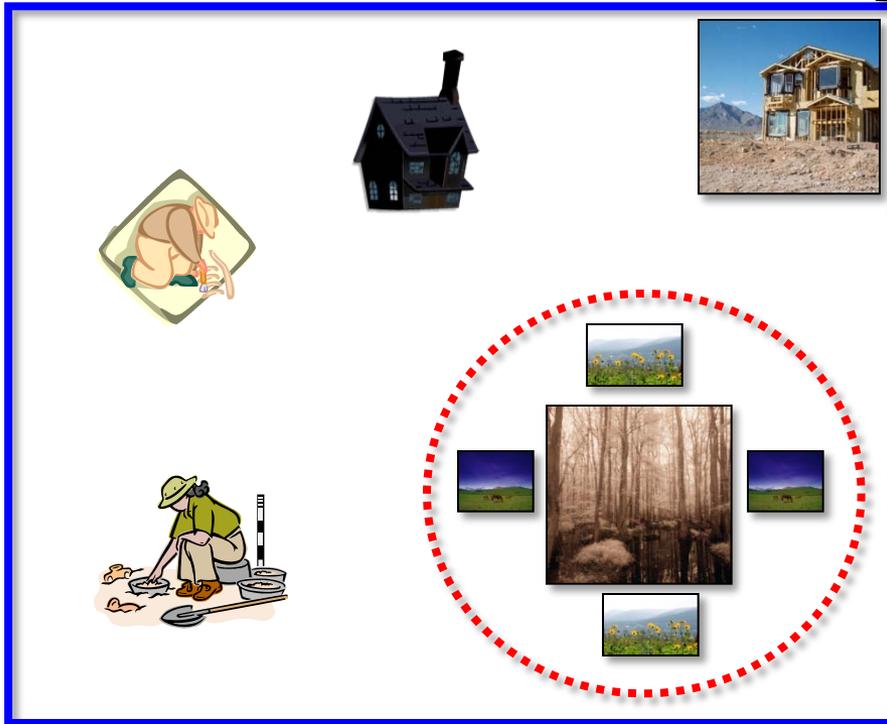
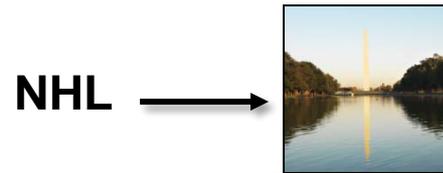
- App B Permit Area = WOUS + Upland buffers (determined by DE)
- App B provide flexibility to expand the permit area proportional to the impacts
- For SPs (in general) permit area = project footprint, and may go beyond
- Corps will consider effects to historic properties within the permit area
- 106 APE = App B Permit Area = SP permit area

