



What You Need To Know About Section 404 Permits

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Agenda Items

- **Corps of Engineers Permit Authorities**
- **Jurisdiction**
- **How is Jurisdiction Determined ?**
- **Types of Permits**
- **What Goes in the Application and Why ?**
- **What is Involved in Evaluating the Permit Application?**
- **Statement of Findings and Permit Decision**

Corps Permit Authorities

- **Rivers and Harbors Act of 1899 – “Section 10”**
- **Clean Water Act – “Section 404”**
 - 40 CFR Part 230: Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material [404(b)(1) Guidelines]
- **Marine Protection, Research & Sanctuaries Act of 1972**
 - **“Section 103” [Ocean Disposal]**

The **National Environmental Policy Act** – procedural law with which all federal agencies must comply...not a Corps permit authority, but rather a federal obligation the Corps must meet

Section 10 of the Rivers and Harbors Act of 1899

prohibits the unauthorized obstruction or alteration of any navigable water of the United States unless you receive a permit from the Corps of Engineers

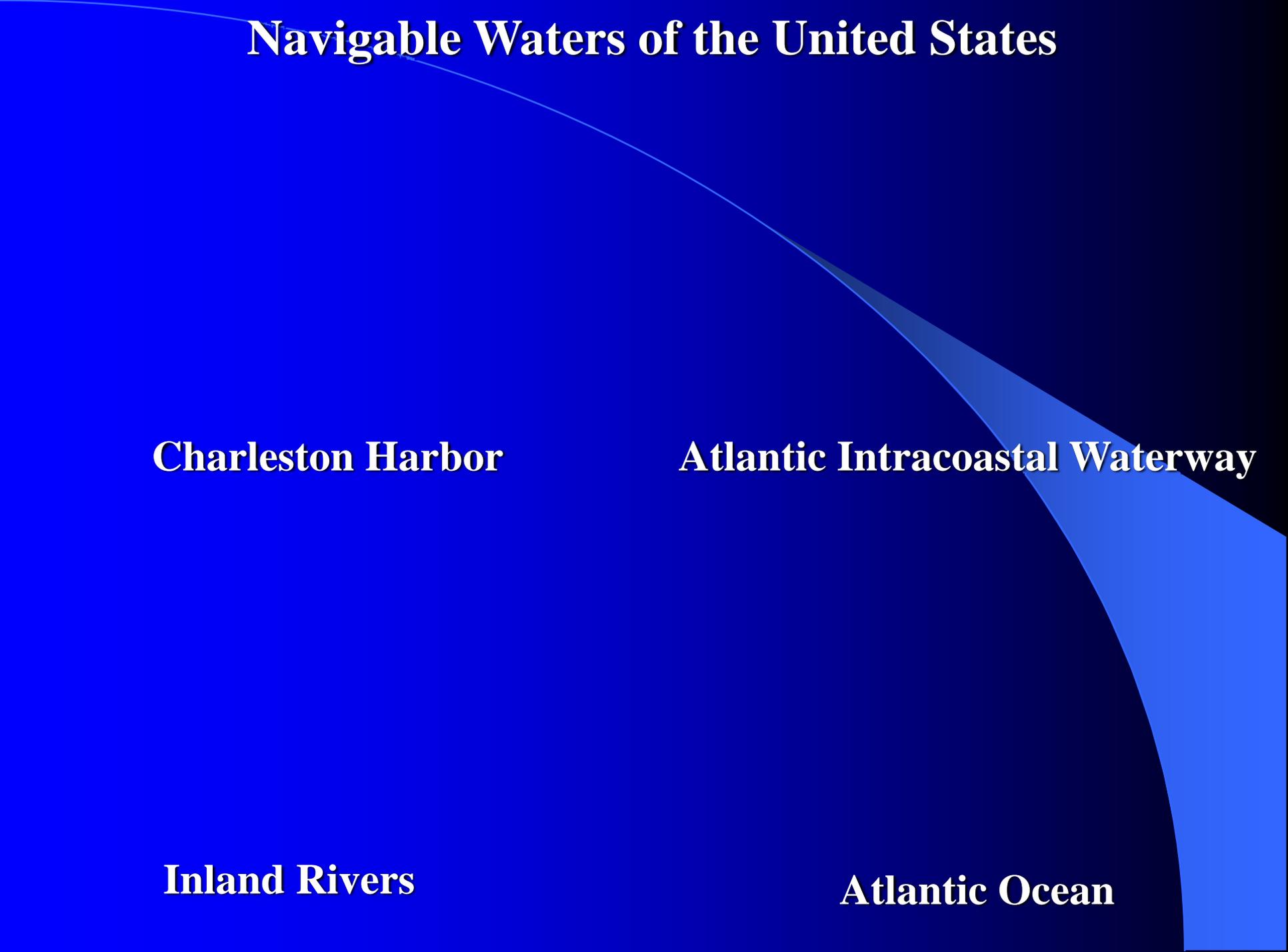
Obstruction or alteration includes:

- construction of any structure in or over any navigable water of the United States,
- excavation of dredge, or deposition of, fill material,
- the accomplishment of any other work affecting the course, location, condition, or capacity of such waters

