

# THE REGULATORY PROGRAM AND THE ENDANGERED SPECIES ACT

Kristie Brink  
Regulatory Project Manager  
Galveston District, Regulatory Division, Policy Analysis Branch  
30 January 2020



US Army Corps  
of Engineers®



# OBJECTIVES



- Compliance with Section 7 of the Endangered Species Act
- (ESA): Corps' Responsibilities as a Federal Action Agency
- ESA Implementing Federal Agencies
- **USFWS Explains Section 7 Interagency Consultation Process**
- Information Required When Submitting a Department of the Army (DA) Permit Application
- Common Consultation Roadblocks During Permit Evaluation
- Permit Applicant Tips



# WHAT ARE THE CORPS' RESPONSIBILITIES?



- **Processing of Applications [33 CRF 325.2(b)(5)]** - requires **all** permit applications to be reviewed for the potential impact on threatened or endangered species pursuant to Section 7 of the ESA, as amended.
- **Section 7(a)(2) of the ESA** – requires Federal agencies to insure that any action **authorized**, funded, or carried out by the action agency is **not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat of listed species.**
- **Section 7(a)(3) of the ESA** – requires Federal action agencies to consult with USFWS and/or NMFS on any authorization that “**may affect**” endangered or threatened species or designated critical habitat.



# LEAD FEDERAL AGENCIES FOR IMPLEMENTING ESA:



Nesting Sea Turtle



Piping Plover

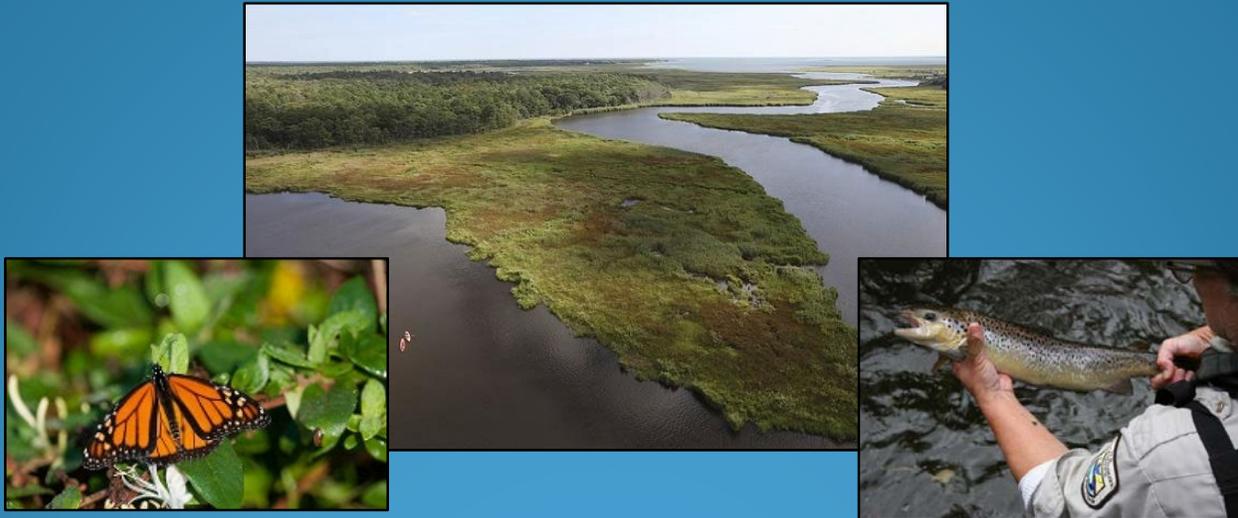
USFWS	NOAA NMFS
<ul style="list-style-type: none"><li>• Terrestrial threatened and endangered species</li><li>• <b>Manatee</b></li><li>• Critical habitat for above</li><li>• <b>Sea turtles</b> on the <u>beach</u> (<b>nesting</b>)</li></ul>	<ul style="list-style-type: none"><li>• Marine aquatic threatened and endangered species</li><li>• Anadromous fishes (in marine <u>and</u> freshwater habitats)</li><li>• Critical habitat for above</li><li>• <b>Sea turtles</b> in the <u>water</u></li></ul>





# U.S. Fish and Wildlife Service

The U.S. Fish and Wildlife Service works with others to conserve, protect, and enhance fish, wildlife, plants and their habitats for the continuing benefit of the American people.





# Endangered Species Act of 1973

## Law:

- ⑩ Conserve ecosystems that listed species depend upon
- ⑩ Develop conservation programs for listed species
- ⑩ Support existing treaties and conventions

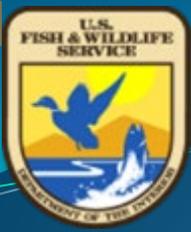


**Black-footed ferret**

Photo by Luray Parker

## Policy:

- All Federal Departments are responsible for conserving species



# Prohibited Acts

## All Listed Species:

No import, sale,  
or interstate transport

## Animals:

No Take unless Authorized

## Plants:

- On Federal lands cannot remove, maliciously damage or destroy
- On non-Federal lands, cannot remove, cut up, destroy or damage in knowing violation of State laws

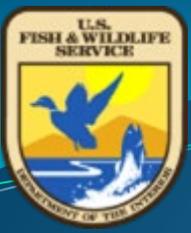


USFWS Photo



# What is Take?

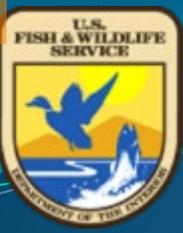
- harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect
- Incidental take – results from, but is not the purpose of, carrying out an otherwise lawful activity



# Definitions

- **Endangered:** in danger of extinction throughout all or a significant portion of its range
- **Threatened:** likely to become endangered in the foreseeable future
- **Critical Habitat :** Specific geographic areas with physical and biological features essential to the conservation of a listed species





# Endangered Species Act

## Section 7: Interagency Cooperation

Houston Toad

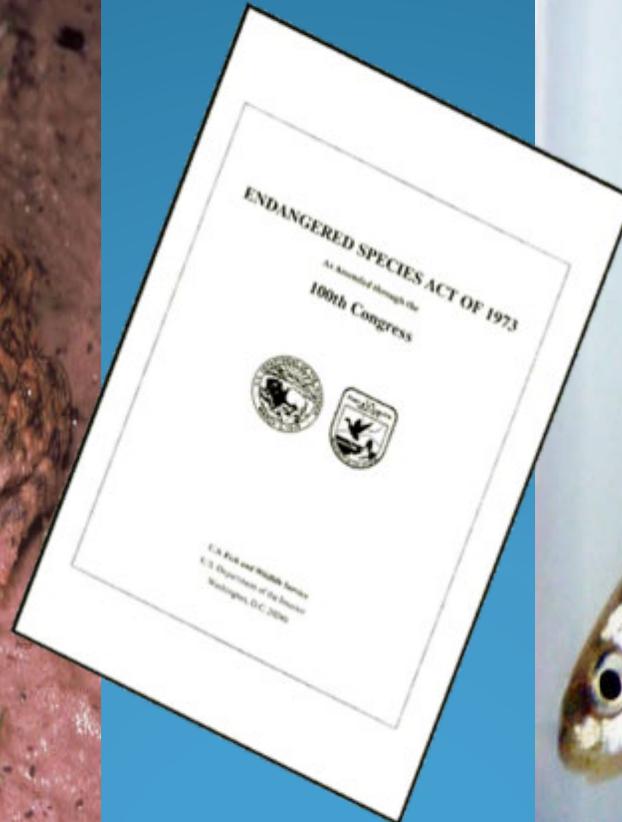


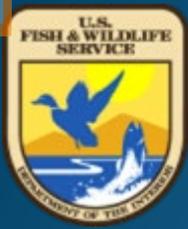
USFWS/Thomas

Rio Grande Silvery Minnow



USFWS/Lusk





# Obtain a Species List

Chiricahua  
Leopard  
Frog



USFWS/Rorabaugh



# IPaC Species List

<http://ecos.fws.gov/ipac/>





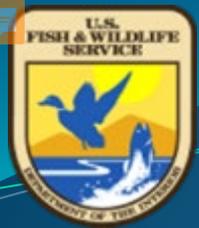
# What is Informal Consultation?

Voluntary discussions,  
correspondence, etc.

Piping Plover

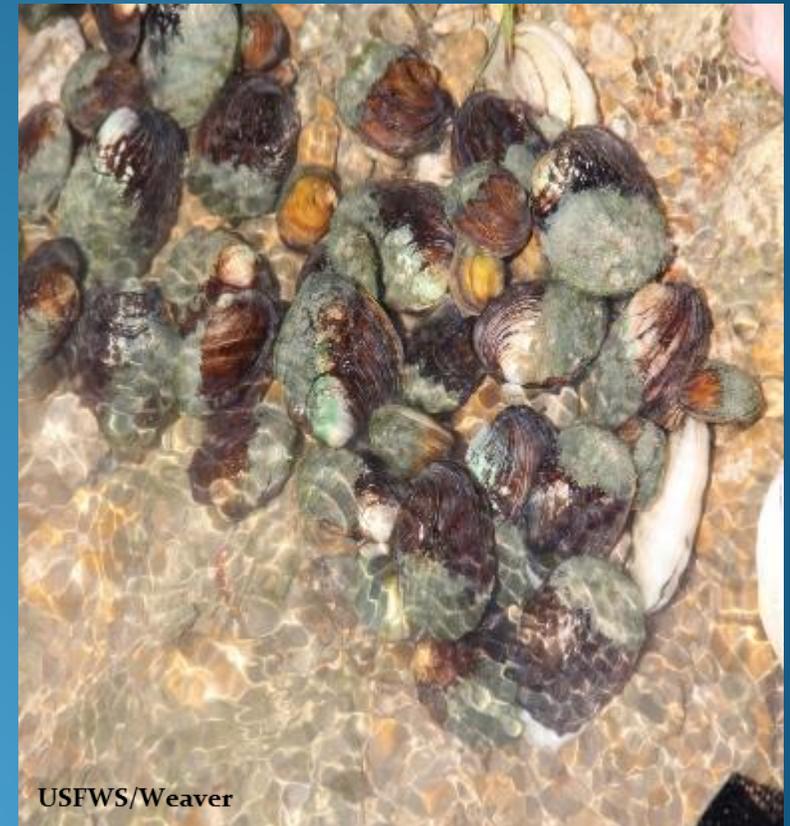


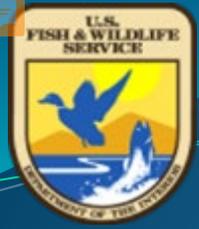
USFWS/Weaver



# Advantages of Informal Consultation

- Time to explore opportunities to benefit the species
- Allows flexibility to develop creative alternatives
- FWS can assist in developing the reports you will need

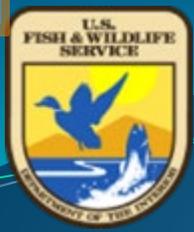




# What is a Biological Evaluation?

- Generic term, not in ESA or Section 7 regulations
- When a BA is not required
- Used to request a concurrence (informal) or initiate formal consultation





# Biological Assessment?

“Major construction activity” =  
a construction project (or other task having  
similar physical impacts) which is a major  
Federal action requiring an EIS under NEPA

Black-capped vireo



USFWS/Eckrich

# What **not** to include in a BA

- Conservation measures that do not avoid, minimize or offset the effects of the action on listed species or critical habitat.
- Jeopardy assessments
- Regulatory background (except the Federal agency's, if relevant)
- Lengthy descriptions of ecoregions, soils, climate, land use cover, and geology. Stick to what is relevant to evaluating the project and the effects of the action.
- Definitions of terms defined in the ESA, regulations or S7 handbook.
- Excessively complicated analysis frameworks.

## Format for Biological Evaluations - NEPA Categorical Exclusions and EAs and Biological Assessments - NEPA EISs

*The following is provided as a recommended guideline, although information should be presented in the order identified below. As projects vary in complexity, it is anticipated that the BE/Bas may vary. Development of the BE/BA may not occur in the format order. Rather, it is anticipated that as additional information becomes available during the crafting of the BE/BA, the appropriate sections will be modified. Federally funded or permitted exploratory activities that may affect listed species and take place prior to project implementation must undergo section 7 consultation.*

**Cover Page:** Name of project, location (city, county, etc.), and date.

**Table of Contents** (all pages must be numbered)

### A. Executive Summary

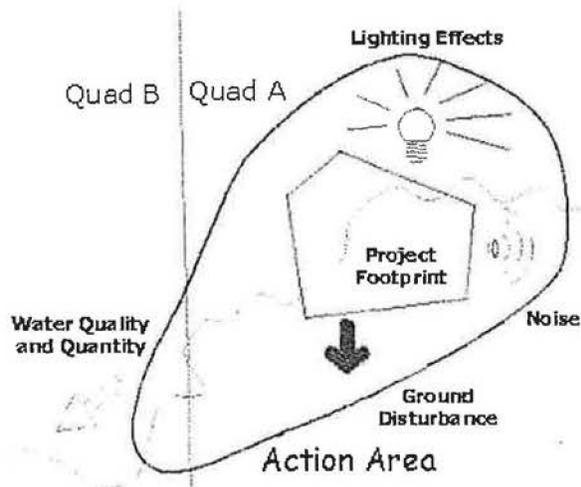
1. Brief summary of project (2 or 3 sentences)
2. In tabular format, identify the species, critical habitat, EFH, status, and effects determinations. If "no effect", include a brief paragraph for each species (these will not be addressed again.) For example:

SPECIES	LISTING STATUS	DETERMINATION
Eight-toed salamander	Endangered	Not likely to adversely affect
Eight-toed salamander critical habitat	Designated	Not likely to adversely affect
Salt marsh treefrog	Threatened	Likely to Adversely Affect
Speckled Thistle	Threatened	No effect

### B. Project Description

**1. Location:** Describe construction boundary, mileposts, State, county, TRS (include GPS coordinates if available). Include vicinity map (all maps and photographs must be first generation copies, legible and at a scale to be meaningful to the description of the activity).

**2. Definition of Action Area:** All areas affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. Include all off-site use areas (i.e. materials sources, waste sites, mitigation sites, stockpiling areas, staging) and locations. A map is helpful, overlaying the all-inclusive action area with species and habitat occurrences.



### 3. Proposed Action:

- a. Describe the anticipated steps involved in the action in expected or logical order and include diagrams that are useful. The intent of the proposed action section is to describe both what will be built and how it will be constructed. For example: 1. Dewater by.... 2. Remove old bridge by.... 3. Remove old abutments by... 4. Construct new abutments... 5. In-water equipment will be..... 6. Order of magnitude of quantities... Include description of actions for the entire action area (including interrelated and interdependent actions). Describe criteria for off-site use areas which minimize potential effects. If the contractor proposes an alternative construction method other than that described in the BE/BA, concurrence from the Services is required.
- b. Identify Best Management Practices (BMPs), Erosion and Sediment Control, and other measures (i.e. work windows, construction techniques, avoidance) designed to minimize effects in this section.
- c. If sideboards are used for ancillary project components, either detail here or in an appendix.
- d. Describe mitigation, monitoring, and reporting plan, as well as conservation bank credits or mitigation sites.

(NOTE: If there are multiple alternatives, different impacts caused by each substantially different alternative must be surveyed and detailed. A matrix is often the best method of depicting multiple impacts and alternatives. If the impacts are the same for each alternative, explain why there is no difference. All alternatives must be addressed.)

### C. Description of the species and their habitat

Identify each species and each critical habitat. Give brief rationales for “no effect” species if it was not included in Executive Summary. Include the following for species with other determinations (repeat for each listed species and listed habitat):

1. Consultation with local Fish and Game and/or Natural Heritage database
2. Literature reviews
3. Consultation with experts on species, as necessary
4. Descriptions of the species and general habitat requirements
5. Relationship of habitat in the project area to local populations
6. Map of the project area at an appropriate scale to show vegetation types and important biological features, such as habitat for sensitive species, wetlands or unique plant assemblages
7. Photographs keyed to locations labeled on the project map.
8. Species information in Action Area including survey protocol used, by whom, etc.
9. Identify designated or proposed critical habitat as separate listed entities. List the primary constituent elements and address the extent to which they are found in the action area.

#### **D. Environmental Baseline**

Describe the past and present effects of human actions on the species or critical habitat in the action area. Describe existing habitat conditions and species trends in detail. Use watershed analysis from the BLM or Forest Service where available, Fish and Game, or any other available scientific or commercial databases or information.

#### **E. Effects of the Action:** Include discussion of direct and indirect effects relative to all species.

1. Direct Effects - Those effects caused directly by the proposed action (include those based on sideboards). Provide the rationale for each determination.
2. Indirect Effects - Caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.
3. Cumulative Effects - Those effects of future State or private activities, not Federal activities, that are reasonably certain to occur within the action area.

#### **F. Determination of Effect**

Must include a clear statement of effect for each species. Example: "We conclude that the Smith Road Bridge Project may affect, but will not likely adversely affect California red-legged frogs because...." For terrestrial species and plants, summarize with a clear explanation leading to a definitive statement of "may affect, but not likely to adversely affect" (or whatever your determination may be).

#### **G. References and personal communications cited**

*Example of citations used in text:*

The passive transport of males has also been observed by Leslie Brown (Santee Nature Center, personal communication) near Greenville, Oregon. Such a mating system would maintain genetic diversity in the population only as long as it remains connected (Smith 2001).