..... SP Permit Area
—— Project Footprint

Permit Area and 106 APE

GPs

Limited Federal Handle – Minimal Effects

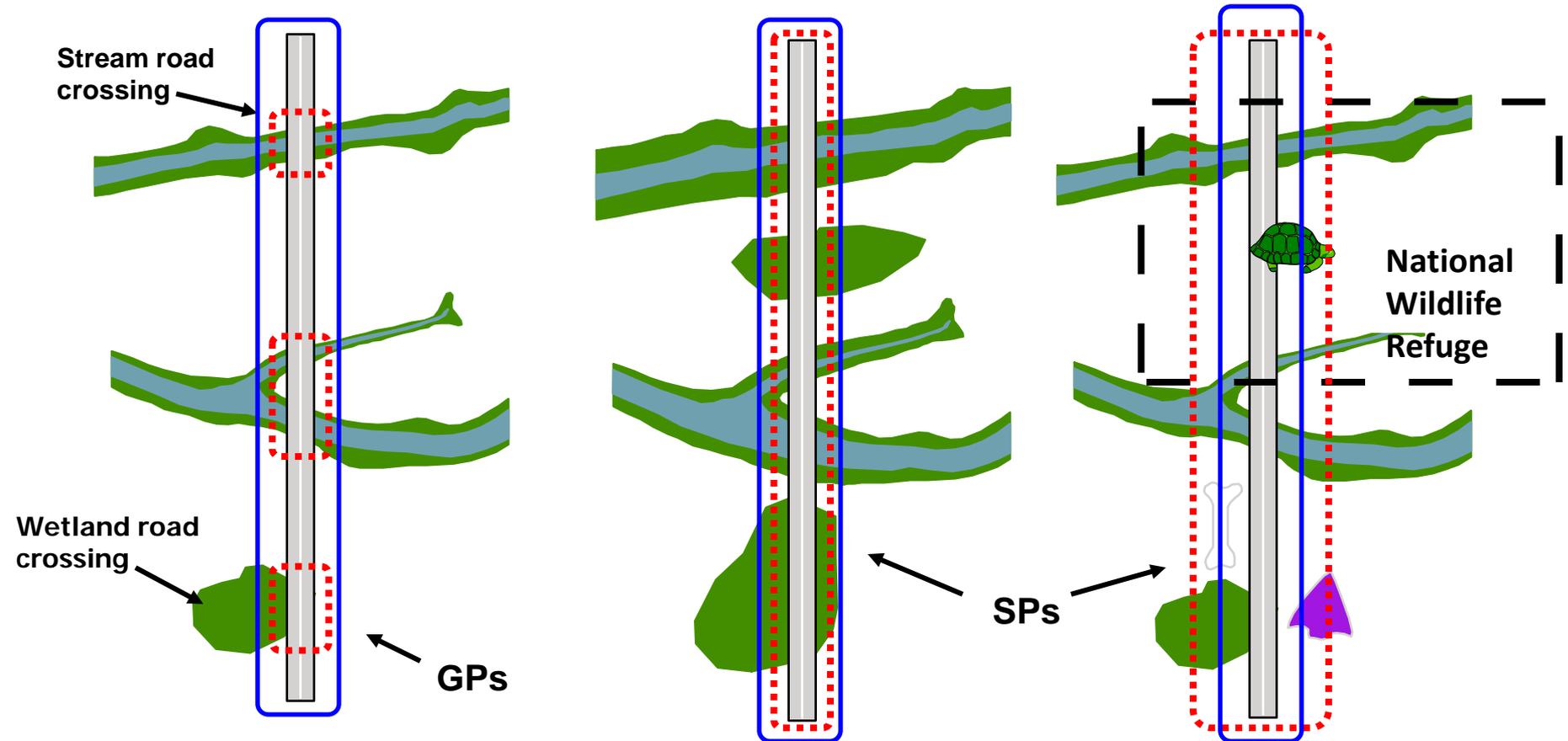


- App B Permit Area = WOUS + Upland buffers (determined by DE)
- Corps will only consider effects to historic properties within the GP permit area
- 106 APE = App B Permit Area = GP Permit Area

 GP Permit Area
 Project Footprint

Permit Area and 106 APE

Corps Proposal – Linear Projects – Federal Handle Varies



- App B provide flexibility to expand the permit area proportional to the impacts

..... Permit Area = 106 APE
—— Project Footprint

Words to the Wise

- Help the Corps integrate 10 & 404 regulatory process with those of other federal, tribal, state agencies to avoid sequential reviews and redundant activities.
- Applicants should coordinate early so the “*Purpose & Need Statement*” can be agreed upon, appropriate “*Alternatives Analyses*” conducted and documented – **BEFORE** project designs are locked in
- Remember, the Corps needs a “complete” application to make a final permit decision.
- Take advantage of pre-application consultation process.
- Be aware – Department of the Army permits are usually conditioned to be good only after applicants also comply with NHPA-106, ESA, WQ certification, CZMA, etc.

Regulatory Program Detail Opportunities at OASA!



Chip's "Hall of Pain"

Allan Steinle (Omaha District)
Chris Godfrey (New England District)
Karen Kochenbach (Northwestern Division)
Kim McLaughlin (Galveston District)
Martha Chieply (Omaha District)
Myrna López (Jacksonville District)
William James (Nashville District)
Jim Townsend (Louisville District)
Ken Jolly (Wilmington District)
Kelly Finch (Jacksonville District)
Dave Lekson (Wilmington District)

Regulatory Program Detail Opportunities at OASA

- Participate in Policy development discussions.
- Influence decisions based on field experience.
- Collaborate in dispute resolution.
- Review Corps CW and RD products.
- Coordinate Army products with Federal Agencies (CEQ, OMB, EPA).
- Review proposed rules from other Federal agencies.
- Prepare briefings, fact sheets and talking points for Principals.

Things to Think About

- What tools do regulators have to identify cultural resources within your permit area?
- Do you have access to a SHPO data base? Others?
- How does/should Regulatory do G2G?
- How to comply with NAGPRA in the regulatory program.
- What tools do regulators have/use to document cultural resources, NAGPRA, Tribal coordination and consultation?
- Do regulators utilize OMBIL Regulatory Module Maps-Federal-National Atlas-Indian Lands overlay tool?
- Do regulators have historic tribal territory maps available to determine with whom to conduct G2G?

Questions?



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