Navigable Waters of the United States

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

Navigable Waters of the United States

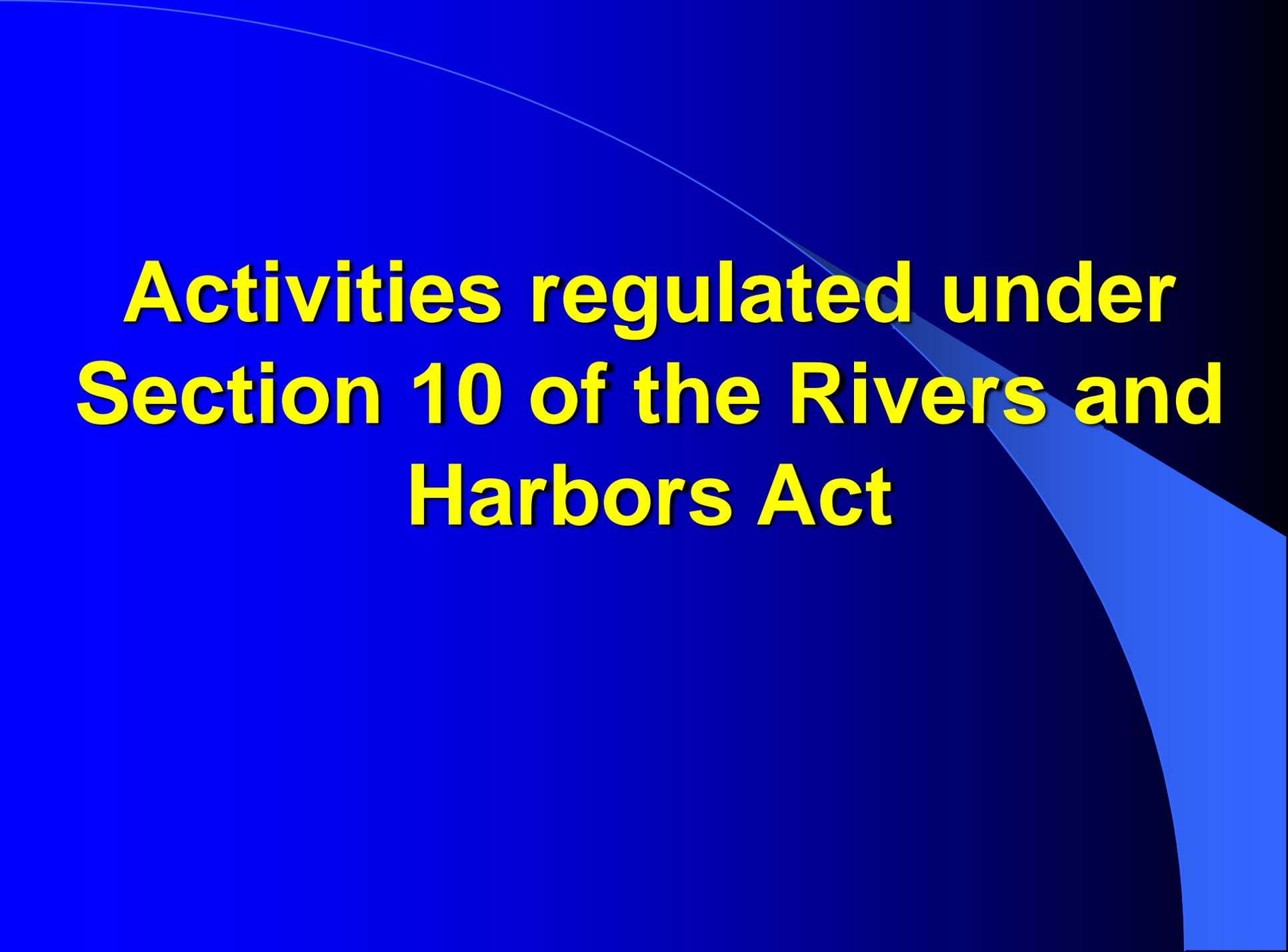


Charleston Harbor

Atlantic Intracoastal Waterway

Inland Rivers

Atlantic Ocean



**Activities regulated under
Section 10 of the Rivers and
Harbors Act**

Rivers and Harbors Act – Section 10 Jurisdiction

Dredging

Beach Nourishment

Excavation

Private Docks

Rivers and Harbors Act – Section 10 Jurisdiction



Shipping Terminal



Construction of Bulkheads



Shoreline Protection



Marinas

Rivers and Harbors Act – Section 10 Jurisdiction

**Overhead
Powerlines**

Why are overhead
lines regulated?

Clean Water Act – Section 404

...is delegated to the Corps by USEPA, and...

authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the **discharge of dredged or fill material into the waters of the United States** at specified disposal sites. (See 33 CFR Part 323.)

Waters of the United States

- All Navigable Waters of the U.S.;
- All interstate waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect the integrity of interstate or foreign commerce including any such waters:
 - ❖ Which are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or,
 - ❖ Which are used or could be used for industrial purpose by industries in interstate commerce.

Continued...

Waters of the United States - *continued*

- All impoundments of waters otherwise defined as waters of the United States under the definition;
- Tributaries of waters;
- The territorial seas;
- Wetlands adjacent to waters (other than waters that are themselves wetlands);

Exceptions:

- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA **are not** waters of the United States.
- Waters of the United States **do not include** prior converted cropland.

Waters of the United States

All Navigable Waters



Streams are Waters of the United States



Wetlands

Clean Water Act jurisdiction over wetlands is probably the most contentious category of Waters of the U. S.

—————> Why would this be the case?? <—————

Because this is the category of Waters that most property owners cannot clearly appreciate as potentially affecting the integrity of oceans, lakes, and rivers that are more clearly linked to navigation and commerce...

...and because this category is the most often involved with requests to place fill material related to construction.

**Activities regulated under
Section 404
of the Clean Water Act**

Is Mechanized Landclearing a Regulated Activity ??

The Corps does not regulate landclearing, however...

...when mechanized landclearing is performed in such a manner that it results in the deposition of dredge or fill material in a water of the U. S., then a permit is required... not because of the activity, but because of the dredge or fill.

Clearing in jurisdictional wetlands can be accomplished without resulting in placement of dredge or fill material.

How Does the Corps Determine Jurisdiction ?

Generally, directly from the Regulation 33 CFR 328.3, which is drafted from the Clean Water Act itself.

Confidence relative to Corps jurisdiction is greatest with the category *navigable waters*.

Importantly, recent court decisions have specified the extent to which the other categories of waters are considered jurisdictional.

Corps regulators recognize waters of the United States by features and characteristics that develop due to the presence of water...

How Does the Corps Determine Jurisdiction ?

Streams are recognized by bed and bank features as well as ordinary high water marks that develop in response to water and flow.