*Example of Literature Cited:*

Smith, D. M. 2001. Genetic subdivision and speciation in the western North American spotted snake complex, *Thamnophis punctatus*. *Evolution* 4:29-35.

*Example of Personal Communications (must be documented):*

Leslie Brown, Research Biologist  
Smith Nature Center  
4125 Willowtree Drive  
Greenville, Oregon 85194  
January 8, 2003 telephone communication (or email, site visit, etc)

**BE/BA Checklist** *(For your use in checking your work)*

**Project** \_\_\_\_\_ **Reviewer** \_\_\_\_\_ **Date** \_\_\_\_\_.

\_\_\_\_\_ **Cover Page:** Name of project, project and key numbers, location (city, county)

\_\_\_\_\_ **Table of Contents** (all pages must be numbered)

**A. Executive Summary**

- \_\_\_\_\_ 1. Brief summary of project (2 or 3 sentences)
- \_\_\_\_\_ 2. Species Table with effect determinations

**B. Project Description**

- \_\_\_\_\_ 1. Location: description and vicinity map
- \_\_\_\_\_ 2. Definition of Action Area
  - \_\_\_\_\_ List of all off-site use areas and locations.
- \_\_\_\_\_ 3. Proposed Action:
  - \_\_\_\_\_ a. Detail how the action will occur (anticipated steps and diagrams).
  - \_\_\_\_\_ b. BMPs and other measures designed to minimize effects.
  - \_\_\_\_\_ c. Sideboards or project design criteria
  - \_\_\_\_\_ d. Monitoring and reporting plan/Mitigation/Conservation Banks.

**C. Description of each species and their habitat**

- \_\_\_\_\_ 1. Consultation with local Fish and Game and/or Natural Heritage database
- \_\_\_\_\_ 2. Literature reviews
- \_\_\_\_\_ 3. Consultation with experts on species, as necessary
- \_\_\_\_\_ 4. Descriptions of the species and general habitat requirements
- \_\_\_\_\_ 5. Relationship of habitat in the project area to local populations
- \_\_\_\_\_ 6. Map of the project area at an appropriate scale
- \_\_\_\_\_ 7. Photographs keyed to locations labeled on the project map.
- \_\_\_\_\_ 8. Species information in Action Area including survey protocol used, by whom, etc
- \_\_\_\_\_ 9. Identify designated or proposed critical habitat

**D. Environmental Baseline**

\_\_\_\_\_ Detailed descriptions

**E. Effects of the Action**

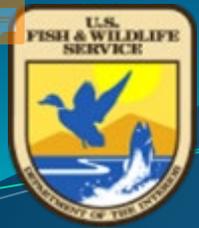
- \_\_\_\_\_ 1. Direct Effects
- \_\_\_\_\_ 2. Indirect Effects
- \_\_\_\_\_ 3. Cumulative Effects

**F. Determination of Effect Project Description**

\_\_\_\_\_ A clear statement of effect for each species

**G. References and personal communications cited Project Description**

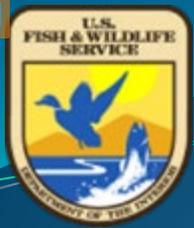
\_\_\_\_\_ Correctly Annotated



# Effects Analysis

- Direct Effects
- Indirect Effects
- Cumulative Effects





# Factors to Consider in Effects Analysis of Critical Habitat

- Physical or Biological Features (PBFs)
- Extent of PBFs in action area
- Effects to each PBF
- Effects to function and conservation role of critical habitat



# Determination of Effects

- ⑩ No effect – no further consultation needed
- ⑩ Not likely to adversely affect – informal consultation concluded with Service's concurrence
- ⑩ Is likely to adversely affect – formal consultation is required



Invasive tree removal

Brenda Smith/USFWS

# May Affect, Not Likely to Adversely Affect

Effects are:

- ⑩ Discountable - extremely unlikely to occur
- ⑩ Wholly beneficial - all positive with no adverse effects
- ⑩ Insignificant - cannot be meaningfully measured, detected, or evaluated.

*USACE obtains written concurrence from Service*

# May Affect, Likely to Adversely Affect

- ⑩ Effects not discountable, wholly beneficial, or insignificant
- ⑩ Includes projects with overall positive effect but with some individual adverse effects
- ⑩ Effects can be measured or detected

*Formal Consultation is required*

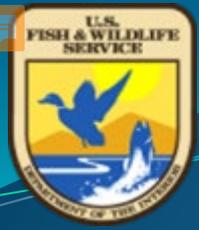


# How to Start Formal Consultation



Red Knot

USFWS/Weaver



# Components of Initiation Package

- Federal Agency letter requesting formal consultation
- BE or BA
- Mandatory items





# Formal Consultation Initiation Package

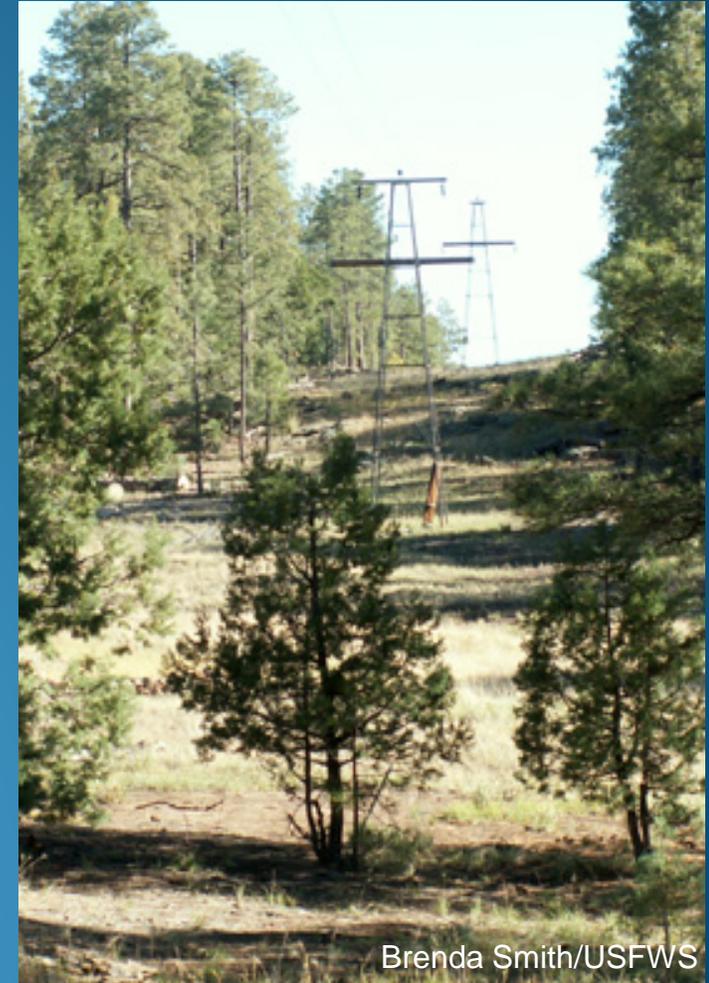
- Project Description
- Description of Area Affected
- Listed species or critical habitat present
- Effects to species/critical habitat, including cumulative
- Relevant reports, including any EIS, EA, or BE/BA
- Relevant available information on the action, species, or critical habitat



Reference: 50 CFR 402.14(c)

# Describe the Project

- Who:** Action agency, cooperators, applicants
- What:** Include all parts of the project
- Where:** Location of all aspects of the project
- When:** Beginning and end of each phase and long-term operation and maintenance
- Why:** Purpose and need, alternatives
- How:** Include any flexibility in timing, location, methods



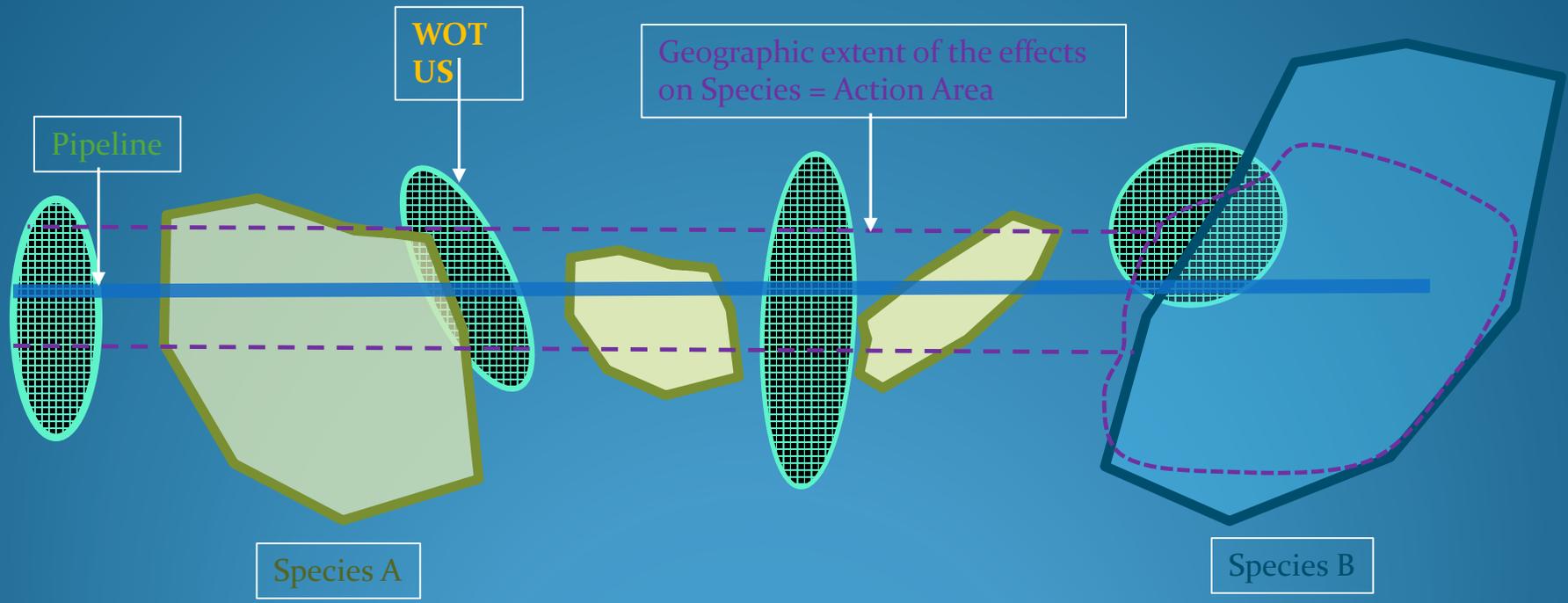
Brenda Smith/USFWS



# Action Area includes all the effects of the action

*Effects of the action* are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.

# Action area



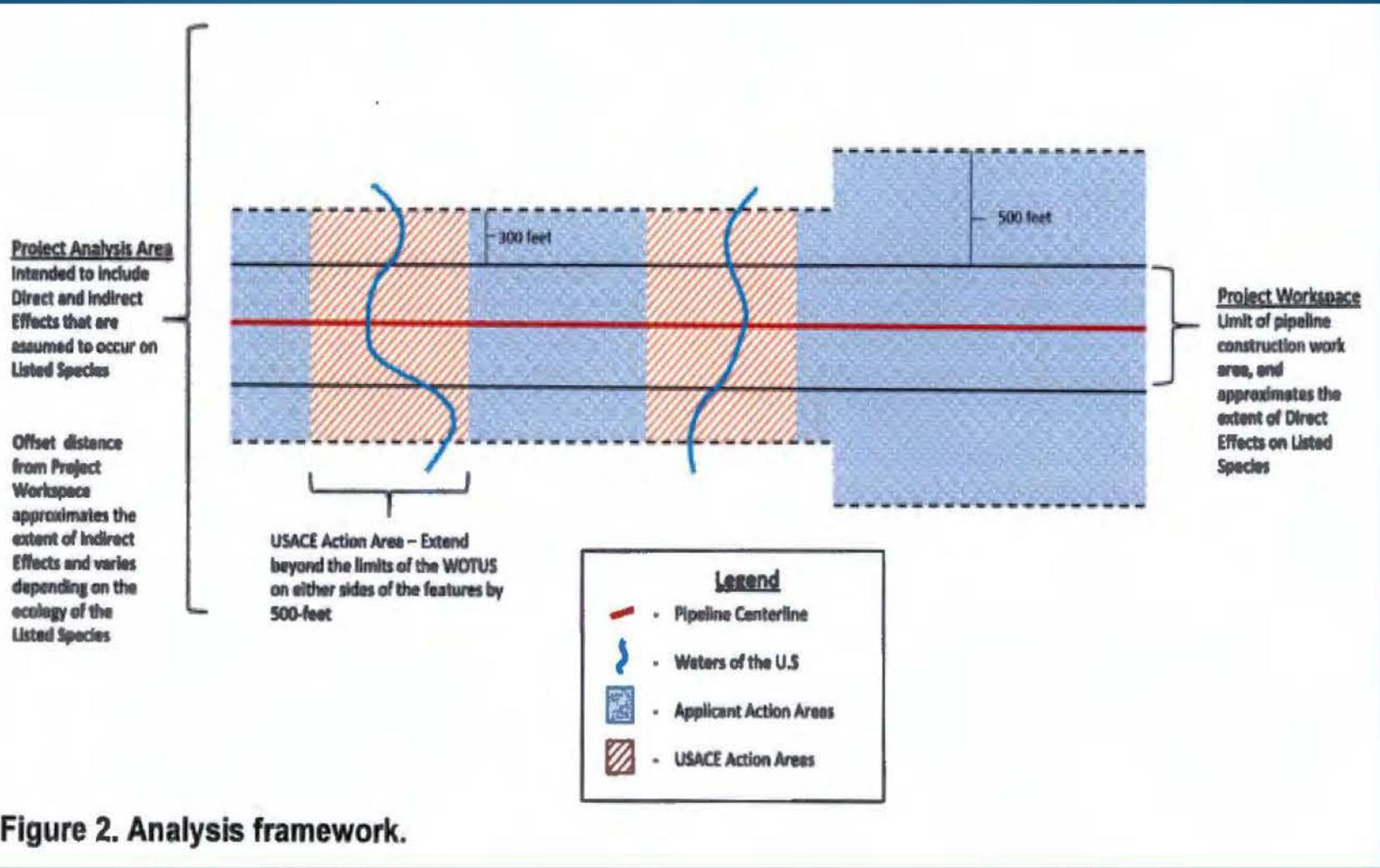


Figure 2. Analysis framework.

# Incorporation by Reference

If a proposed action is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

1. The proposed action involves similar impacts to the same species in the same geographic area;
2. No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and
3. The biological assessment has been supplemented with any relevant changes in information.



# Discretionary Elements

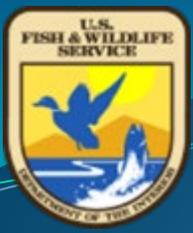
- Results of on-site inspections
- Views of recognized experts
- Review of literature and other information
- Analysis of effects, including cumulative
- Analysis of alternative actions



# Evaluation of Initiation Package

- Have the mandatory components been provided?
- If so, consultation is initiated on the date received by the FWS
- Within 30 working days, the FWS provides written acknowledgement of the consultation request and advises the Federal agency of any data deficiencies





# Section 7(d)

- Applies to Federal agencies and applicants
- Prohibits irreversible or irretrievable commitment of resources

Reference: 50 CFR 402.01





# Statutory Time Requirements

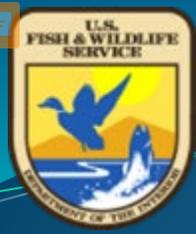
## Formal Consultation

- Begins when complete information received
- Concludes 90 days after initiation. Then 45 days to write Biological Opinion.
- May be extended for a specific time period if FWS and Federal agency mutually agree
- Cannot be extended more than 60 days without consent of applicant



# Service Responsibilities during Formal Consultation

- Review all relevant information provided by the Federal agency or otherwise available. May include an on-site inspection of the action area with representatives of the Federal agency and the applicant.
- Evaluate the current status and environmental baseline of the listed species and critical habitat
- Evaluate the effects of the action and cumulative effects on the listed species or critical habitat
- Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat.



# Statutory Time Requirements

## Biological Opinion

- Issued within 45 days after ending formal consultation

## Extension of the 45-day post-consultation period

- Only if Federal agency gets consent of the applicant
- May be extended 10 days if the Federal agency returns a draft biological opinion within 10 days of issuance deadline



# Completion of Consultation

- Issuance of biological opinion
- Re-initiation triggers:
  - The amount or extent of taking specified in the ITS is exceeded
  - New information reveals effects not considered
  - The action is later modified in a way that causes an effect not analyzed
  - A new species is listed or critical habitat designated that may be affected by the action



# Process for Section 7 Consultation in Small Federal Handle Situations

May 22, 2017 letter FWS → Corps with consultation process

October 2, 2018 letter Corps → FWS that Corps agrees with process

Preamble to revisions of section 7 regulations:

“When the Services write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the act they can assign responsibility of specific terms and conditions of the incidental take statement to the Federal action agency, the applicant, or both taking into account their respective roles, authorities, and responsibilities.”

# Process for Section 7 Consultation in Small Federal Handle Situations

The Corps will...