Wetlands are recognized by the combined presence of three parameters: hydrology, hydric soils, and hydrophytic vegetation.

The process of recognizing and *delineating* the boundary of a wetland is described in the 1987 Corps of Engineers Wetland Delineation Manual, as well as regional supplements to help identify hydric soils more accurately.

At a property owner request, the Corps will issue a letter clearly indicating the jurisdictional waters of the U. S. on the property.

Jurisdictional Waters of the U.S. Affect the Integrity of Navigable Waters

The basis of Clean Water Act jurisdiction over waters that are **NOT** navigable is that these waters affect the downstream navigable waters in any (or all) of three ways:

Physical integrity – (sediments, flow duration, velocity, volume)

Chemical integrity – (pollutants, nutrients)

Biological integrity – (food web support, migration)

What About Waters That Do Not Affect the Integrity of Downstream Navigable Waters ?

Wetlands or waters with NO physical, chemical, or biological connection to downstream navigable waters are known as “Isolated Waters”.

A 1997 decision in the Wilson Case ruled that isolated wetlands were not jurisdictional in the 4th Circuit.

[4th Circuit = MD, VA, WV, NC, SC]

In 2001, the Solid Waste Agency of Northern Cook County (Illinois), known as **SWANCC**, ruled that isolated wetlands are not jurisdictional nationwide.

What About Waters That Do Not Affect the Integrity of Downstream Navigable Waters ?

What about wetlands or waters WITH a physical, chemical, or biological connection to downstream navigable waters...

...but where the connection (or nexus) is not substantial enough to actually affect the integrity of navigable waters?

These wetlands or waters will not be jurisdictional under the Clean Water Act, per the 2006 Supreme Court decision known as the Rapanos/Carabell decision.

Jurisdictional Waters of the U.S. Affect the Integrity of Navigable Waters

The Rapanos Guidance established categories of waters and wetlands based on their relative permanence and significance of their connection (nexus) to downstream navigable waters.

- TNWs – Traditionally Navigable Waters
- RPWs – Relatively Permanent Waters
Perennial and Seasonal Streams
- non-RPWs – Non-Relatively Permanent Waters
less than seasonal streams (intermittent flow)
- wetlands adjacent to the above categories

CWA SECTION 404 JURISDICTION

Pursuant to 2007 Rapanos Guidance

Waters of the U.S. include:

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Jurisdictional
by definition

Significant
Nexus
Determination
required

The Permit Process

In a nutshell:

To identify and permit the least environmentally damaging project alternative that meets the project purpose.

Types of Permits

- **Individual Permit (Standard Permits)**
- **Letters of Permission**
- **General Permits**

Regional Permits

Nationwide Permits

Programmatic Permits

General Permits

- Regional Permits
- Nationwide Permits

NATIONWIDE PERMITS

These are permits issued to the General Public for specific types of activities that the Corps has determined will not result in more than minor impact to the nation's waters...

...when designed and constructed to meet the numerous national, regional, and even specific conditions which may apply.

NATIONWIDE PERMITS

There are currently 50 Nationwide Permits issued, for activities ranging from placing culverts for road crossings to placing rip rap for shoreline protection, as well as placement of minor amounts of fill for commercial or residential construction.

Many Nationwides can be used to authorize a project without even notifying the Corps, while others require pre-construction notification and an authorization letter from the Corps.

Nationwide authorization is generally issued within 45 days.

REGIONAL GENERAL PERMITS

Are issued by individual Corps Districts to various entities to permit specific types of routine minor activities.

Like Nationwide Permits, these Regional GPs are heavily conditioned to encourage project designers to minimize impacts to Waters of the U.S...while still streamlining and speeding the permit process for the applicant and reducing the workload of the Corps.

Examples of Regional General Permits

- **2005-14-001 – SC Office of Ocean and Coastal Resource Management** – certain activities in the Critical Area of the Coastal Zone
- **2005-14-002 – SC Department of Transportation** – certain activities performed by SCDOT associated with replacement of existing roads.
- **2007-14-001 – SC Electric and Gas** – certain activities on Lake Murray
- **2007-14-002 - SC Public Service Authority** – certain activities on Lakes Marion and Moultrie
- **2007-14-004 – Duke Power Company** – certain activities on those lakes owned and operated by Duke Power Company.

Individual Permits

The Permit Process Involves:

- **Related LAWS** (in addition to Corps authorities)
- **Public Interest Review**
- **404 (b)(1) Guidelines**
- **National Environmental Policy Act**

Related Laws

- ★ Coastal Zone Management Act
- ★ Section 401 of the Clean Water Act
- ★ **National Historic Preservation Act of 1966**
- ★ **Endangered Species Act of 1973**
- ★ Fish & Wildlife Act of 1956
- ★ Migratory Marine Game-Fish Act
- ★ Fish & Wildlife Coordination Act
- ★ Clean Air Act
- ★ Resource Conservation & Recovery Act of 1976
- ★ Comprehensive Environmental Response Compensation and Liability Act of 1980
- ★ Essential Fish Habitat

PUBLIC INTEREST REVIEW FACTORS

conservation

economics

aesthetics

**general environmental
concerns**

wetlands

historic properties

fish and wildlife values

flood hazards

floodplain values

land use

navigation

**shore erosion and
accretion**

recreation

water supply

and conservation

water quality

energy needs

safety

food and fiber production

mineral needs

considerations of

property ownership

and, in general,

the needs and welfare

of the people

404(b)(1) Guidelines

No discharge of fill material shall be permitted if

- there is a **practicable** alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem,
- it violates State water quality or toxic effluent standards; jeopardizes the continued existence of an endangered or threatened species; or violates the protection of any marine sanctuary
- it will cause or contribute to significant degradation of the waters of the United States.
- appropriate and practicable steps have not been taken which will minimize potential adverse impacts on the aquatic ecosystem.