- Provide a BA for the proposed action as a whole and is inclusive of all anticipated effects of the larger project to listed species and critical habitat.
- distinguish between effects to listed species and critical habitat within and outside of Corps' jurisdiction.
- oversee compliance with Reasonable and Prudent Measures that apply to activities within its jurisdiction.
- Request reinitiation when triggered by one of the reinitiation factors where discretionary Federal involvement or control over the action has been retained or is authorized by law.

# Process for Section 7 Consultation in Small Federal Handle Situations

The Service will...

- Issue a biological opinion that evaluates all of the components of the larger project, including effects of the larger project on listed species and critical habitat
- Identify in the incidental take statement what reasonable and prudent measures address impacts of activities in the Corps' jurisdiction which the Corps must implement through its permit
- Identify reasonable and prudent measures that address impacts of the larger project outside the Corps' jurisdiction and specify that they must be implemented by the applicant if the take exemption is to apply.

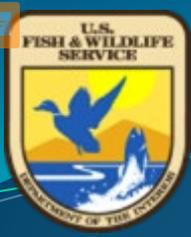


# Integrating HCPs and Federal Actions

Option 1: Include affected Federal agencies in the HCP planning process

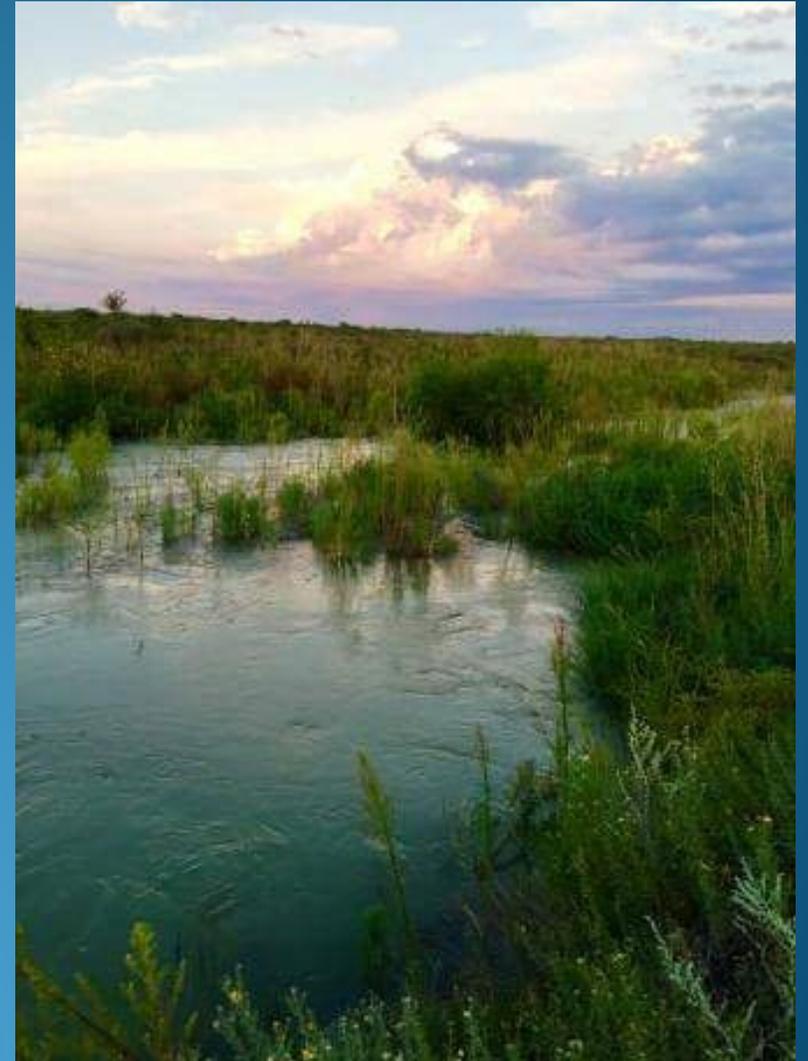
Option 2: Federal agencies request consultation under the intra-Service consultation with the Service designated as the lead federal agency

Option 3: A federal agency requests consultation for an action, and incorporates the HCP measures into their Biological Assessment.



# Tools and Policies

- Consultation handbook
- Consultation regulations
- Streamlining guidance
- FWS staff
- See our web page  
<http://www.fws.gov/southwest>



# Revisions to 50 CFR 402

## The revisions:

- Address alternative consultation mechanisms
- Revise the definitions of “destruction or adverse modification” and “effects of the action” and add definition of “environmental baseline”
- Establish deadline to conclude informal consultation
- Address circumstances for reinitiation





## Definitions Established or Revised

- Destruction or Adverse Modification
- Director
- Effects of the Action
- Environmental Baseline
- Programmatic Consultation



*Effects of the action* refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (Sec § 402.17)

## 402.17 Other Provisions

(a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

- (1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;
- (2) Existing plans for the activity; and
- (3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.



## 402.17 Other Provisions (continued)

(b) *Consequences caused by the proposed action.* To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

- (1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or
- (2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or
- (3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

(c) The provisions in paragraph (a-b) of this section must be considered by the action agency and the Services.



# What changes from prior regulations and why?

- The fundamental approach to “effects of the action” has not changed.
- We introduced the term “consequences” to avoid using “effects” to define “effects”.
- The revised definition prioritizes describing the effects, rather than categorizing effects (e.g., direct vs indirect).
- The definition articulates a two-part test (“but for” and “reasonably certain to occur”) for effects and activities resulting from an action. No change from current practice.
- The revisions will allow for greater consistency in the determination of effects.



*Environmental baseline* ~~includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.~~ **refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action.**

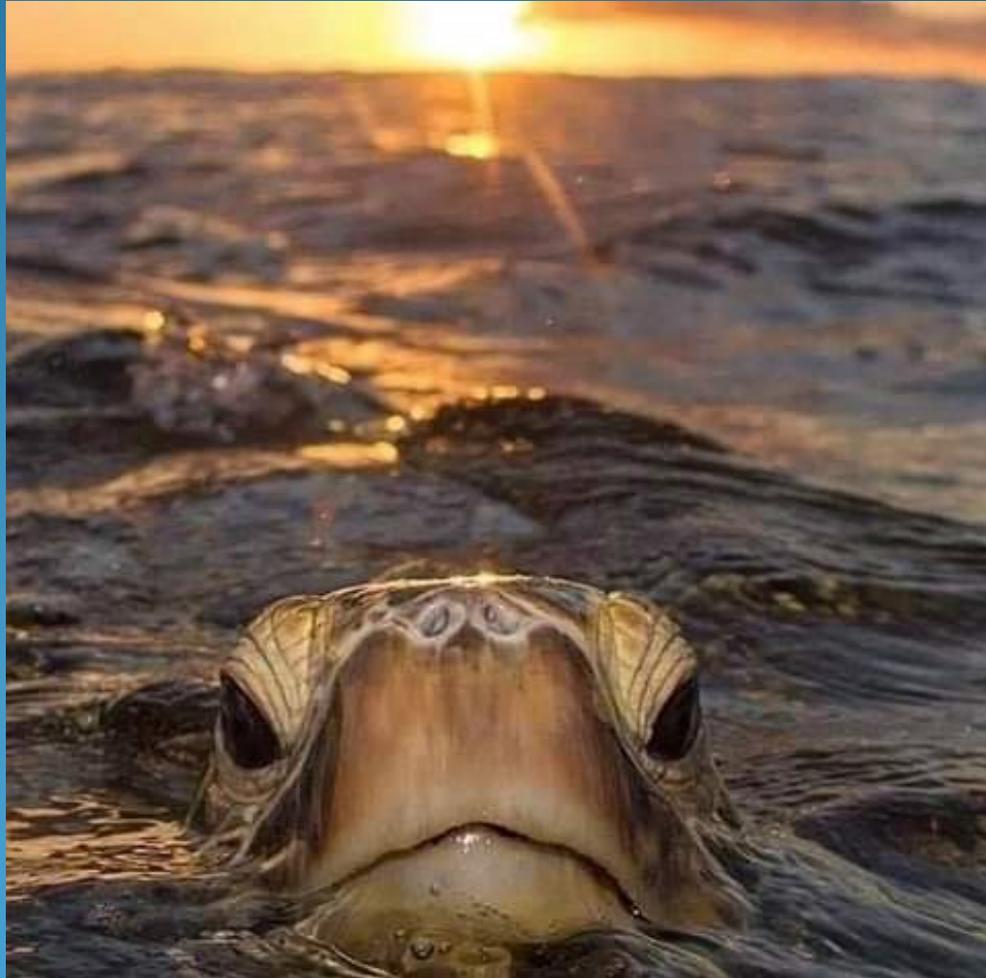
The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of state or private actions which are contemporaneous with the consultation in process.

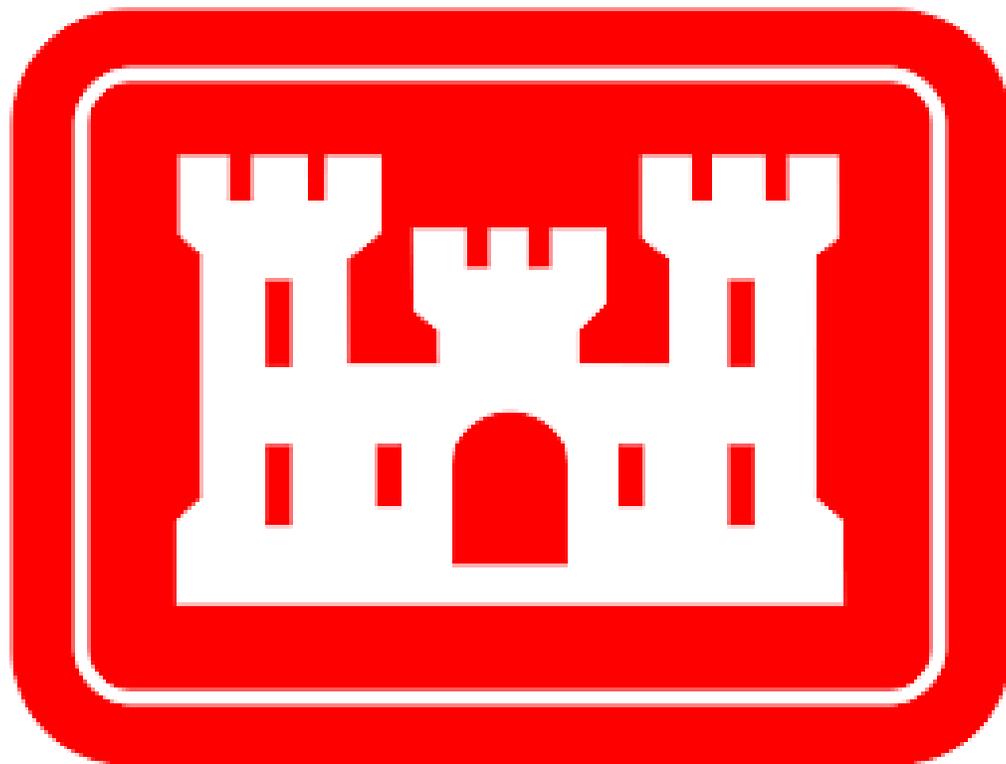
**The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.**



*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species. ~~Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.~~

Thank you!







# NATIONWIDE PERMIT (NWP) APPLICATIONS



- **33 CFR 330.4(f)(2) and General Condition 18(c)** – requires non-federal permittees to submit a pre-construction notification (PCN) for any NWP covered action “if any listed species or designated critical habitat might be affected **or** is in the vicinity of the activity, **or** if the activity is located in designated critical habitat.”
- **General Condition 32(b)(7)** – requires the project proponent to identify, in the PCN, the listed species that might be affected by the proposed NWP activity or utilizes the designated habitat in which the NWP activity is proposed to occur

(Note – A PCN submitted because the proposed activity might affect listed species or critical habitat is not authorized by NWP until either the Corps makes a “no effect” determination or makes a “may affect” determination and completes Section 7 consultation.)





# INDIVIDUAL PERMIT APPLICATIONS



- **33 CFR 325.1 Applications for permits**

- **(d) Content of application. (10) Complete application.** Provides sufficient information to issue a public notice.

- **33 CFR 325.3 Public Notice**

- **(a) General. (11)** A statement of the district engineer's current knowledge on endangered species.

- Typical Public Notice statements:

- The proposed activity “would not affect listed species or their critical habitat.” **OR**
- “may affect an endangered or threatened species or their critical habitat.”

- Public notices serve as the request for information from USFWS/NMFS on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity.

Houston Toad





# ADDITIONAL INFORMATION TO INCLUDE IN PERMIT APPLICATION



- For informal consultations, provide information listed in § 402.14(c)(1). It can be at a lesser level of detail, but needs to be sufficient for the Corps to make an effect determination and USFWS and/or NMFS to make its written concurrence (or non-concurrence) decision.
- Information required for a complete formal consultation initiation package is identified at § 402.14(c)(1), as well as a completed biological assessment.





# INFORMATION REQUIRED FOR CONSULTATIONS (50 CFR 402.14(c)(1)):



1. A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action.
  - The purpose of the action;
  - The duration and timing of the action;
  - The location of the action;
  - The specific components of the action and how they will be carried out;
  - Maps, drawings, blueprints, or similar schematics of the action; and
  - Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.
2. A map or description of all areas to be affected directly or indirectly by the federal action, and not merely the immediate area involved in the action (i.e., the action area).
3. Information obtained by or in the possession of the federal agency and any applicant on the listed species and designated critical habitat in the action area, including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.
4. A description of the effects of the action and an analysis of any cumulative effects.
5. A summary of any relevant information provided by the applicant, if available.
6. Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.



# COMMON ROADBLOCKS TO CONSULTATION



- Incorrect “No Effect” Determinations:

- Displacement

- “They’ll move out of the way during construction.”
- “There are plenty of other places in the area for them to go.”

- Not Known to Occur Here

- “I’ve been here for years and have never seen one.”
- “We surveyed and didn’t find any, so that proves they aren’t here.”

- Contracting Clauses

- “We’ll stop construction and call you if any are discovered.”
- “If found during construction, we’ll propose avoidance measures.”

- Only considered effects within the proposed project area.
- Not following updated survey and/or effects analysis guidance.
- Not providing sufficient project details for determination of effects on listed species.
- Not evaluating indirect and/or beneficial effects.





# APPLICANT TIPS



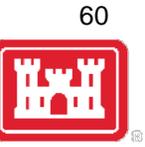
- Before submitting a DA permit application, applicants can contact USFWS/NMFS directly for technical assistance.
- Submit applications early!
- Consider species specific work windows when timing permit application submission and completion of consultation.
- Remember, a permit decision can **not** be issued until Section 7 consultation has been completed.

Whooping Crane





# THANK YOU!



Galveston District Regulatory Office  
Regulatory Hotline: 409-766-3982

Kristie Brink: 361-814-5847 x1005  
[Kristie.A.Brink@usace.army.mil](mailto:Kristie.A.Brink@usace.army.mil)

# SECTION 106 AND THE REGULATORY PROCESS

Jerry Androy  
Regulatory Archeologist and Tribal Liaison  
30 January 2020



US Army Corps  
of Engineers®



# NATIONAL HISTORIC PRESERVATION ACT (NHPA) SECTION 106 (1966)



Section 106 of the National Historic Preservation Act requires “...the head of any federal department... having authority to license any undertaking shall...prior to the issuance of any license...take into account the effect of the undertaking...” on any properties included in or eligible for the National Register of Historic Places.

In addition, the agency must afford the Advisory Council a reasonable opportunity to comment on such undertakings.



# IMPLEMENTING REGULATIONS



## 36 CFR 800

- There is a misconception that the Corps of Engineer's Regulatory Program does not follow the 800 Regs
  - we do follow it.
- The 800 Regs establish the process Federal Agencies use to (1) identify Historic Properties, (2) assess effects of a project to Historic Properties, and (3) resolve Adverse Effects to Historic Properties

33 CFR 325, Appendix C (along with the 2005 and 2007 Interim Guidance) Appendix C describes how the Corps incorporates the 800 Regs into the Regulatory process to ensure compliance with Section 106. The Corps is committed to upholding our Section 106 responsibilities but is often limited *by the authority given to us by Congress.*



# WHAT IS A HISTORIC PROPERTY?



## General Guidelines

Should be at least 50 years old

Must retain evidence of human activities

Must be physically defined as either a District, Site, Building, Structure, or Object

## Significant on a National, Regional, or Local scale

A.Event(s) and Broad

Patterns of History

B.Important People

C.Design, Construction, and Work of a Master

D.Information Potential

## Aspects of Integrity

Location

Design

Setting

Materials

Workmanship

Feeling

Association



# SECTION 106 PROCESS – INITIAL STEPS



- A. Determine the **Undertaking** and identify the **Permit Area**
  
- B. If multiple Federal Agencies are involved, identify the **Lead Agency**
  
- C. Determine if the Undertaking has the **Potential to Cause Effects to Historic Properties**



# DETERMINE THE UNDERTAKING AND IDENTIFY THE PERMIT AREA



36 CFR 800.3(a) Establish undertaking. The **agency official** shall determine whether the proposed **Federal action** is an **undertaking** as defined in 800.16(y) and, if so, whether it is a type of activity that has the **potential to cause effects** on historic properties

36 CFR 800.16(y) Undertaking means 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; and those **requiring a federal permit**, license, or approval.