The National Environmental Policy Act of 1969

(“NEPA” P.L. 91-190; 42 U.S.C. 4321)

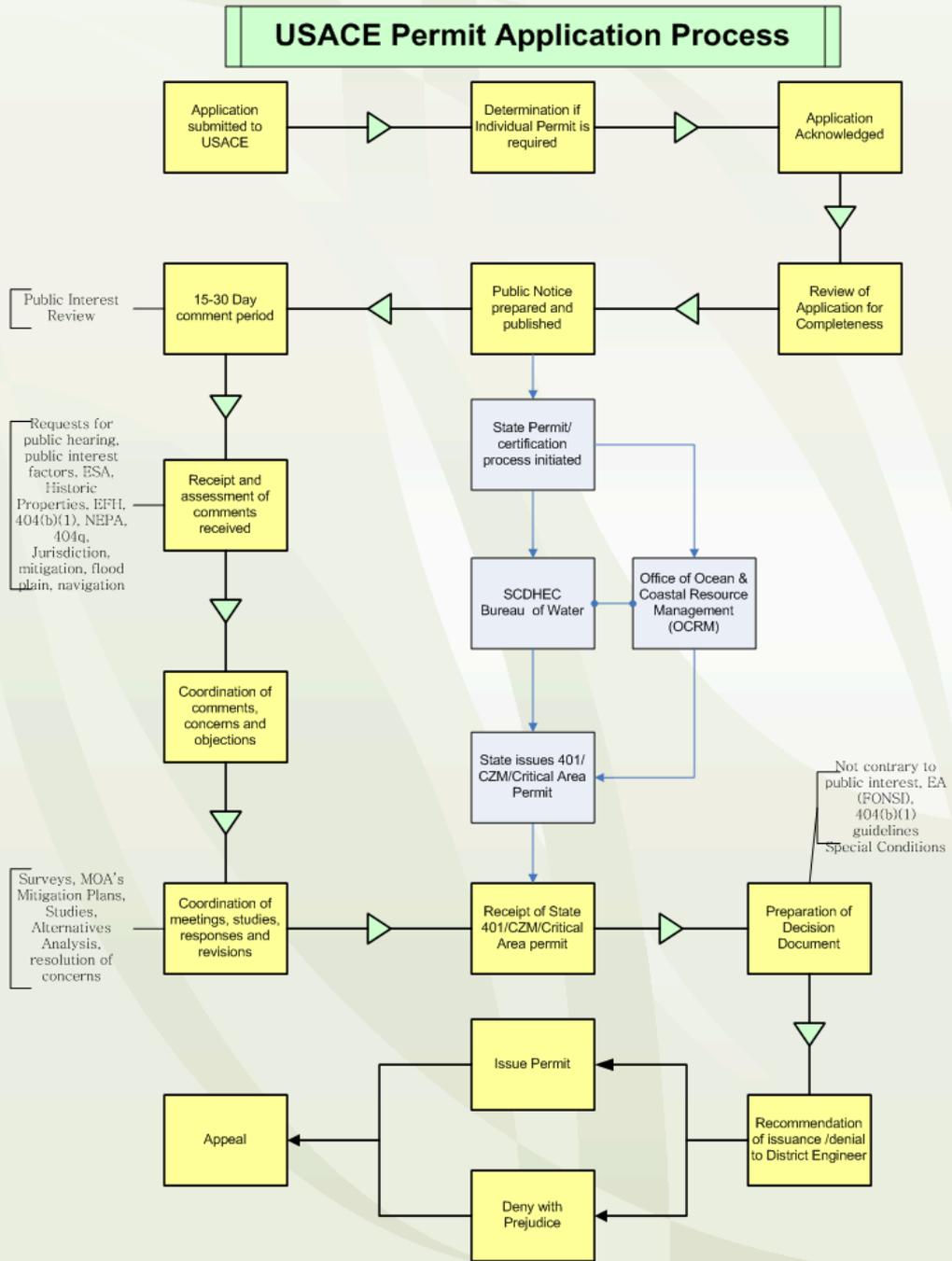
Encourages and facilitates *public involvement* in decisions which affect the quality of the human environment.

Requires agencies to identify and assess the **reasonable** alternatives to proposed actions that will avoid or minimize adverse effects upon the quality of the human environment.

Requires agencies to avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

PERMIT PROCESS FLOW CHART

(see handout)





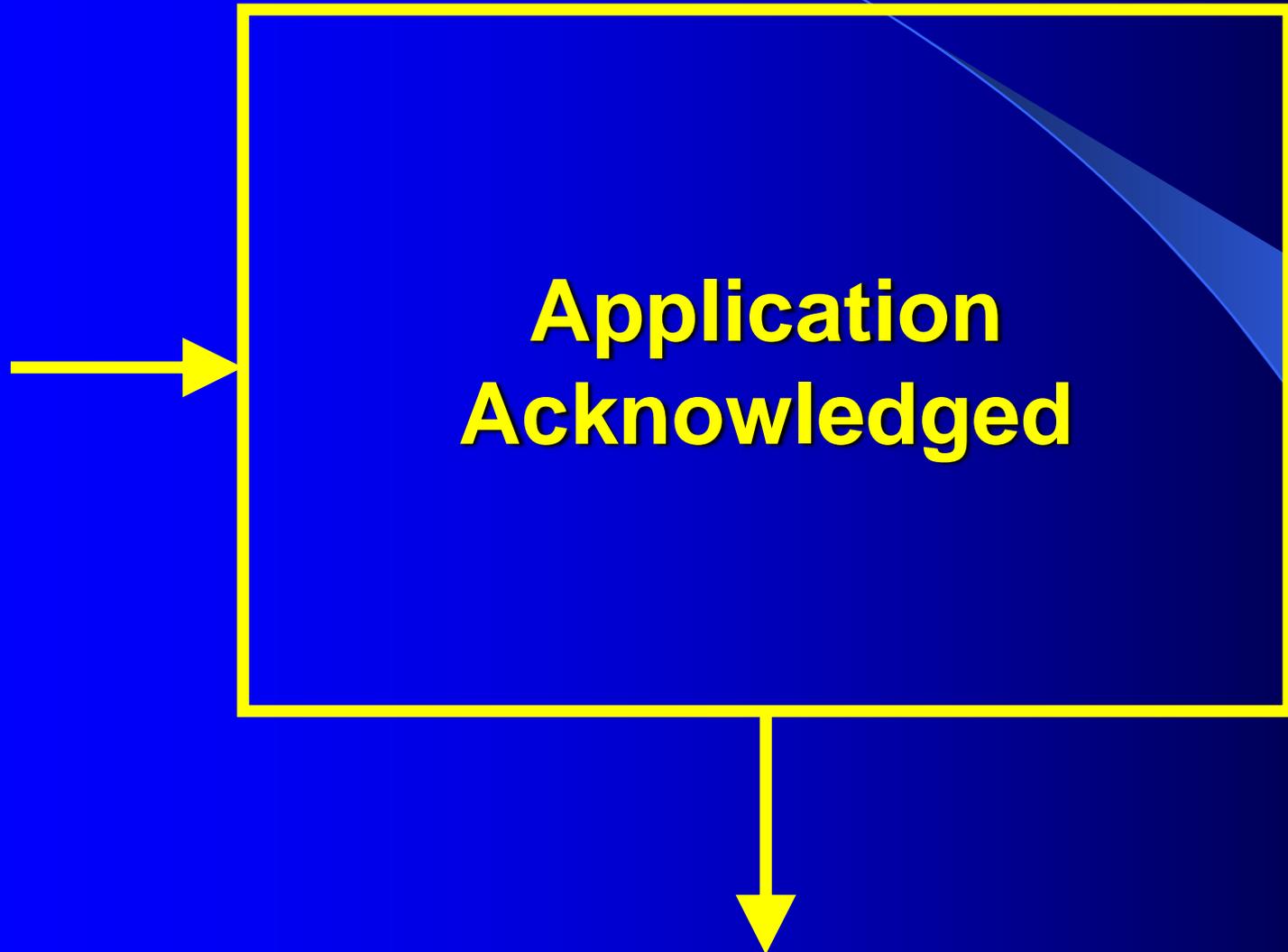
**Application
Submitted to
USACE**

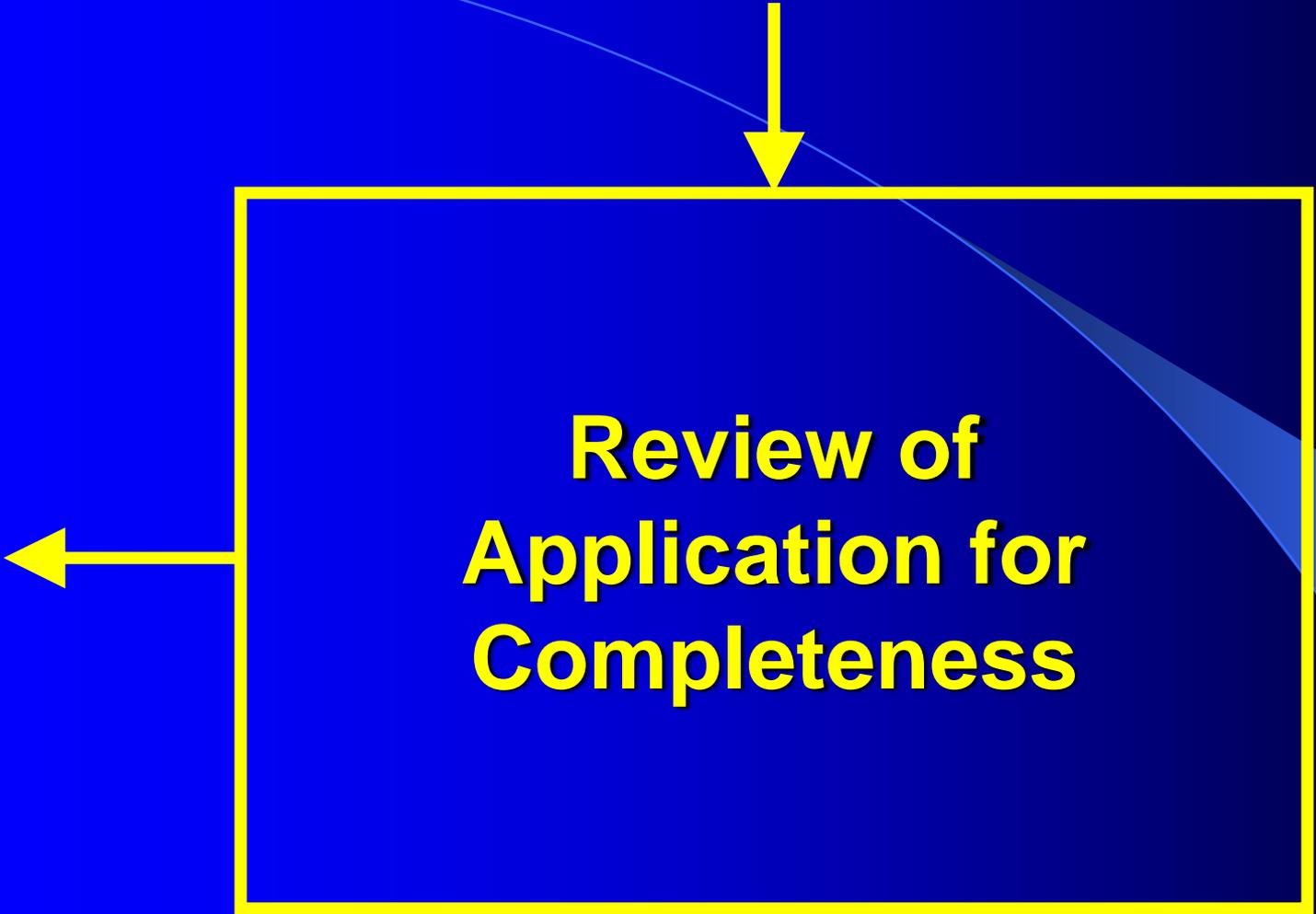
Pre-application meeting is encouraged for many projects

**Determination if
Individual Permit
is Required**

Wouldn't it be nice if we could help identify an applicable NWP?