Key concepts:

- The Corps is the action agency
- The Corps identifies the Undertaking
- Undertaking is defined *relative to the scope/extent* of the Corps' authority – in most instances the Undertaking for Section 106 review is the same as the Single and Complete project in NEPA
- This step is not done in consultation with the Advisory Council or the SHPO



# IDENTIFY THE LEAD FEDERAL AGENCY



There are projects where multiple Federal Agencies are involved

The Federal Agency with the greatest level of involvement should be designated as lead

- Allowed (actually encouraged) under the regulations (800 and Appendix C)
- Reduces duplication of effort
- Should be done in writing and the SHPO/Advisory Council need to be notified

When the Corps is lead, our process proceeds as normal

When another agency is lead, the Corps role/responsibilities are:

- Ensure we have all the appropriate documentation to demonstrate compliance with Section 106 in our permit areas
- Confirm our undertaking/permit area is included
- No requirement to sign MOAs/PAs (although we may)

**The 106 Process must be completed prior to permit issuance/verification**

**We should not have to “supplement” the work of the lead agency, but will if needed**



# NO POTENTIAL TO CAUSE EFFECTS



36 CFR 800.3(a)(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part

The term “No Potential to Cause Effect” is not defined in Appendix C. Instead, Appendix C Part 3(b) discusses three situations when a proposed activity has “little likelihood” to effect historic properties. These three tests are often used to make a No Potential to Cause Effects determination.

- 1) Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the permit area may be presumed to have been lost unless specific information indicates the presence of such a property (e.g., a shipwreck).
- 2) Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such a property.
- 3) Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the affected area.

**No consultation with the SHPO or Advisory Council is required**



# SECTION 106 PROCESS – IDENTIFICATION OF HISTORIC PROPERTIES



- A. Consultation with the SHPO/Advisory Council**
- B. Determine the Area of Potential Effect**
- C. Investigations for Historic Properties**
- D. Scopes of Work**
- E. Determinations of Eligibility**



# SHPO/ADVISORY COUNCIL CONSULTATION



Section 106 requires Federal Agencies provide the Advisory Council a reasonable opportunity to comment on undertakings

Section 101 of the NHPA creates the position of the State Historic Preservation Officer (SHPO)

Section 101 also grants the SHPO the authority to speak for the Advisory Council on matters within their state

Other Consulting Parties may be identified for the 106 Process

Native American Tribes may be included in the consultation process

In the Section 106 process, from this point on, every step is done in consultation with the SHPO



# AREA OF POTENTIAL EFFECT



## 36 CFR 800.4 Identification of Historic Properties

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

## 800.16 Definitions

(d) Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

Appendix C has the “But For” Clause

(i)...activity would not occur but for the authorization of the work or structures within WOUS.

(ii)...activity must be integrally related to the work or structures to be authorized within WOUS. OR...the work or structures authorized must be essential to the completeness of the overall project and program.

(iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

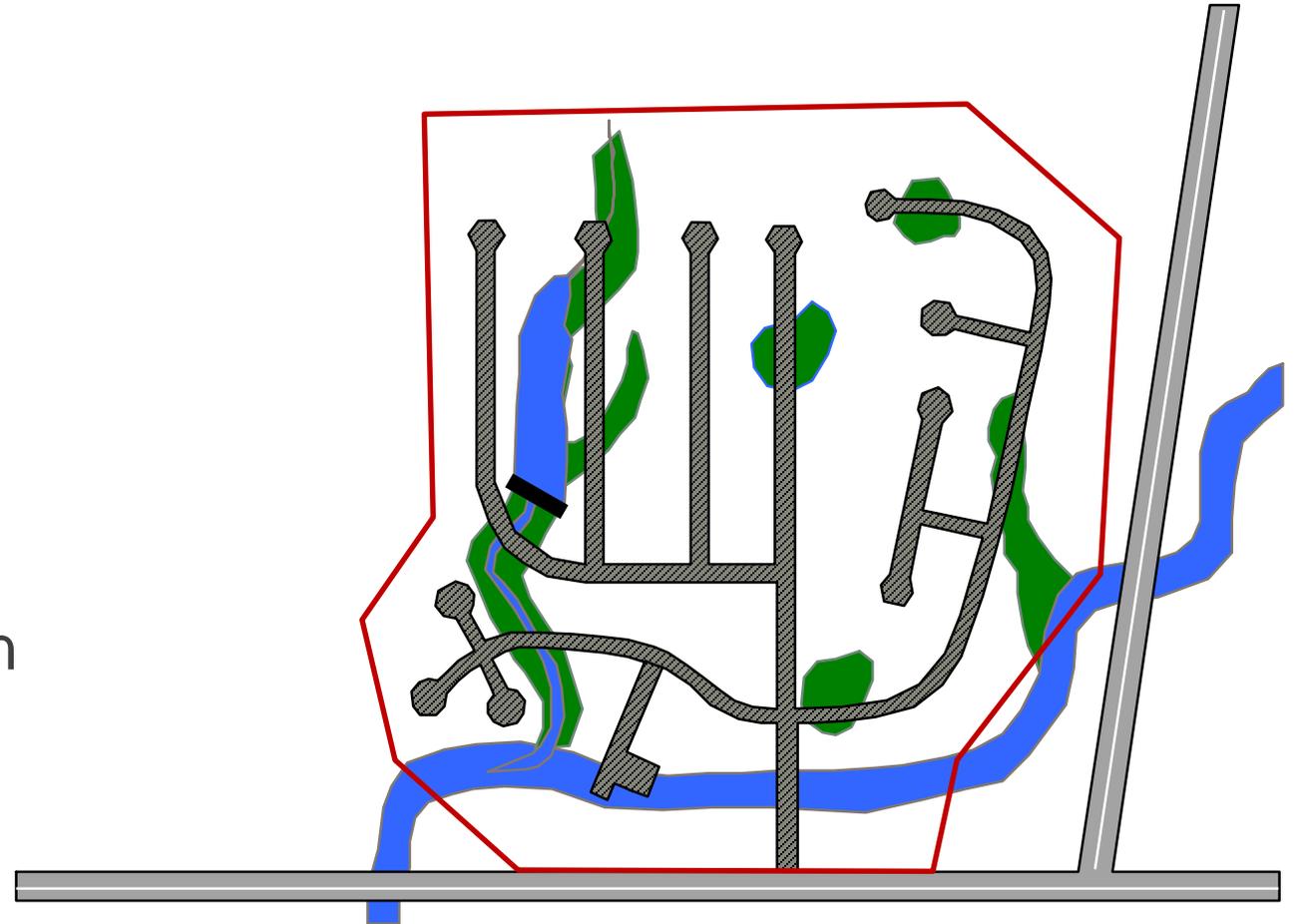


# AREA OF POTENTIAL EFFECT/“BUT FOR” CLAUSE



*For example*

- A residential development is proposed
- Will impact wetlands and streams
- Apply the “but for” clause and capture everything within the red boundary
- Consult with the SHPO and they agree the APE is everything within the red boundary





# INVESTIGATIONS FOR HISTORIC PROPERTIES



36 CFR 800.4(b)(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.

The agency official shall take into account:

past planning, research and studies,

the magnitude and nature of the undertaking and the degree of Federal involvement,

the nature and extent of potential effects on historic properties,

and the likely nature and location of historic properties within the area of potential effects.



# SCOPES OF WORK FOR INVESTIGATIONS



The Corps strongly recommends the applicant submit a scope of work for Section 106 Investigations

- Ensure the correct level of effort occurs
- Ensure the permit area and area of potential effect are covered
- Ensure the correct investigations are conducted

Most investigations are completed prior to submitting an application

- The Corps can't give a definitive response until a permit application is submitted
- The Corps' Project Manager has to determine the Undertaking
- The Corps can provide general guidance



# DETERMINATIONS OF ELIGIBILITY



36 CFR 800.4(c)(2) Determine whether a property is eligible.

If the **agency official determines** any of the National Register criteria are met and the SHPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the **agency official determines** the criteria are not met and the SHPO agrees, the property shall be considered not eligible.

- The key item to focus on - only the Federal Agency can make a determination of eligibility in the 106 process



# SECTION 106 PROCESS – ASSESSMENT OF EFFECTS



- A. What is an Effect in the Section 106 Process
  - A. What is a Direct Effect
  - B. What is an Indirect Effect
- B. No Effect/No Historic Properties Present
- C. No Adverse Effect
- D. Adverse Effect
- E. Resolution of Adverse Effects



# EFFECTS AND THE DIFFERENCE BETWEEN DIRECT AND INDIRECT EFFECTS



## 36 CFR 800.16 Definitions

(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

There is a general misunderstanding in the 106 process that direct effects are physical impacts and indirect effects are any non-physical impacts.

- A direct effect is any alteration to the aspects of integrity that are caused by an undertaking.
- An indirect effect is any alteration to the aspects of integrity that are caused by a project but come later in time or are more distantly related to the undertaking.

## Aspects of Integrity

- Location
- Design
- Setting
- Materials
- Workmanship
- Feeling
- Association



# NO HISTORIC PROPERTIES PRESENT/NO EFFECT



No Historic Properties Present – an investigation was completed and no properties were identified within the APE that were determined eligible for inclusion in the National Register of Historic Places

No Effect – National Register eligible property/properties are present but the project will not alter any of the qualifying characteristics

Special conditions may be placed on permits to ensure a No Effect determination



# NO ADVERSE EFFECT TO HISTORIC PROPERTIES



Properties eligible for inclusion in the National Register are present and the project will result in an alteration to the qualifying characteristics, however:

- The alterations are beneficial to the property
- The alterations are so minor that they are of no concern

Special conditions may be placed on permits or a Memorandum of Agreement will be executed to ensure a No Adverse Effect determination



# ADVERSE EFFECTS TO HISTORIC PROPERTIES



Properties eligible for inclusion in the National Register are present and the proposed project will result in alterations to the qualifying characteristics in a manner which will result in loss of eligibility  
Adverse Effects must be resolved prior to issuing a permit/verification

## Resolution of Adverse Effects

- Avoidance – can the project be redesigned to avoid all impacts? (Special Condition applied to permit)
- Minimization – can the project be redesigned to minimize the impacts so they are no longer adverse? (Special Condition applied to permit)
- Mitigation – redesign to avoid or minimize is not an option – some form mitigation will need to occur (a MOA must be executed and Special Condition will be placed on the permit)



# RESOLUTION OF ADVERSE EFFECTS - MITIGATION



Memorandum of Agreements and Special conditions are required (special conditions alone not sufficient, per 2005 Interim Guidance)

It generally takes the Corps about 4-6 months to execute a MOA

– If everything goes well, if problems are encountered it could take significantly longer

Mitigation cannot occur prior to execution of the MOA

The permit cannot be issued/verified until the MOA is executed and the mitigation is completed (or all signatories agree construction can commence)



# TRIBAL CONSULTATION





# TRIBAL CONSULTATION AND THE NATIONAL HISTORIC PRESERVATION ACT (NHPA)



## **Section 101(d)(6)(A) – Added 1992**

Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be historic properties.

## **Section 101(d)(6)(B) – Added 1992**

The Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties.

Compliance with Section 101(d)(6) occurs through the Section 106 process.



# CONSULTING WITH TRIBES UNDER SECTION 106



- Consultation required when eligible properties of cultural or religious importance could be affected by the proposed undertaking
- Properties can be located on private lands
  - There may be other properties of interest to tribes, e.g. historic building where a treaty may have been signed
  - Tribes that should be consulted with may no longer live in the region
- Treaties may define other Tribal Trust Resources
- The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.



# TRIBE'S WITH AN INTEREST IN THE GALVESTON DISTRICT



1. Alabama-Coushatta Tribe of Texas
2. Alabama-Quassarte Tribal Town
3. Apache Tribe of Oklahoma
4. Caddo Nation of Oklahoma
5. Cherokee Nation
6. Cheyenne And Arapaho Tribes, Oklahoma
7. Choctaw Nation of Oklahoma
8. Comanche Nation of Oklahoma
9. Coushatta Tribe of Louisiana
10. Delaware Nation
11. Eastern Band of the Cherokee Indians
12. Kickapoo Traditional Tribe of Texas
13. Kiowa Indian Tribe of Oklahoma
14. Mescalero Apache Tribe
15. Northern Arapaho Tribe
16. The Seminole Nation of Oklahoma
17. Tonkawa Tribe of Oklahoma
18. Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie)



# TRIBAL CONSULTATION EARLY IN THE PLANNING PROCESS



I recommend you reach out to Tribes early in the planning stages of a project to get their input

How do you find out which Tribes to contact?

- Reach out to the Corps' Tribal Liaison
- You can check the Tribe's websites or contact their Historic Preservation Office
- HUD has a good online database (the Tribal Directory Assessment Tool (TDAT))
  - <https://egis/hud.gov/TDAT/>

Even if you contact the Tribes, the Corps still has to engage in government-to-government consultation – but it goes much smoother when the Tribes know of the project and are good with it



# TRIBAL HISTORIC PRESERVATION OFFICER (THPO)



If a project is occurring on Tribal Lands and the Tribe has a THPO, then their THPO replaces the SHPO in Section 106 process.

The Alabama-Coushatta Reservation is the only reservation within the Galveston District and they do not have a THPO.



# COMMONLY ASKED QUESTIONS AND RECURRING PROBLEMS





# ARPA PERMITS AND NAGPRA



The Archeological Resources Protection Act and the Native American Grave Protection and Repatriation Act only apply to Federal Lands and Federal Property.

In the Galveston District, you will only deal with the Corps and ARPA or NAGPRA if your project is located on Addicks and Barker Reservoirs or Wallisville Lake (or a few other minor land holdings)

These laws only apply to fee owned property – it does not include easements

If your project is crossing another Federal Agency's land, then they are responsible for their own ARPA and NAGPRA



# HUMAN REMAINS



If you encounter human remains during 106 surveys or construction:

- Stop all work in the immediate vicinity
- Follow State law and contact the local Sheriff's office
- Contact the Corps
- Contact the SHPO
- If human remains are removed from the site, it is the applicant's responsibility to know where they are at all times



# SECTION 110(F) NHPA – NATIONAL HISTORIC LANDMARKS



Prior to the approval of any Federal undertaking which **may directly and adversely** affect any National Historic Landmark, the head of the responsible Federal agency shall, to the **maximum extent possible**, undertake such planning and actions as may be necessary to **minimize harm** to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

A direct effect is any alteration to the characteristics that are caused by a project.

## Aspects of Integrity

Location

Design

Setting

Materials

Workmanship

Feeling

Association



# LINEAR PROJECTS AND THE “BUT FOR” CLAUSE



33 CFR 325 1.g(4) ...consider a linear crossing of the waters of the United States; for example, by a transmission line, pipeline, or highway.

(i) Such projects almost always can be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States... Thus the "but for" test is not met by the entire project right-of-way... Typically, however, some portion of the right-of-way, approaching the crossing, would not occur in its given configuration "but for" the authorized activity. This portion of the right-of-way, whose location is determined by the location of the crossing, meets all three tests and hence is part of the permit area.

(ii) Accordingly, in the case of the linear crossing, the permit area shall extend in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated...