Corps sends a postcard indicating the application was received





**Review of
Application for
Completeness**

Completeness includes an application form, adjacent property owners list, legible drawings...

APPLICATION COMPLETENESS

For Public Notice purposes:

- **Application form**
- **Adjacent property owners address list**
- **Project description**
- **Legible drawings (size, color, detail)**

Commence Parallel and Simultaneous
State Permit/Certification Process

**Public Notice
Prepared and
Published**

(Adjacent property owners notified)

State Permit/Certification Process

Commence Public Interest Review

**15 – 30 Day
Comment Period**



PUBLIC INTEREST REVIEW FACTORS

conservation

economics

aesthetics

**general environmental
concerns**

wetlands

historic properties

fish and wildlife values

flood hazards

floodplain values

land use

navigation

**shore erosion and
accretion**

recreation

water supply

and conservation

water quality

energy needs

safety

food and fiber production

mineral needs

considerations of

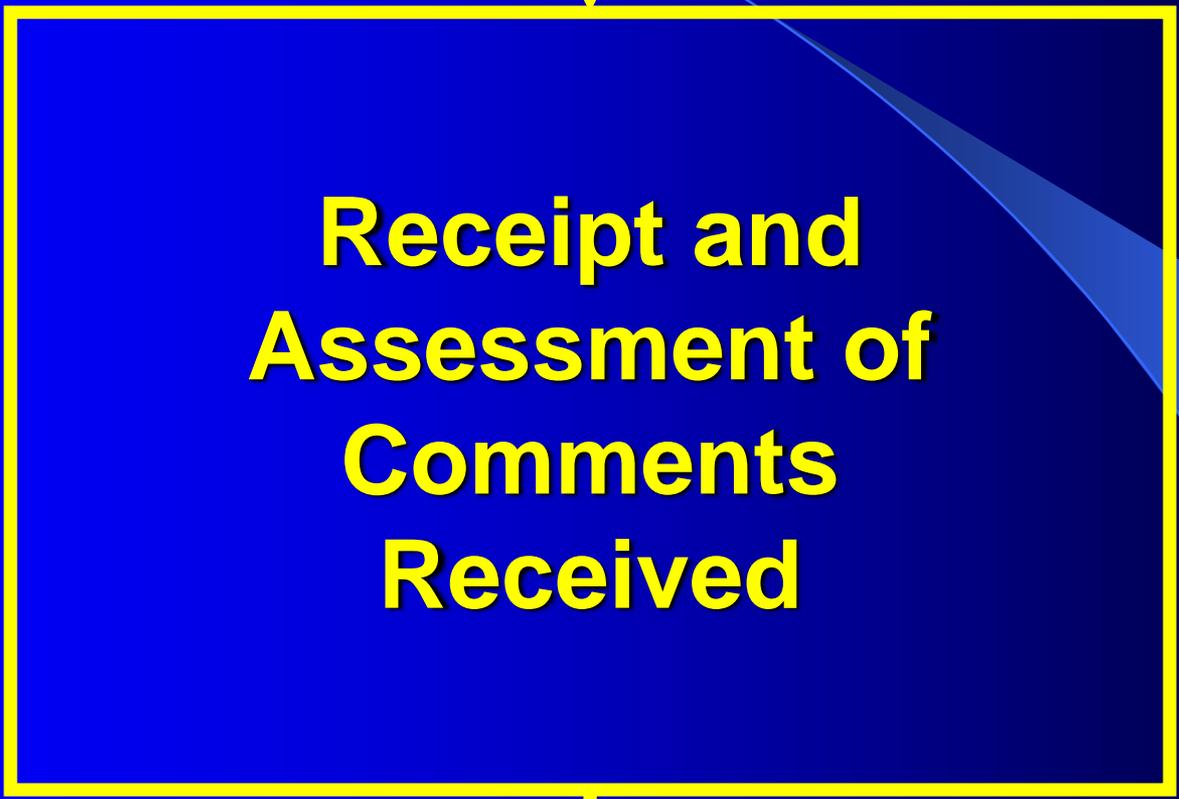
property ownership

and, in general,

the needs and welfare

of the people

Requests for public hearing;
public interest factors; ESA;
Historic Properties; EFH;
404(b)(1);
NEPA;
404(q);
Jurisdiction;
Mitigation;
flood plain;
navigation,
etc.



**Receipt and
Assessment of
Comments
Received**



Decision Making Process

- Public Interest Factors
- Cumulative Impacts
- Secondary Impacts
- Compliance with the Endangered Species Act
- Compliance with the National Historic Preservation Act

Decision Making Process - *continued*

- Magnuson-Stevens Fishery Conservation Management Act (*Essential Fish Habitat*)
- Compliance with all applicable Memoranda of Agreement
- Impacts to Federal Projects
- Any special requirements (artificial reefs, powerlines, etc)
- Navigation
- Clean Air Act Conformity

Decision Making Process - *continued*

- Compliance with the 404(b)(1) Guidelines including (but not limited to):
 - Alternatives
 - Avoidance
 - Minimization
 - Mitigation
 - Sediment Quality
- Compliance with NEPA

404(b)(1) GUIDELINES

Water Dependency must be determined by the Corps based on the applicant's project description and plans.

Projects which do not require siting in waters of the U.S. to achieve their purpose must address the “rebuttable presumption”...

...that an upland alternative exists which will involve less wetland impacts. This is the central premise of the alternatives analysis concept– to identify the...

least environmentally damaging project alternative.



**Coordination of
Comments,
Concerns and
Objections**

(sent to applicant to address)

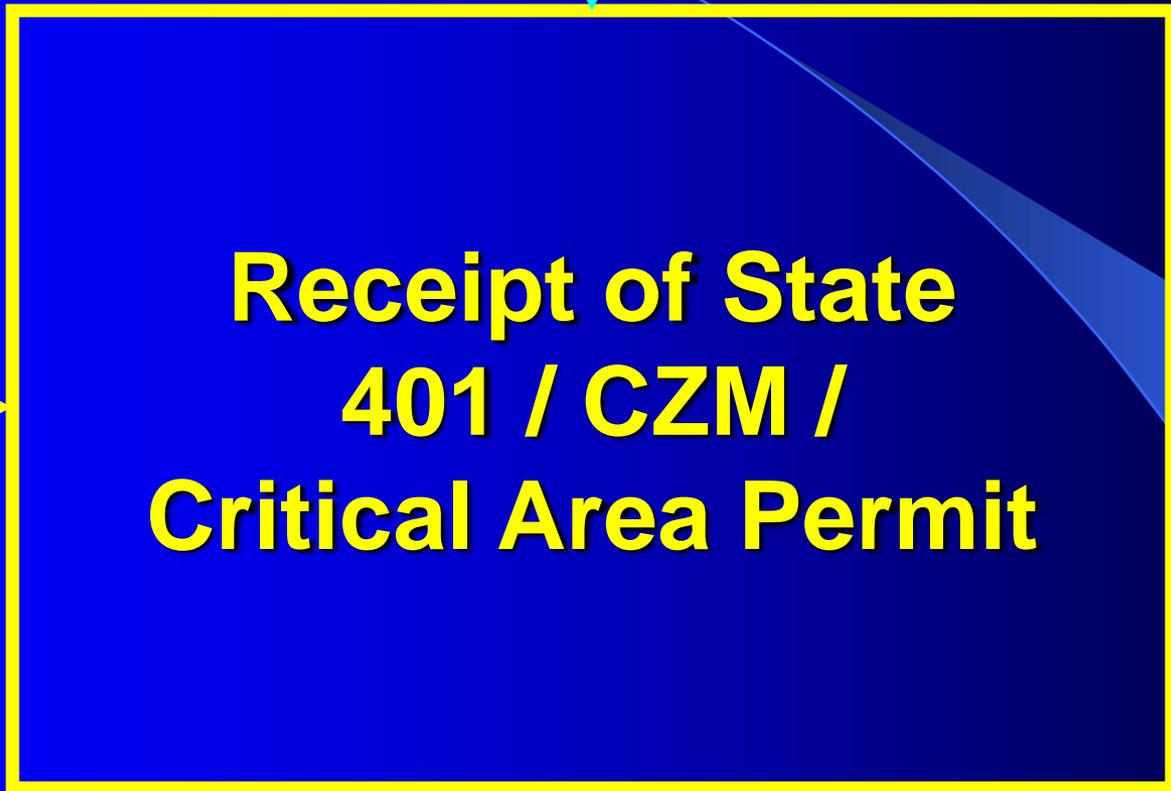
Surveys; MOA's; Mitigation Plans;
Studies; Alternatives Analysis;
Resolution of Concerns, etc.



**Coordination of
Meetings, Studies,
Responses and
Revisions**



State Permit/Certification Process



**Receipt of State
401 / CZM /
Critical Area Permit**



Not Contrary to Public Interest; EA (FONSI);
404(b)(1) Guidelines; Special Conditions