# LINEAR PROJECTS AND THE “BUT FOR” CLAUSE

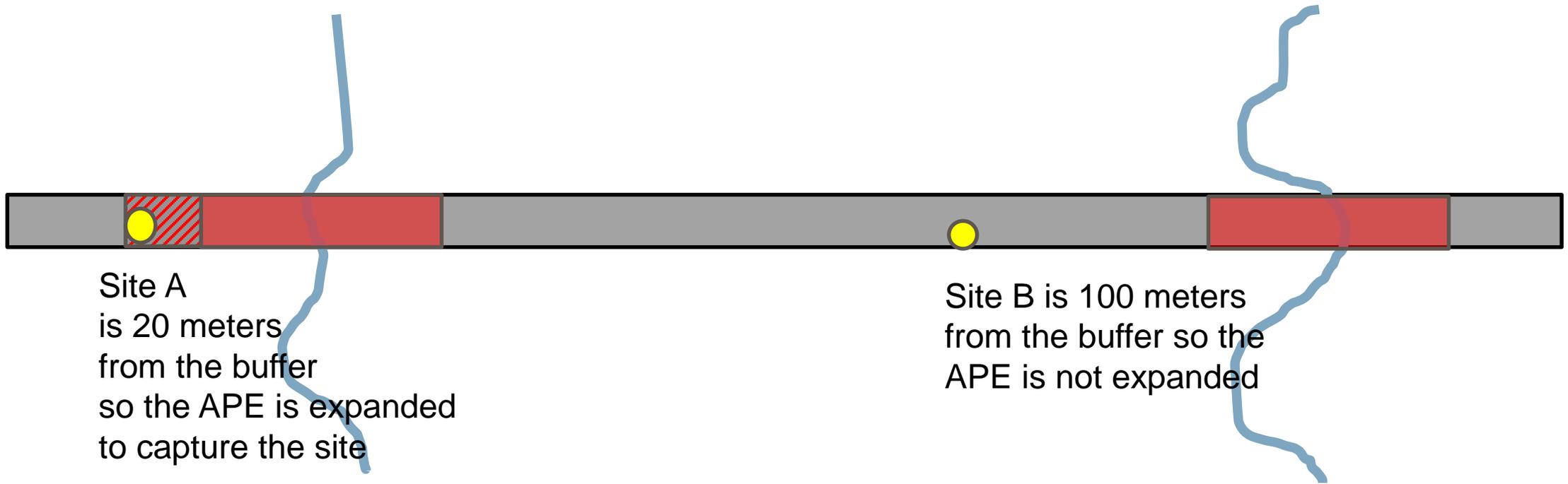


In the Galveston District, we use the following guidelines for Section 106 Investigations on Linear Projects (these are guidelines not hard rules):

- All jurisdictional wetlands need to be reviewed
- The review should include the entire wetland plus a 50 meter buffer
- If there is a recorded historic property or archeological site within 25 meters of the buffer, the buffer needs to be extended to include the property/site
- If there are a series of wetlands with 100 meters or less between the buffered zones, then the entire area should be included in the 106 APE
- If the 50-meter buffer enters an area that doesn't need investigation, then it can be excluded
- HDDs under section 404 waters are not subject to Section 106 review, provided the entry and exit locations and the workspaces are in uplands



# EXAMPLE – LINEAR PROJECTS AND THE “BUT FOR” CLAUSE

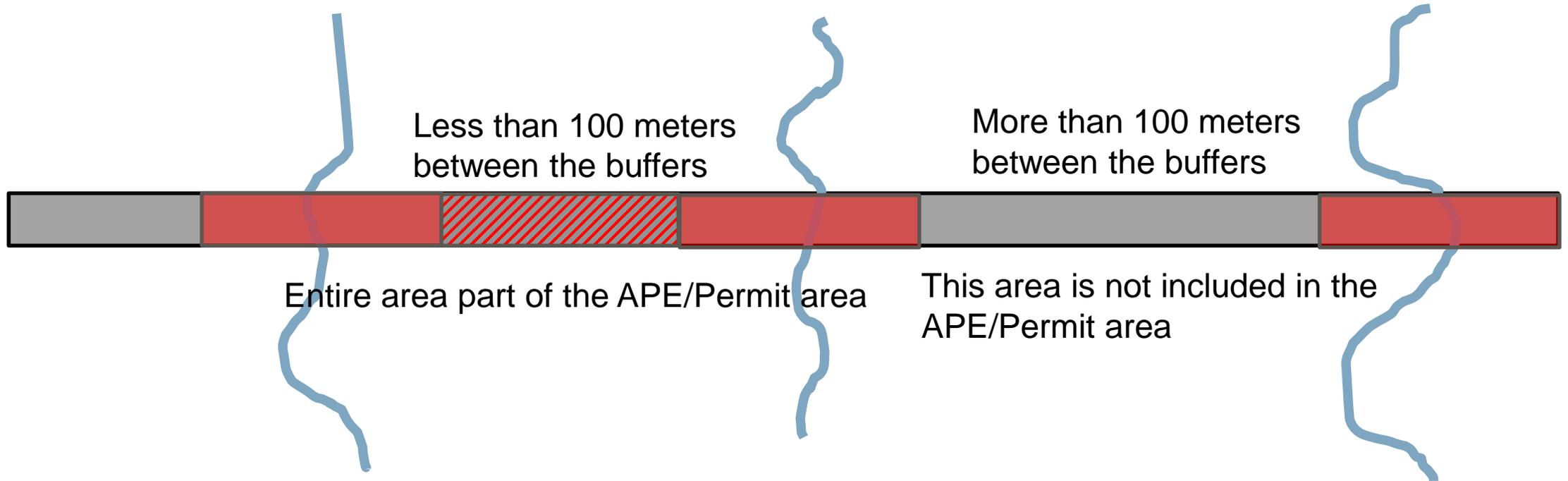


Site A is 20 meters from the buffer so the APE is expanded to capture the site

Site B is 100 meters from the buffer so the APE is not expanded



# EXAMPLE – LINEAR PROJECTS AND THE “BUT FOR” CLAUSE





# LINEAR PROJECTS AND ARCHEOLOGICAL SITES IN UPLANDS



While the “but for” clause doesn’t allow the Corps to capture an entire linear project, the Corps still recognizes activities occur within uplands.

2.b. In addition to the requirements of the NHPA, **all historic properties** are subject to consideration under the National Environmental Policy Act, (33 CFR Part 325, Appendix B), and the Corps' **public interest review requirements** contained in 33 CFR 320.4. Therefore, historic properties will be included as a factor in the district engineer's decision on a permit application.

5.f. ...The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but **will consider the effects of undertakings on any known historic properties that may occur outside the permit area.**

If you have a linear project, the archeological technical report should include a discussion of all recorded properties – even those in uplands outside the permit area. The Corps cannot require the sites in uplands be investigated, but we will make assumptions based on the best information available as to whether or not the properties are eligible for the National Register and the assessment of effect.

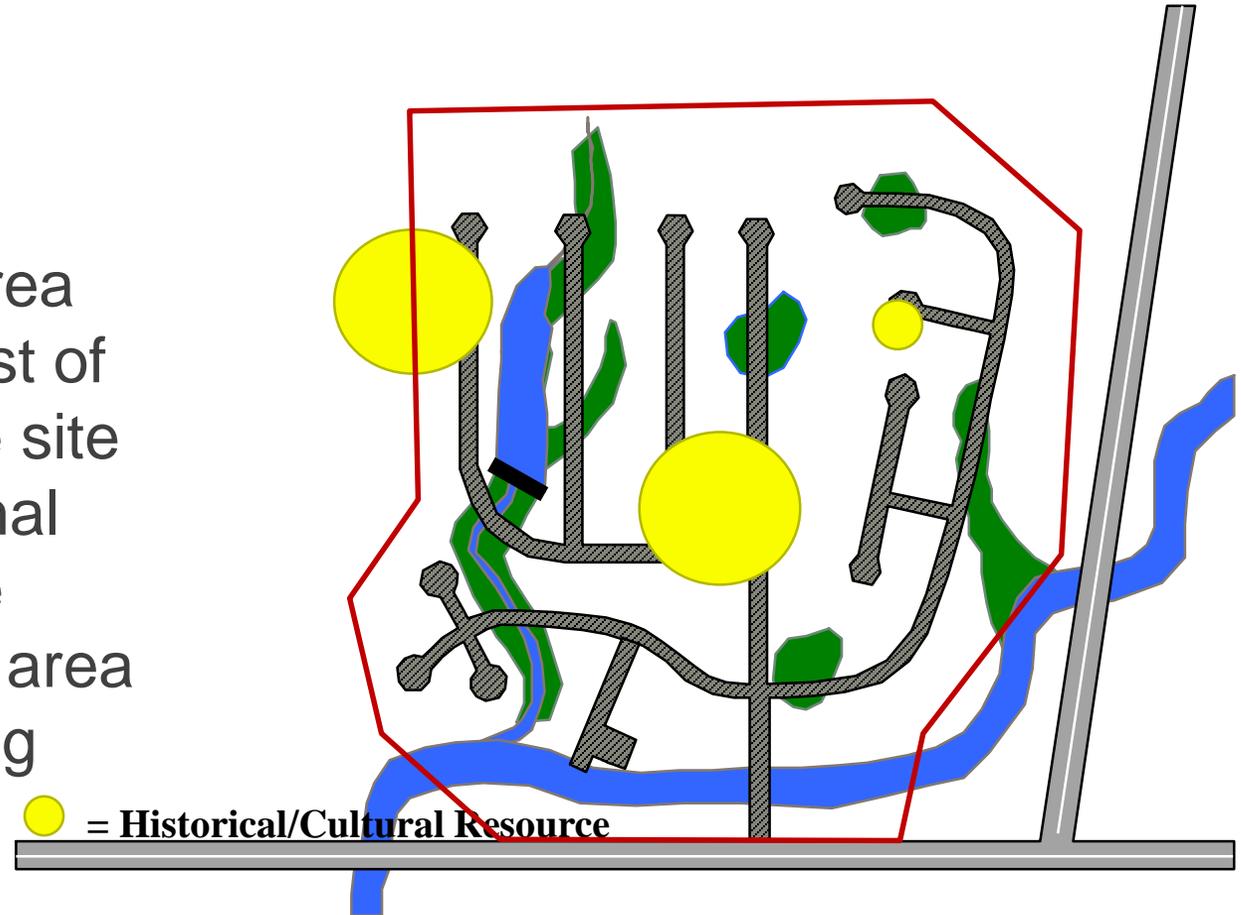


# SITES PARTIALLY WITHIN A PERMIT AREA



What happens when a site extends outside the project area?

- The Corps cannot require investigations outside the permit area
- You may find it is in the best interest of your project to document the entire site
- If you can't, then greater than normal investigation needs to occur on the portion of the site within the permit area
- The effort should include excavating one or more 1x1 meter test units





# NON REPORTING NATIONWIDE PERMITS



Only projects with **No Potential to Cause Effects** to Historic Properties qualify for Non Reporting Nationwide Permits

- 1) Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the permit area may be presumed to have been lost unless specific information indicates the presence of such a property (e.g., a shipwreck).
- 2) Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such a property.
- 3) Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the affected area.



# SECTION 110(K) – ANTICIPATORY DEMOLITION



Each Federal agency shall ensure that the agency **will not grant** a loan, loan guarantee, **permit**, license, or other assistance to an applicant who, with **intent to avoid the requirements of section 106**, **has intentionally significantly adversely affected a historic property** to which the grant would relate, **or having legal power to prevent it, allowed such significant adverse effect to occur**, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

## Appendix C has the “But For” Clause

(i)...activity would not occur but for the authorization of the work or structures within WOUS.

(ii)...activity must be integrally related to the work or structures to be authorized within WOUS. OR...the work or structures authorized must be essential to the completeness of the overall project and program.

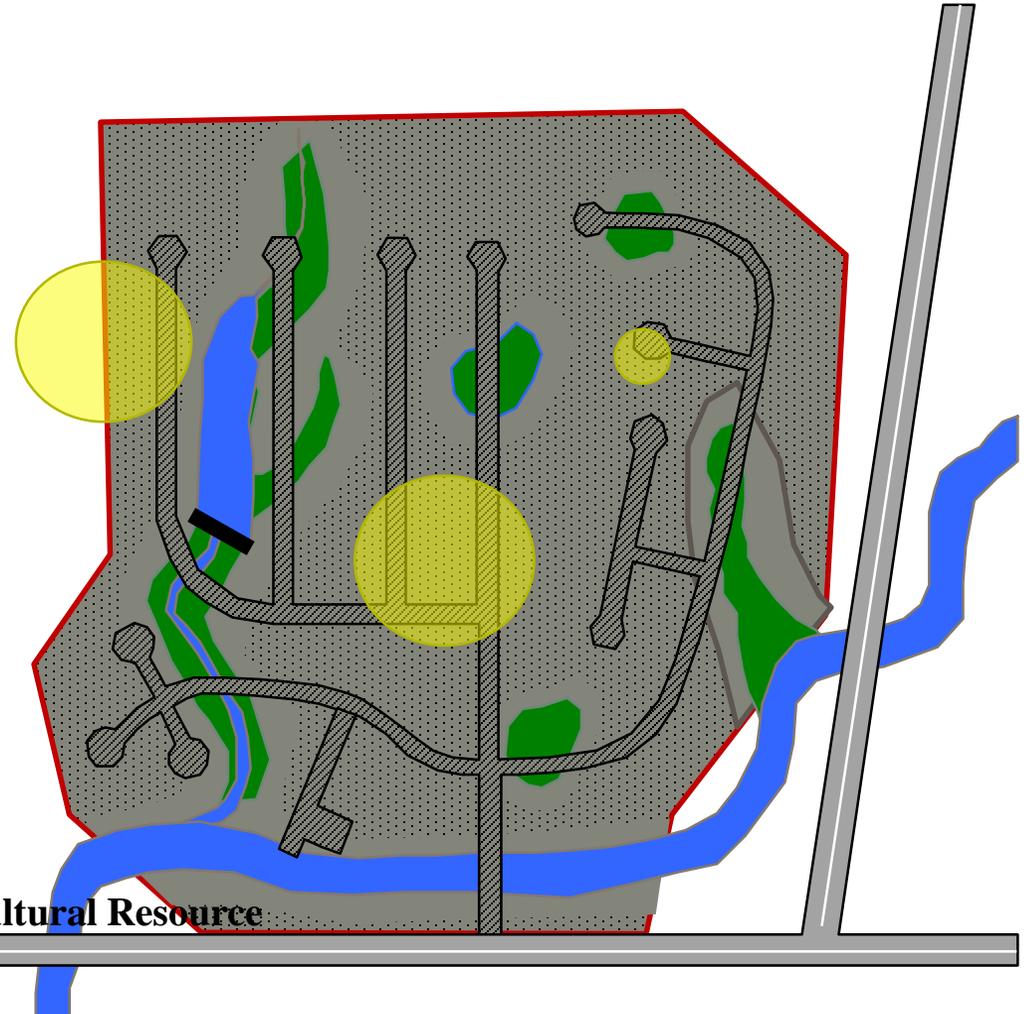
(iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.



# SECTION 110(K) – ANTICIPATORY DEMOLITION



Action	Performed by	Timeframe*
The Corps conducts an investigation of the alleged Section 110(k) violation	Corps	30 days
The Corps prepares a factual report of findings based on the results of the investigation	Corps	30 days
The State Historic Preservation Officer (SHPO) and the applicant review and provide comments on the report of findings	SHPO and Applicant	30 days
The Corps incorporates any comments from the SHPO and the applicant into the report of findings and submits to the Advisory Council on Historic Preservation (ACHP)	Corps	30 days
The ACHP reviews the report of findings and provides an opinion to the Corps	ACHP	45 days
The Corps uses the factual information, the report of findings, and the ACHP's opinion to make a decision on how to proceed	Corps	30 days



● = Historical/Cultural Resource



# ARCHEOLOGICAL MONITORING



## Approvable Situations

- When work is occurring close to a known Historic Property
- When traditional survey methods are unreasonable due to cost (money **and** time)
- When environmental impacts for an investigation are prohibitive

## Situations Not Likely to be Approved

- When traditional survey methods seem unreasonable due to cost (money **or** time)
- In lieu of survey (e.g. the land owner won't allow on their property)



# DESKTOP REVIEWS



- Desktop reviews are a great tool during the planning stage of a project
- Remember – this is only the Archeological Consultant's opinion
- The Archeological Consultant should visit the project area
- The Corps and/or the SHPO may disagree with the opinion
- Make sure any desktop review is coordinated with the SHPO
- Make sure you have read the desktop review and know what it states
- Include desktop reviews with your permit application
  - It will be reviewed and any information in it will be taken into consideration



# CAN 106 BE COMPLETED AFTER THE PERMIT IS ISSUED?



The most common response is No

But there are exceptions

- When Archeological Monitoring is approved
- When a Programmatic Agreement is executed



# QUESTIONS? COMMENTS?



Reminder - This presentation will be placed on our website



# Texas General Land Office

Coastal Field Operations

---



# Coastal Field Operations

## Upper Coast Field Office

11811 North D St.

La Porte, Texas 77571-9135

Phone: 281-470-1191

Fax: 281-470-8071

### Areas of Responsibility:

North and east of Colorado River (Matagorda County) to the Texas/Louisiana border

## Lower Coast Field Office

602 N. Staples Street, Suite 240

Corpus Christi, Texas 78401

Phone: 361-886-1600

Fax: 361-888-9305

### Areas of Responsibility:

South and west of (and including) Colorado River (Matagorda County) to the Texas/Mexico border



# Coastal Field Operations

- We are part of Coastal Resources Division, under Coastal Protection
- 22 Full-time employees, 2 interns
- Key functions:
  - Coastal surface leasing
  - Permit Service Center
  - Storm response
  - Assist with other Coastal initiatives
  - Support other divisions in the agency





# Coastal Field Operations

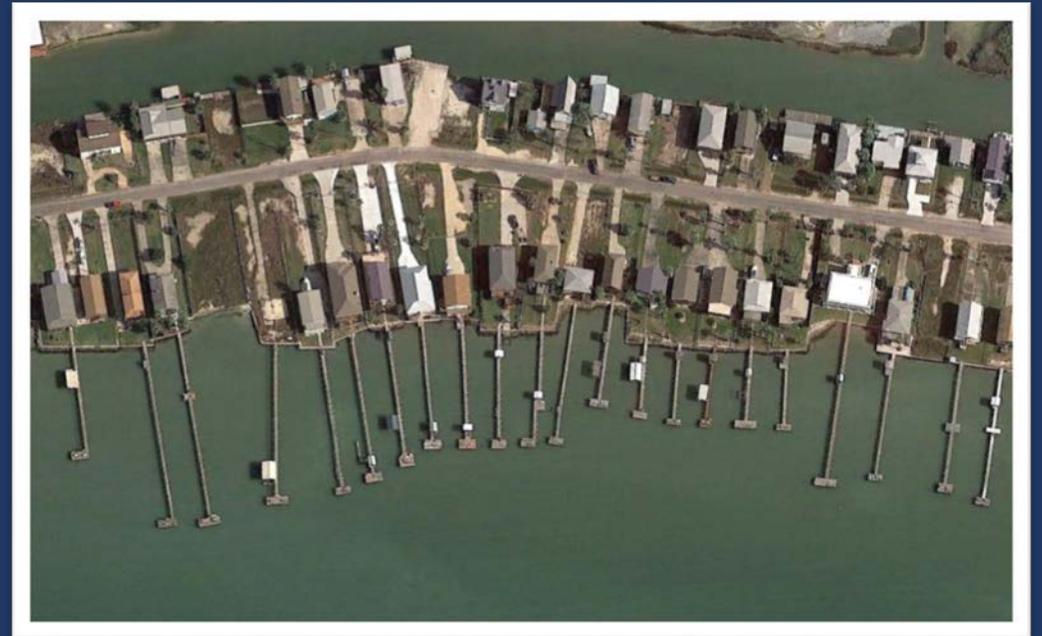
---

- Coastal Surface Leasing
  - Provide technical field assessments and contracts for projects on state-owned submerged land
    - Submerged lands in bays, and tidewater limits of coastal lakes, bayous, inlets, streams, estuaries, rivers, and creeks
  - Authorization required from Texas General Land Office and School Land Board
    - Texas Natural Resources Code, Chapters 33 and 51
    - Texas Administrative Code
  - Jurisdiction extends to 10.3 miles into Gulf of Mexico
  - More than 9000 active Coastal Easements, Leases, and Registrations