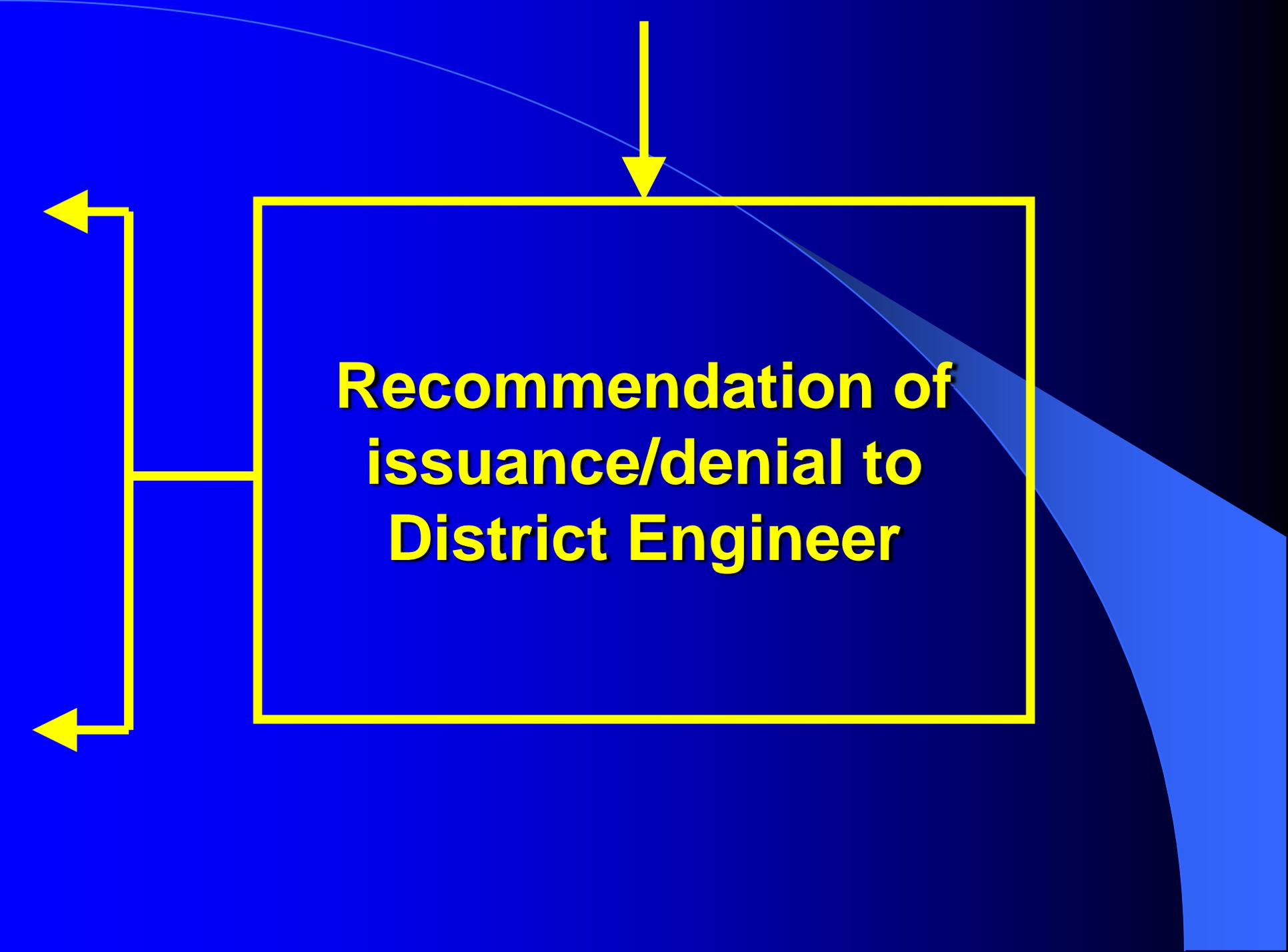
Preparation of Decision Document

Permit Conditions

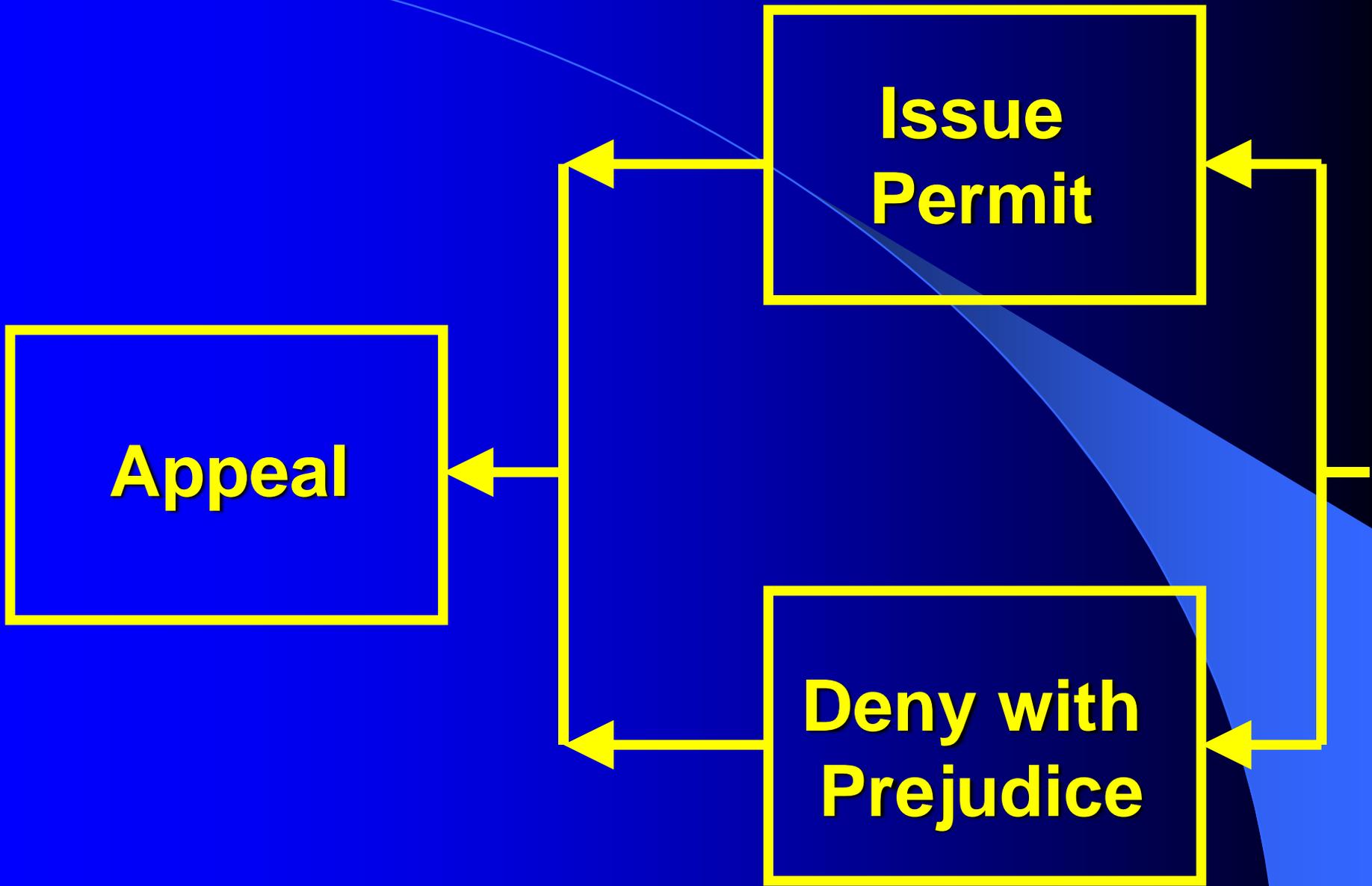


Decision Document

- Statement of Findings
- Environmental Assessment
- FONSI
- 404(b)(1) Compliance Documentation
- Must address all other pertinent laws and regulations

A flowchart diagram on a blue background. A central yellow-outlined box contains the text "Recommendation of issuance/denial to District Engineer". A yellow arrow points down into the top of the box. A yellow arrow points left from the left side of the box, then goes down and then left again. A light blue curved arrow starts from the top right and points towards the top of the box. A light blue curved arrow starts from the right side and points towards the bottom right.

**Recommendation of
issuance/denial to
District Engineer**



WEB SITES

US Army Corps of Engineers

Headquarters - Regulatory Program:

www.usace.army.mil

Charleston District – Regulatory Program

www.sac.usace.army.mil