# Coastal Field Operations

- Examples of Leases/Easements/Registrations issued by the GLO:
  - CE (Coastal Easement)
  - SP (Structure Registration Permit)
  - LC (Commercial Coastal Easement)
  - PC (Cabin Permit)
  - SL (Surface Lease)
  - CL (Coastal Lease)
  - SD (Special Document)
  - ME (Miscellaneous Easement)





# Permit Service Center (PSC)

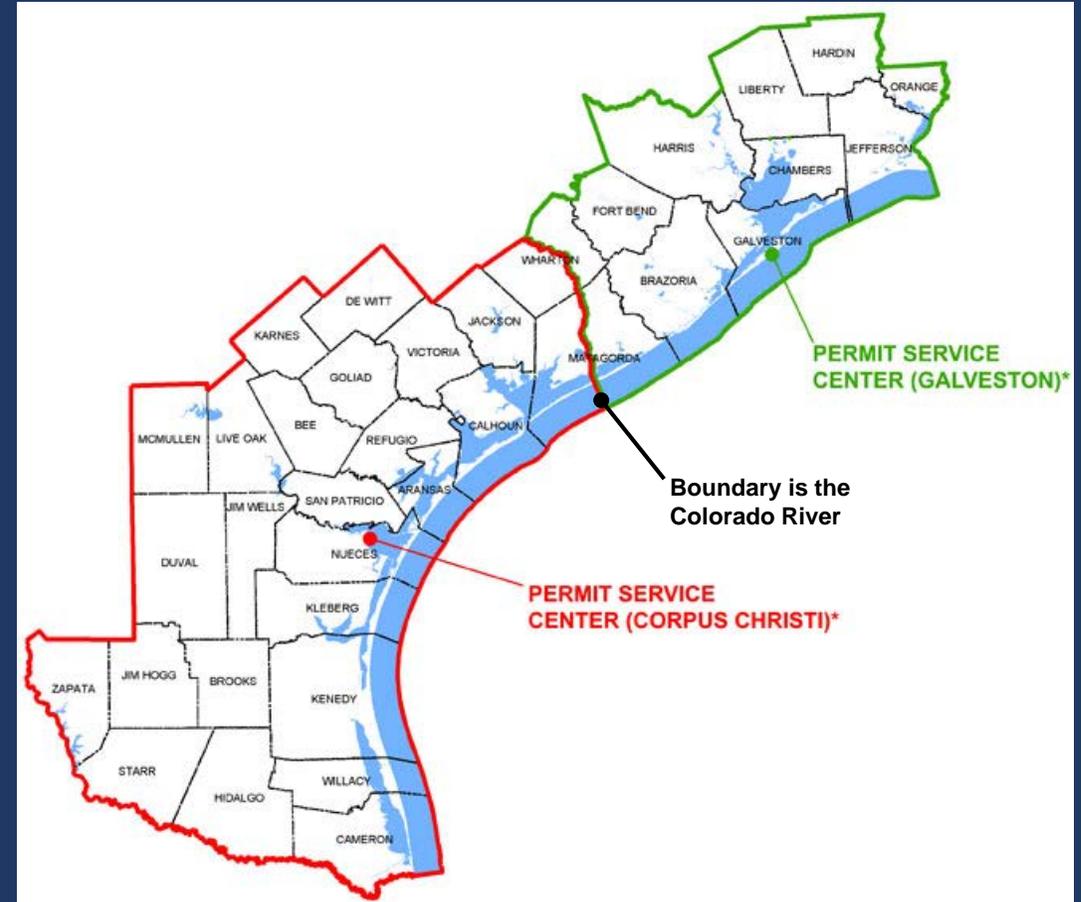
## Galveston

Texas A&M Galveston Campus  
Sea Aggie Center, Room 912  
Galveston, TX 77553  
(409) 741-4057

## Corpus Christi

602 N. Staples Street, Suite 240  
Corpus Christi, TX 78401  
(361) 886-1630

[permitting.assistance@glo.texas.gov](mailto:permitting.assistance@glo.texas.gov)





# Permit Service Center (PSC)

---

- The PSC, established under the Texas Coastal Management Program (CMP) by the Coastal Coordination Act, provides individuals and small businesses in the coastal zone permitting assistance at no charge.
- Overall goal: to streamline the permitting process for the applicant
- Benefits include:
  - Clarification of what permits are needed for a project
  - Serve as a central receiving point to streamline the process
  - Provide technical guidance to applicants
  - Utilize the Joint Permit Application (US Army Corps of Engineers/General Land Office)



# Permit Service Center (PSC)

---

- Administration of the USACE Pier Regional General Permit (GP) (SWG-2002-02904)
  - Cooperative agreement signed in 2009 by GLO and USACE.
    - GLO has administered 700+ Pier General Permits since signing the agreement
  - The GLO administers the USACE GP for qualifying structures, greatly streamlining the permitting process
  - This is also used to encourage applicants to reduce the size of their proposed structures to streamline the authorization process



# Federal Consistency

---

- Federal Consistency Review is the process by which the Coastal Coordination Advisory Committee (CCAC) ensures that projects occurring within the coastal zone comply with CMP goals and policies.
- The process for conducting consistency reviews addresses four questions:
  - Is the proposed project within the CMP boundary?
  - Will the proposed project adversely affect CNRAs?
  - Is the proposed project subject to review?
  - Is the proposed project consistent with the goals and policies of the CMP?



# Federal Consistency

---

- There are several types of permit applications that are reviewed by the Council:
  - Federal Actions (Corps Permits)
  - Federal Activities (Corps dredging projects)
  - Letters of Permission/Interagency Coordination Notices
  - Outer Continental Shelf Plans/Right-of-Way pipelines
  - Federal Financial Assistance (local government funding from HUD)
  - Activities and Development Projects (Interagency Coordination Teams) – Widening and Deepening projects
- Projects meeting the criteria for Nationwide permits are not reviewed because the Nationwide permit was deemed consistent.



# Hurricane Planning & Response

---

- Impact Assessment
  - Soon as safe and timely, field teams deploy
  - Locate and document hazardous debris on state land
  - Document damage to structures on state land
- Debris Removal
  - GLO legal responsibility: removal of debris that poses an immediate threat to human health and safety on state land
    - State-owned submerged lands
    - Public beaches
  - Work closely with FEMA and USACE



# Hurricane Harvey

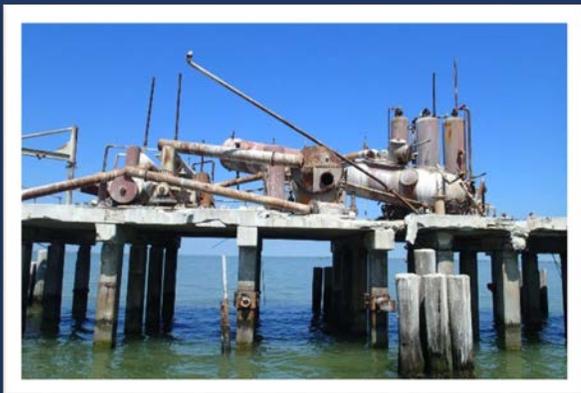
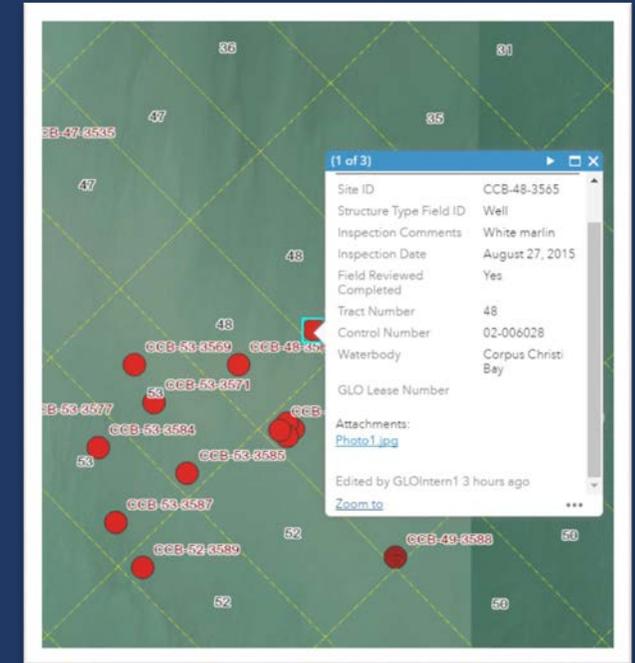
- 997 structures (piers) damaged over 50%
  - Majority in lower coast (Aransas, Calhoun, and Matagorda counties)
  - 40,400 cubic yards of debris removed from the public beach and state land
  - 165 vessels removed by GLO's Oil Spill program





# Other Coastal Initiatives

- Texas Coastal Resiliency Master Plan
- Coastal Texas Protection Restoration Feasibility Study
- NOAA Grants
  - CMP, Living Shorelines, Rapid Assessment Method (RAM), Coastal Taxonomy Project
- Track / document unauthorized and derelict structures
  - Identify / seek funding for removal





# Inactive Pipelines (Texas Bays)

- “Abandonment in place” will not be authorized
- Upon expiration of the easement, an final 5-year term may be requested
- Removal is required before the end of that term
  - Documentation / removal report required
  - Exceptions may be considered on limited, case by case basis
    - If granted, an easement is required as long as line is present
    - Maintenance (compliance, reburial, etc.) is responsibility of easement holder
    - Possible future removal required
- Policy can be found here:





# Contacts

---

## Upper Coast / La Porte

### Coastal Field Operations

11811 North D St.  
La Porte, Texas 77571-9135  
Phone: 281-470-1191  
Fax: 281-470-8071

## Galveston

### Permit Service Center

Texas A&M University Galveston  
1001 Texas Clipper Road  
Building 3026, Room 912  
Galveston, Texas 77554  
Phone: 409-741-4057  
Fax: 409-741-4010  
Toll Free: 866-894-7664

## Lower Coast / Corpus Christi

### Coastal Field Operations/Permit Service Center

602 N. Staples Street, Suite 240  
Corpus Christi, Texas 78401  
Coastal Field Operations Phone: 361-886-1600  
Permit Service Center Phone: 361-886-1630  
Fax: 361-888-9305

[permitting.assistance@glo.texas.gov](mailto:permitting.assistance@glo.texas.gov)  
[federal.consistency@glo.texas.gov](mailto:federal.consistency@glo.texas.gov)



**TEXAS**

---

**PARKS &**

---

**WILDLIFE**

# Inland Fisheries Division



## Sand & Gravel Permitting Program

# **TPWD Sand & Gravel Permit Program**

- TPWD Authority**
- TPWD Jurisdiction**
- Permits**

# TPWD Authority

## ◆ CHAPTER 86, PARKS & WILDLIFE CODE

**§86.001** “The commission shall manage, control, and protect marl and sand of commercial value and all gravel, shell and mudshell located within the tidewater limits of the state, and on islands within those limits, and within freshwater areas of the state not embraced by a survey of private land, and on islands within those areas.”

# TPWD Authority

## ◆ CHAPTER 86, PARKS & WILDLIFE CODE

§86.002 (a) No person may disturb or take marl, sand, gravel, shell or mudshell under the management and protection of the commission...for any purpose other than that necessary or incidental to navigation or dredging under state or federal authority without first having acquired from the commission a permit authorizing the activity.”

# TPWD Jurisdiction

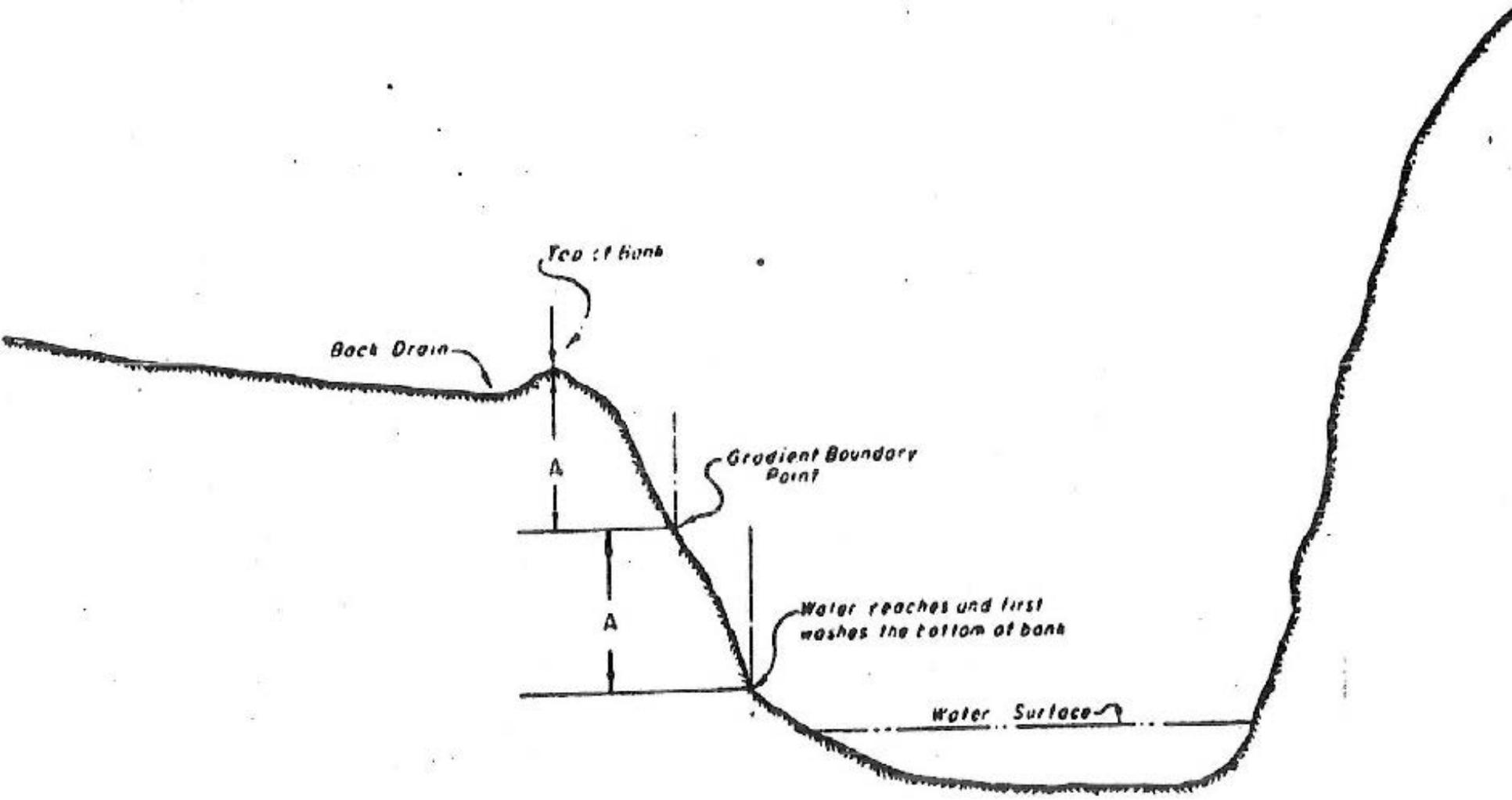
- ◆ **PUBLIC FRESHWATER AREAS**
  - ◆ **Navigable Streams** - state definition: streams averaging 30 feet wide or more between the banks from the mouth up
    - ◆ **State-owned** - publicly owned, publicly accessible
    - ◆ **“Small Bill” Streams** - privately owned, publicly accessible
  - ◆ **Spanish & Mexican Land Grants** - perennial streams where the sovereign never relinquished title to the bed
- ◆ **TIDEWATER LIMITS of the STATE**
  - ◆ **Coastal Waters** - up to mean high tide
  - ◆ **Gulf Waters** - offshore to 3 marine leagues (10.35 miles)
- ◆ **ISLANDS WITHIN THESE AREAS (generally)**

# TPWD Jurisdiction

- Navigable Streams
  - State-owned streams
  - “Small Bill” streams
- **Gradient Boundary**
- Jurisdictional Activities

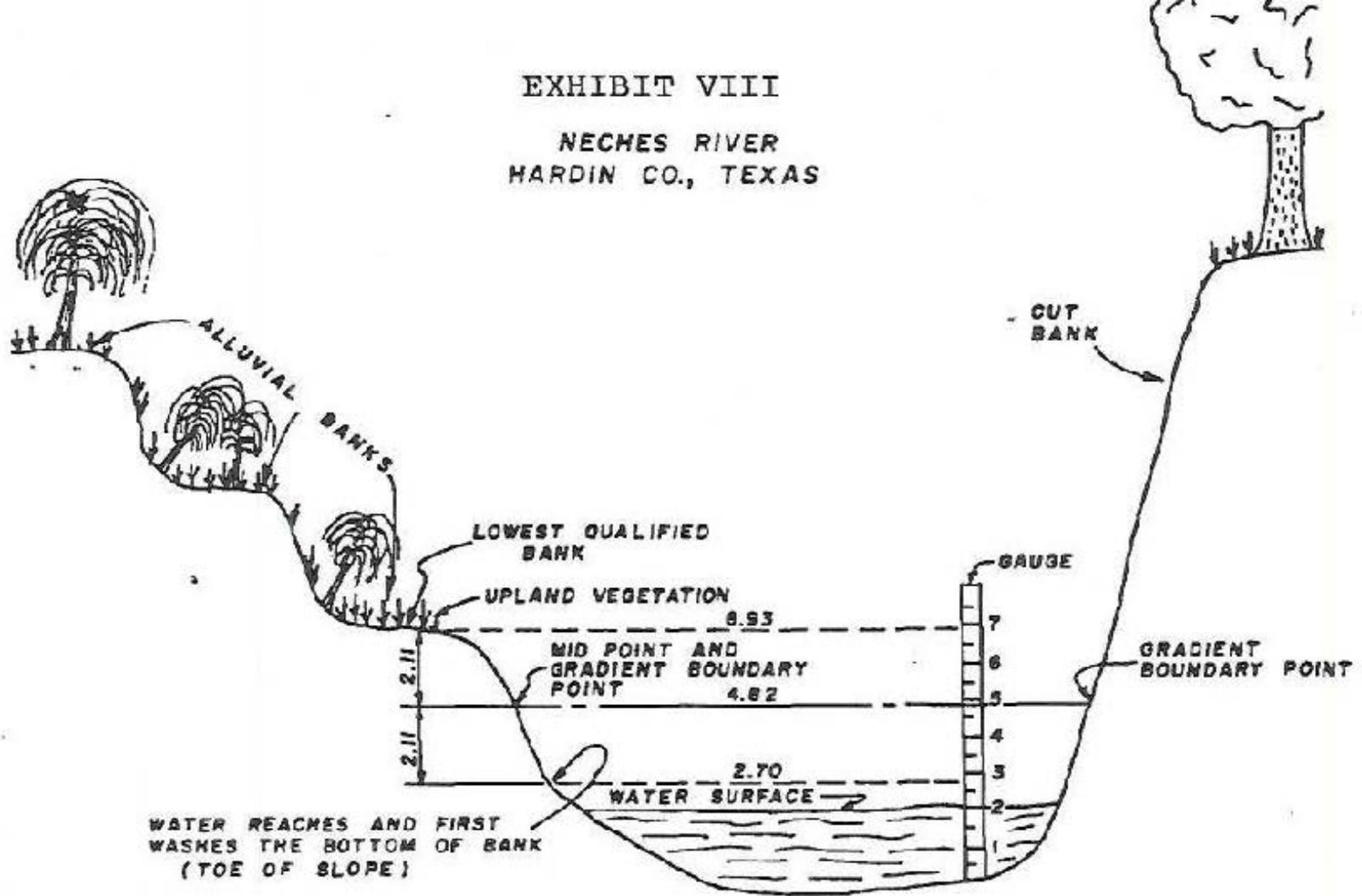
# Gradient Boundary

- ◆ **The Line Between the Navigable Streambed and the Adjoining Private Property**
- ◆ **An Elevation**
- ◆ **Legal Definitions: "a gradient of the flowing water in the stream, and is located midway between the lower level of the flowing water that just reaches the cut bank and the higher level of it that just does not overtop the cut bank"; "that portion of its soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during an entire year, without reference to the extra freshets of the winter or spring or the extreme drouths of the summer or autumn."**
- ◆ **A true Gradient Boundary Survey must be performed by a qualified surveyor (LSLS)**



**FIGURE 3.** Diagram showing qualified bank with back-drain and cross section showing where basic Gradient Boundary point is on that bank.

EXHIBIT VIII  
NECHES RIVER  
HARDIN CO., TEXAS





gradient boundary elevation

stream bottom

# South Llano River

TEXAS  
PARKS &  
WILDLIFE



# Sabine River

TEXAS  
PARKS &  
WILDLIFE



# San Saba River

TEXAS  
PARKS &  
WILDLIFE



# Dry Frio River

TEXAS  
PARKS &  
WILDLIFE



# Alamito Creek

TEXAS  
PARKS &  
WILDLIFE



# Coastal Waters

TEXAS  
PARKS &  
WILDLIFE



# EXEMPTIONS BY STATUTE



- ◆ “...necessary or incidental to navigation...”
- ◆ “...dredging under state or federal authority...”
- ◆ Projects to restore, maintain, or expand storm conveyance capacity of the San Jacinto River & its tributaries by SJRA & HCFCD
- ◆ Brown Cedar Cut – nonprofit exemption
- ◆ Cedar Bayou – nonprofit exemption
- ◆ < 125 c.y. of unconsolidated deposits from on-channel impoundments built before 1956

# EXEMPTIONS BY RULE



- ◆ **Projects to restore or maintain storage capacity of existing public water supplies**
- ◆ **Maintenance projects or construction of new utility lines carried out by public utilities for non-commercial purposes**
- ◆ **Public road projects of the Texas Department of Transportation**

# OTHER EXCEPTIONS

- ◆ Coastal leases and easements of the GLO
- ◆ Streams relinquished by the legislature
  - ◆ Rivers & Streams within Beaumont, Dallas, El Paso, Ft. Worth, Galveston, Houston, San Antonio, Wichita Falls
  - ◆ Brazos River & Bosque River within Waco below Waco Dam (city limits as of January 1, 1965)

# TPWD Jurisdiction

- Navigable Streams
  - State-owned streams
  - “Small Bill” streams
- Gradient Boundary
- **Jurisdictional Activities**

# TPWD Authority

- ◆ **Chapter 86, Parks & Wildlife Code**
  - ◆ **§86.002 (a)** No person may disturb or take marl, sand, gravel, shell or mudshell...without first having acquired from the commission a permit authorizing the activity
- ◆ **There is no established minimum threshold**









# TPWD Sand & Gravel Permit Program

- TPWD Authority
- TPWD Jurisdiction
- **Permits**

# Sand and Gravel Permit



- ◆ **§86.004** The commission may grant a permit...**if the commission finds ...the [activity] will not:**
- ◆ (1) damage or injuriously affect any island, reef, bar, channel, river, creek, or bayou used for navigation, or any oysters, oyster beds, fish, or wildlife in or near the water used in the operation;
- ◆ (2) change or injuriously affect any current...;
- ◆ (3) significantly and injuriously change the hydrology...;
- ◆ (4) significantly increase downstream nonpoint source pollution...; and
- ◆ (5) significantly accelerate erosion upstream or downstream...

# Sand and Gravel Permit



- ◆ **§69.108(a)** The director may consider the following criteria...
- ◆ (5) whether the granting of the permit will have a material adverse effect on recreational activity...;
- ◆ (6) whether the granting of the permit will have a material adverse effect on commercial fishing or the general seafood industry...;
- ◆ (7) the effect, if any, on navigation in the general area affected by the permit; and
- ◆ **(b)(1)** whether operation under the proposed permit will damage or injuriously affect oysters, oyster beds, or fish-inhabiting waters thereof or adjacent thereto...

# Permitting Issues

- ◆ **Fish & Wildlife & Their Habitats** – aquatic & riparian
- ◆ **Geomorphic Structure/Stability** – riffle/pool structure, beds, banks, bottoms, bars, islands, reefs, etc.
- ◆ **Erosion potential** – beds, banks & bottoms; upstream & downstream
- ◆ **Water Quality** – turbidity, sedimentation, contaminants
- ◆ **Sediment budget** – volume, aggrading or degrading
- ◆ **Hydraulics & Hydrology**
- ◆ **Recreation**
- ◆ **Navigation** – state definition includes paddling & walking
- ◆ **Commercial Fishing & Seafood Industry**

# Possible Outcomes

- ◆ **Permit**
- ◆ **Deny**
- ◆ **Issue with conditions: restrictions, mitigation, restoration, operational limits**



**Sand & Gravel Program:**

**[www.tpwd.state.tx.us/faq/landwater/sand\\_gravel/](http://www.tpwd.state.tx.us/faq/landwater/sand_gravel/)**

**Texas River Guide:**

**[www.tpwd.state.tx.us/landwater/water/habitats/rivers/](http://www.tpwd.state.tx.us/landwater/water/habitats/rivers/)**

TEXAS

---

PARKS &

---

WILDLIFE

# Aquatic Resource Relocation Plans Aquatic Introduction Permits

TEXAS  
PARKS &  
WILDLIFE

## Coastal Fisheries Division



# Texas Statute

## Texas Parks and Wildlife Code

### Title 2. Texas Parks and Wildlife Department

### Chapter 12. Powers & Duties Concerning Wildlife

### Sec. 12.001. General Duties



Texas Fatmucket  
and Paper Pondshell

The Department shall administer the laws relating to game, fish, shellfish, and marine life, as defined in TPWD code.



Eastern oyster

# Texas Parks and Wildlife Code

## Sec. 12.0011. Resource Protection



The Department is the state agency with primary responsibility for protecting the state's fish and wildlife resources

Authorizes the Department to investigate fish kills and any type of pollution that may cause loss of fish or wildlife resources, estimate the monetary value of lost resources, and seek restitution or restoration from the party responsible for the fish kill or pollution through suit in county or district court.



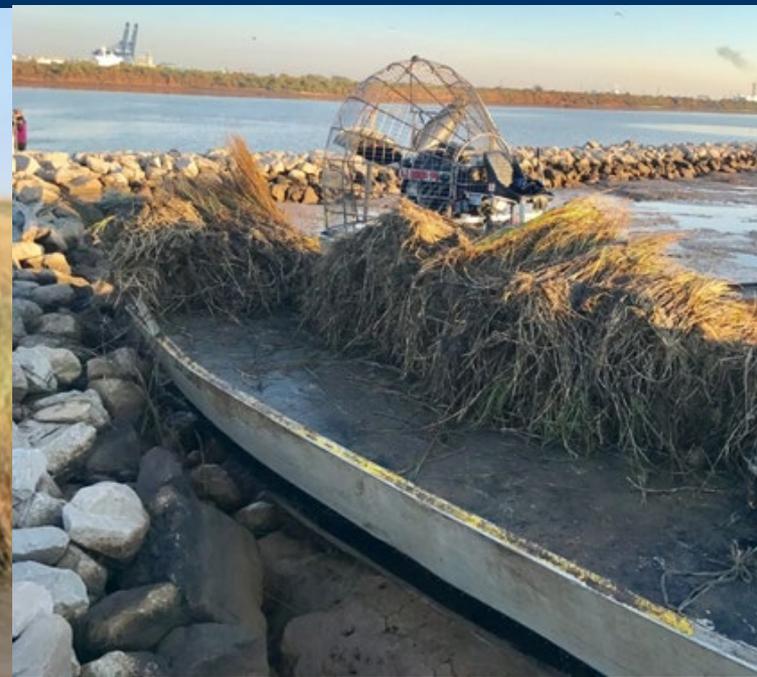
Restitution for each individual of a threatened species is at least \$500, and for each individual of an endangered species is at least \$1,000. (15 threatened freshwater mussel species in Texas).

In addition, the Texas Parks and Wildlife Code makes it a criminal offense to kill any fish or wildlife resources classified as threatened or endangered.

# Texas Parks and Wildlife Code Sec. 12.0015. Regulation of Fish, Shellfish and Aquatic Plants



Directs TPWD to regulate the introduction and stocking of fish, shellfish and aquatic plants into state waters.



Texas Parks and Wildlife Code  
 Title 5. Wildlife and Plant Conservation  
 Chapter 66. Fish and Aquatic Plants  
 Sec. 66.015. Introduction of Fish, Shellfish,  
 and Aquatic Plants

No person may place any species of fish, shellfish, or aquatic plant into the public water of the state without an **Aquatic Introduction Permit (AIP)** issued by the Department.

Non-native species are prohibited.



Wetland restoration

# Texas Administrative Code



Title 31. Natural Resources & Conservation  
Part 2. Texas Parks and Wildlife Department

Chapter 57. Fisheries

Subchapter C. Introduction of Fish, Shellfish  
and Aquatic Plants

RULES §57.251 – §57.259

- Definitions
- General Provisions
- Permit Applications
- Denials
- Renewals
- Amendments
- Reporting and Record Keeping
- Prohibited Acts
- Violations and Penalties



Wetland Mitigation

# Aquatic Introduction Permit (TAC §57)



- ◆ Allows TPWD to direct and track aquatic organism introductions into state waters.
- ◆ Used for relocation of aquatic organisms during construction, mitigation, restoration, enhancement, and creation of habitat during regulated activities in state waters. Not considered avoidance.
- ◆ **Aquatic Relocation Resource Plan (ARRP)** is recommended prior to issuance of AIP.



# Where does ARRP and AIP apply in regulatory process ?



- **Dewatering, maintenance, and construction related activities in rivers, creeks, streams, lakes, sloughs, reservoirs, bays, estuaries, stilling basins, and other flood control structures that may negatively impact fish, shellfish, and other aquatic resources.**
- ◆ **Mitigation for impacts to aquatic resources (wetlands, seagrass, oysters or other shellfish).**
- **Restoration and enhancement of aquatic resources (wetlands, seagrass, oysters or other shellfish).**

# Dewatering Activities

TEXAS  
PARKS &  
WILDLIFE



Pipeline Repairs



Dam Maintenance



Bridge Construction



# Texas Two Step Process

**Go to TPWD Permit Web Site for AIP and ARRP**

<https://tpwd.texas.gov/business/permits/>

**Links for AIP - Form PWD 1019 – T3200 (07/19)**

[https://tpwd.texas.gov/publications/pwdforms/media/pwd\\_1019\\_t3200\\_app\\_permit\\_stock\\_public\\_waters.pdf](https://tpwd.texas.gov/publications/pwdforms/media/pwd_1019_t3200_app_permit_stock_public_waters.pdf)

**Links for ARRP Guidelines**

[https://tpwd.texas.gov/publications/pwdpubs/media/pwd\\_if\\_t3200\\_1958\\_arrp\\_guidelines\\_packet.pdf](https://tpwd.texas.gov/publications/pwdpubs/media/pwd_if_t3200_1958_arrp_guidelines_packet.pdf)

# Aquatic Resource Relocation Plan

- 1. Introduction (include regulatory authorizations)**
- 2. Project description (include why project is needed)**
- 3. Locations (include harvest and relocation sites)**
- 4. Expected start and end date of regulated activities**
- 5. Any federal/state threatened/endangered species**
- 6. Fish/Freshwater Mussels/Oysters/Aquatic Plants**
- 7. Invasive species control methods**

# Aquatic Resource Relocation Plan

## 8. Relocation Methods

8.1 Mechanical or Manual methods used to relocate aquatic organisms (bucket-loader/shovel/net/trap/etc.)

•

8.2. Containers used.

8.3. Transportation methods used to relocation site.

8.4 Best Management





# Aquatic Introduction Permit



- ◆ Apply at least 30 days prior to projected start date.
- ◆ Include map(s) and aerial view(s) of regulatory activity location/harvest/borrow site, and the relocation site.
- ◆ Include USACE permit number, GLO surface lease(s) and any relevant TPWD sand and gravel permit number.
- ◆ Include approved ARRP describing methods used to capture and relocate fish/oysters/freshwater mussels or harvest methods for relocating aquatic plants/seagrass.
- ◆ Provide anticipated start date and completion date.

**NOTE: AIP may be valid for up to one year from the date of issuance or until the permitted introduction has been completed, whichever comes first.**

# Aquatic Introduction Permit Application



## Application for Permit to Introduce Fish, Shellfish or Aquatic Plants into Public Waters (No Fee Required)

For assistance completing this form, please call 512-389-4742 or email [IFpermits@tpwd.texas.gov](mailto:IFpermits@tpwd.texas.gov).

**NOTE:** This application will not be considered unless fully completed and must be received by the Department at least 30 days before the proposed introduction. Consultation with local or regional fisheries biologists before application submission is required for aquatic resource relocations and recommended for all applicants. If you have not yet consulted the local biologist please call or email the permits office for their contact information.

### 1. APPLICANT INFORMATION:

Effective September 1, 2015, Texas Parks & Wildlife is required to collect Social Security numbers for the purpose of child support enforcement under the Texas Family Code, Section 231.302 and Federal Statute 42 U.S.C. §666. Missing or incomplete information may delay application processing time.

Name: \_\_\_\_\_ Social Security #: \_\_\_\_\_ **Do not print SS on form call IF w/ number**

Address: \_\_\_\_\_  
 Street City State Zip

Email: \_\_\_\_\_ Primary Phone: (\_\_\_\_) \_\_\_\_\_

Would you like to help us reduce paper use by choosing to receive your permit by email?  Yes  No

### 1. PUBLIC WATER WHERE ORGANISMS WILL BE INTRODUCED (address or GPS coordinates):

**Name of Water Body at coordinates : Latitude Longitude/ See attached ARR**

### 2. EXPECTED DATE OF INTRODUCTION: \_\_\_\_/\_\_\_\_/\_\_\_\_ (MM / DD / YYYY)

For relocations or plantings—what is the expected end date of the activity? \_\_\_\_/\_\_\_\_/\_\_\_\_

### 3. WHAT IS THE PURPOSE OF THIS INTRODUCTION?

Fish Stocking  Planting  Aquatic Resource Relocation  Research

Other – Please Describe: \_\_\_\_\_

### 4. SPECIES TO BE INTRODUCED (for aquatic resource relocations, please skip this question):

Common Name	Scientific Name	Number	Size
1) Smooth cordgrass	<i>Spartina alterniflora</i>	~ 2,000 plants	0.15 acre
2) Eastern Oyster	<i>Crassostrea virginica</i>	~ 10,000 individuals	0.10 acre
3)			
4)			

### 4. SPECIES TO BE INTRODUCED (continued):

Common Name	Scientific Name	Number	Size
5)			
6)			
7)			
8)			

### 5. SOURCE OF ORGANISMS:

**Borrow Site/Name of Water Body at coordinates Latitude Longitude/ See attached ARR**

### 6. COMMENTS:

**USACE Permit # SWG-XXX-XXXXX**

**GLO Leases CEXXXXXX (relocation site) and SLXXXXX (harvest site)**

7. SIGNATURE: I hereby affirm that all of the information provided above is accurate and complete and that I have read the rules pertaining to introduction of Fish, Shellfish, or Aquatic Plants (31 TAC Ch. 57C; available by mail upon request or online at [http://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac\\_view=5&ti=31&pt=2&ch=57&sch=C&rl=Y](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=31&pt=2&ch=57&sch=C&rl=Y)). I understand that under Texas Penal Code §37.10, it is a felony to make a false statement on this form

\_\_\_\_\_  
Signature of Applicant

\_\_\_\_/\_\_\_\_/\_\_\_\_  
Date

### Please return completed application to:

Permit Coordinator, Inland Fisheries  
 Texas Parks and Wildlife Department  
 4200 Smith School Road  
 Austin, Texas 78744

To help our office process your request more efficiently, you may email completed forms to [IFpermits@tpwd.texas.gov](mailto:IFpermits@tpwd.texas.gov) or fax to: 512-389-4405

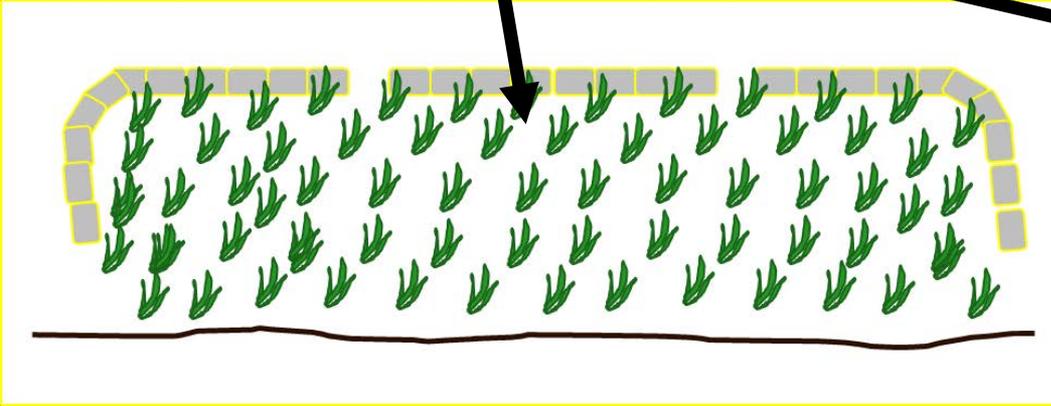
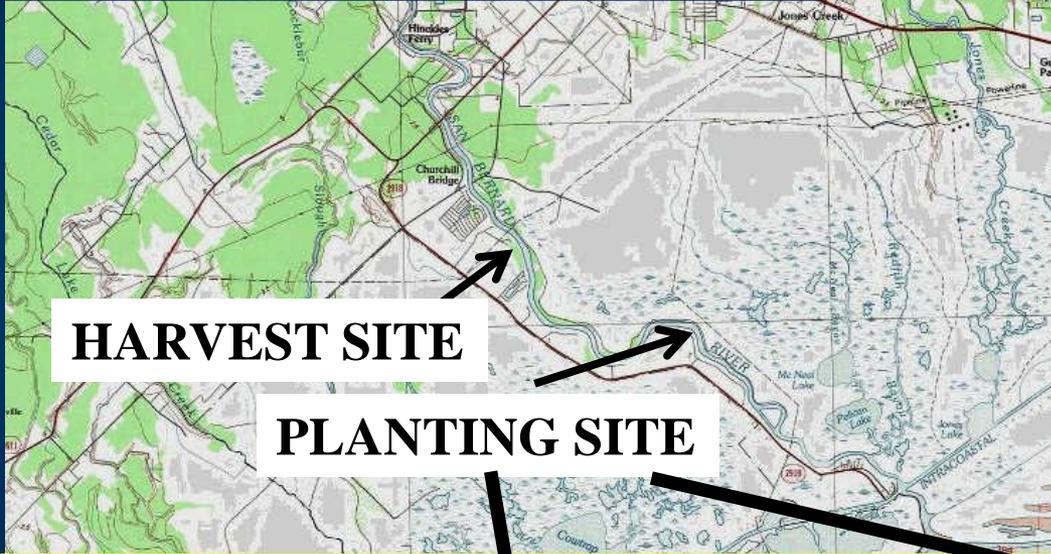
Texas Parks and Wildlife Department maintains the information collected through this form. With few exceptions, you are entitled to be informed about the information we collect. Under Sections 552.021 and 552.023 of the Texas Government Code, you are also entitled to receive and review the information. Under Section 559.004, you are also entitled to have this information corrected.



# Project Plans

should include  
Name of Applicant  
Water Body, County  
Latitude, Longitude  
USACE Permit #  
with 2,000 *S. alterniflora*  
planted on 3 ft. centers  
in 25'x250' area  
protected by breakwater.

Project Location Map  
should include  
Name of Applicant  
Water Body, County  
Latitude, Longitude



# TPWD Transplant Guidelines

## Smooth Cordgrass and Seagrass



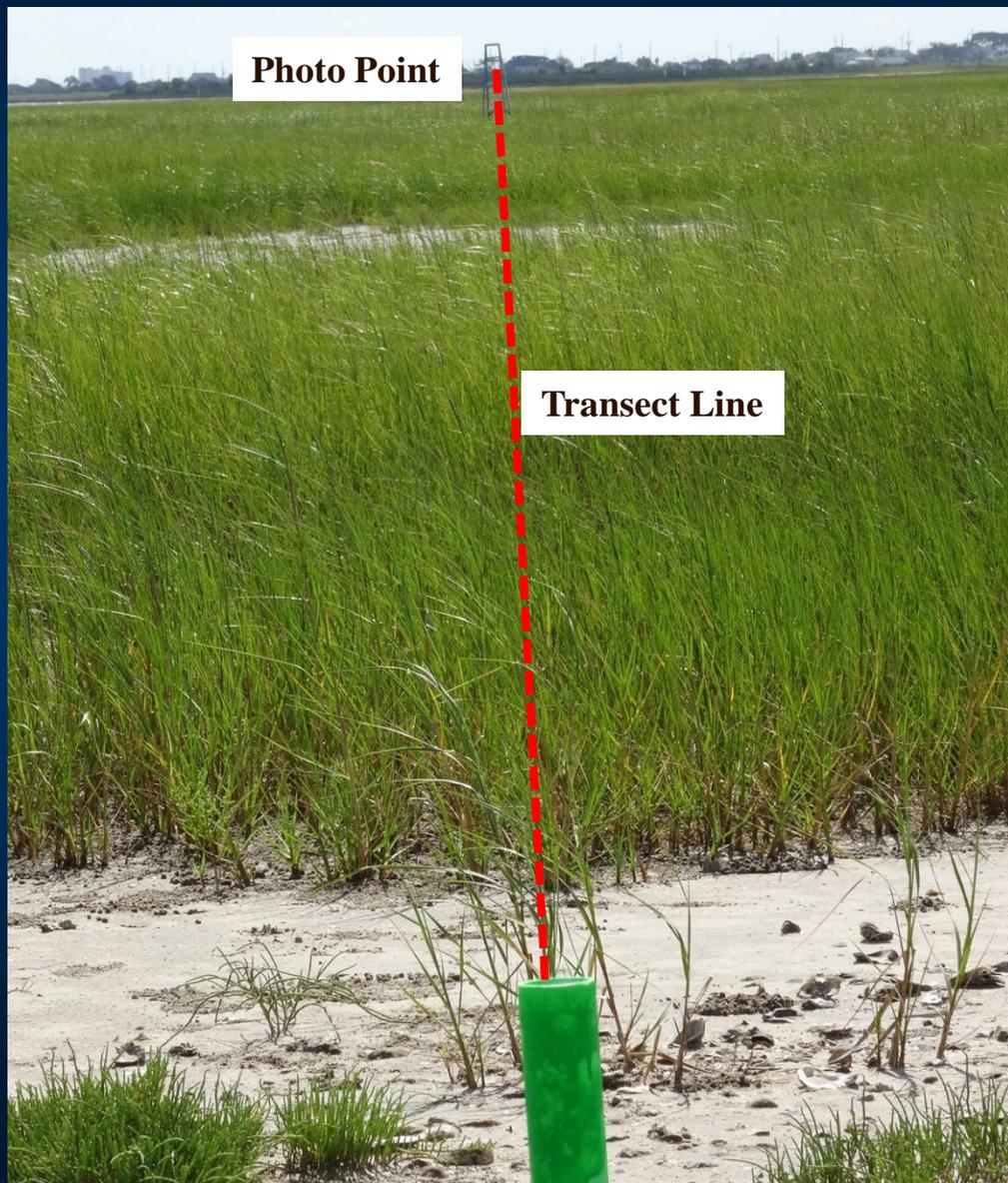
- ◆ **Transplant timing should be coordinated with TPWD.**
- ◆ **Confirm elevation of transplant site. May need to allow sediment to stabilize before surveying.**
- ◆ **Stake harvest and transplant sites.**
- ◆ **Notify field office at least 1 week prior to harvest.**
- ◆ **Limit harvest to one 15 cm plug / 1 m<sup>2</sup> area.**
- ◆ **Place transplant plugs (3-5 stems) on 3-ft centers.**

**Notify field office within 6 weeks of transplant**

# TPWD Recommends Monitoring for Success Criteria after Planting

- **60 days post-planting survey recommended.**
- **As-built survey of acreage and elevation.**
- **Report percent cover or density of plants survived.**
- **Monitor 6 months post-planting and then annually for a minimum of 2 - 3 years.**
- **Photographs (taken from same place each time).**
- ◆ **2 years post-planting monitoring recommended with success criteria of 70%**

# Monitoring Survey Recommendations



- Make visual observations and take photographs along established transects.
- Stake transect lines, take photographs at each transect location's start and end points.
- Record latitude and longitude of photographs from same location every monitoring period.
- Visually estimate percent canopy coverage or plant density at each location.

# Texas Two-Step Recommended Oyster Survey Methods for Assessing Impacts



1. Side scan survey project area and any work areas with sub-bottom profiler to identify hard bottom habitat (project dependent)
2. Identify and map all hard-bottom returns. (TPWD Scientific Collection Permit required).
  - Diver Quadrats (bring samples to surface).
  - Dredge (tow less than one minute).
  - Poling (only used in shallow water areas).
  - Patent Tongs (new method).

# Diver Quadrat Methodology

- ◆ Four  $\frac{1}{4}$  meter quadrats per acre of reef collected by diver
- ◆ Record water quality parameters
- ◆ Place quadrat on reef
- ◆ Use tools to collect all oysters in quadrat
- ◆ Bring to surface for recording all live and



# TPWD Dredge Specifications

**30-second dredge tows should be able to contain all the shell collected without falling out**



Frame: constructed with 13 mm diameter cold rolled steel rod 495 mm wide x 241 mm high x 1,000 mm long.

Teeth: 127 mm long, 9 teeth spaced on 51-mm centers.

Bag: 356 mm deep with 4 bottom rows and 1 top row of 51 mm diameter metal rings, 6.3 mm thick joined by 45 mm I.D. No. 84 and 31.8 mm I.D. No. 62 "S" hooks. The top row and bottom rows are joined by 4 full meshes of 76-mm mesh braided nylon solid core webbing of 8-mm rope.

# Patent Tongs Comparable to Diver Quadrats





## Tools Needed:

- Calipers
- Oyster Knife
- Axe
- Camera

Measure all live oysters in each sample and enumerate spat, juveniles, and market size oysters.

- Record numbers in each size class.
- Count and record all live/dead oysters (valves hinged).
- Photograph each sample collection.

# AIP Oyster Relocation Considerations

- ◆ Relocate oysters close to existing habitat with similar depth, salinity, dissolved oxygen, temperature conditions.
- ◆ Relocate oysters to same commercial harvest area classification: Closed or Open harvest areas.
- ◆ Relocate on suitable base (stable sediments) and/or clean approved shell, limestone rock, or concrete rock. (prefer 18-inch elevation off bottom)
- ◆ Relocation site should be oriented into current to achieve optimum circulation for oyster survival.

Thank you



TEXAS

PARKS &

WILDLIFE

**Joe McMahan**  
**Division Chief**  
**Regulatory Division**  
**Date: 30 JAN 2020**



**US Army Corps  
of Engineers®**



# AGENDA

History and Program Overview

Trends

Navigable Waters Protection Rule

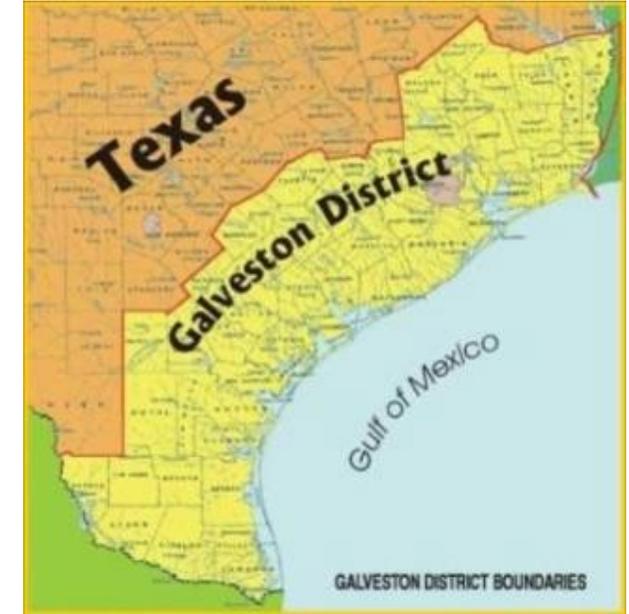
Goals and Priorities





# HISTORY AND PROGRAM OVERVIEW

- First engineer district in Texas (1880)
- 50,000 square mile district boundary, ~100 miles inland
- ~1000 miles of channels
- 367 miles of Gulf coastline
- 16 Congressional district
- 48 Texas counties, 4 Louisiana parishes
- 18 Coastal counties
- 28 ports
- Approximately 400 district employees
- Regulatory Division staff of ~45
- Annual Regulatory budget=\$7M





# TRENDS



- Increase in number of large scale energy projects along the entire coast
- Complex projects are now “the norm”
- Coordination of other Corps business lines and Regulatory Division
- Multiple district projects
- Increased frequency of changing regulations and guidance
- Limitations on capacity for placement of dredged material
- Increased interest in use of Section 103 of MPRSA for use of ODMDS



# NAVIGABLE WATERS PROTECTION RULE

February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” EO 13778

- Calls on EPA and the Army Corps to review the final 2015 Rule and “publish for notice and comment a proposed rule rescinding or revising the rule....”
- Directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*.



# NAVIGABLE WATERS PROTECTION RULE



## Step 1 Proposed Rule

- Rescinds the 2015 Rule and recodifies the prior regulations. (i.e. 1986 regulations and the 2003/2008 guidance documents)

## Step 2 Proposed Rule

- Revises the definition of “waters of the United States” consistent with EO 13778.
- Respond to Executive Order 13778, which calls for rescinding or revising the 2015 definition of WOTUS.
- Increase predictability, consistency, and regulatory certainty through a clearer definition of WOTUS.
- Restore and maintain water quality while respecting primary state and tribal authority over their land and water resources.
- Operate within legal limits established by Congress, clarified by the Supreme Court.



# NAVIGABLE WATERS PROTECTION RULE

23 January 2020, the Environmental Protection Agency and Department of the Army finalized the Navigable Waters Protection Rule that defines “waters of the United States” (WOTUS) and clarifies the limits of federal control under the Clean Water Act.

The rule is anticipated to be published in the Federal Register in late February 2020 and will become effective 60-days following publication. Opposition to the new rule and litigation are expected.

The Navigable Waters Protection Rule outlines four clear categories of waters that are considered “waters of the United States.” These four categories protect the nation’s navigable waters and the core perennial and intermittent tributary systems that flow into those waters.



# GOALS AND PRIORITIES



## Executing the Mission

- Improve consistency/timely decisions

- Embracing change

- Integrity of the program

## Relationships

- Public/Tribes/interagency/congressional

- Establish/continue to build

## Communication

- Involves listening and taking action

- Transparency

## Division Program Risk

- Managing expectations

- Health of regulatory workforce

