



Endangered Species Act & 404 Permitting

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The Clean Water Act



§ 404 Permitting

- Clean Water Act (CWA) prohibits discharge of any pollutant into waters of the United States
 - §404 of CWA allows the U.S. Army Corps of Engineers to issue permits allowing the discharge or dredge of fill material into navigable waters
- Necessary for construction of structure or infrastructure in a water of the US

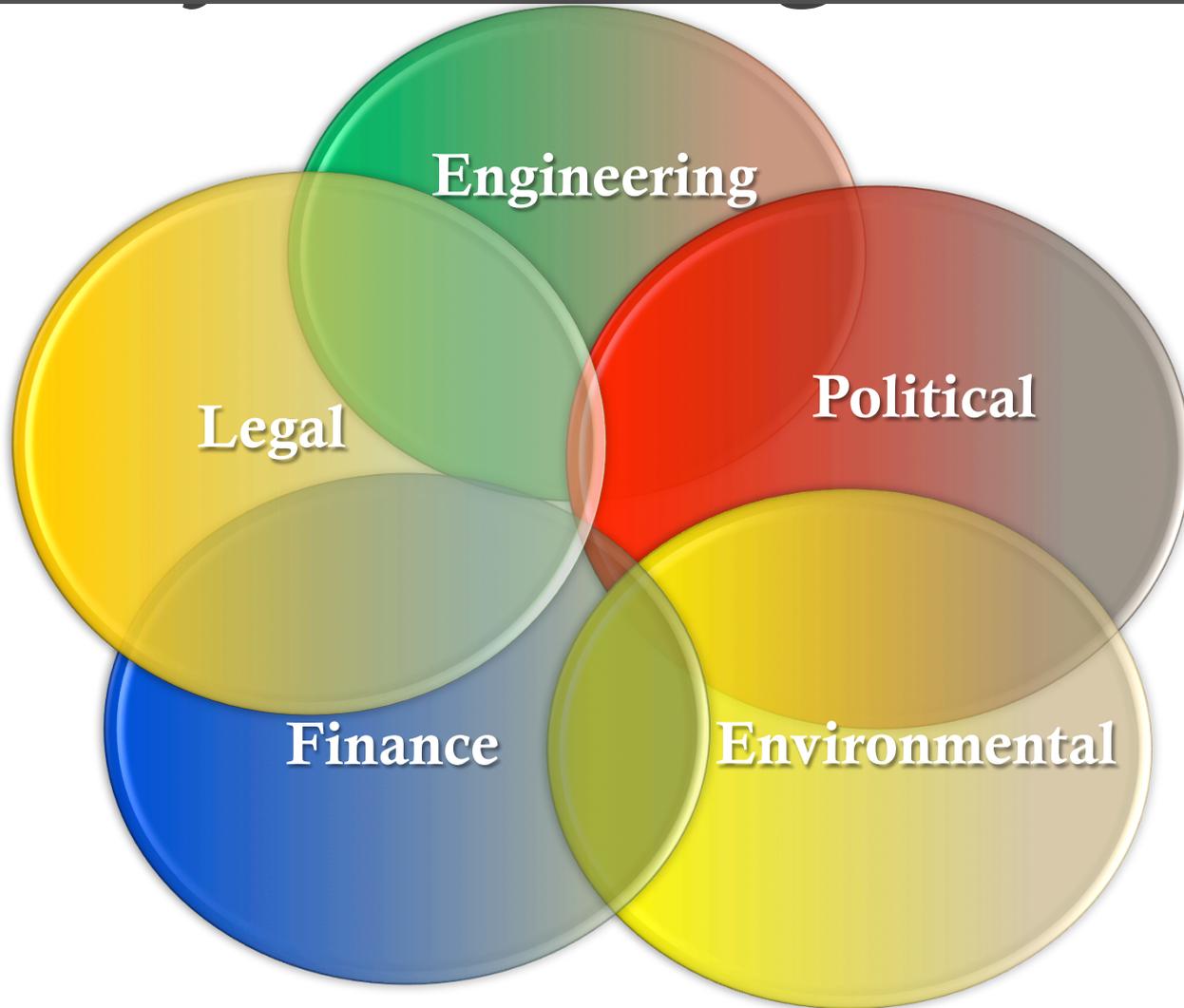


404 permitting



- Endangered Species Act 7(a)(2):
 - Federal agencies shall insure actions not likely to:
 - Jeopardize continued existence of species OR
 - Result in destruction/adverse modification of designated critical habitat
- USACE lead agency under NEPA 404 process

Project Management





404 Permitting



- Need & Purpose
- Water Dependency
- Scope
- Jurisdictional Water Determination
- Cultural Resource Section 106
- Protected Species



Fish and Wildlife Service – “IPaC”

- Animals
 - Occur in the State of GA (38)
 - 10 Threatened
 - 28 Endangered
 - Listed but do not occur in the State (14)
 - 4 threatened
 - 10 endangered
- Plants
 - 22 species
 - 7 Threatened
 - 15 Endangered



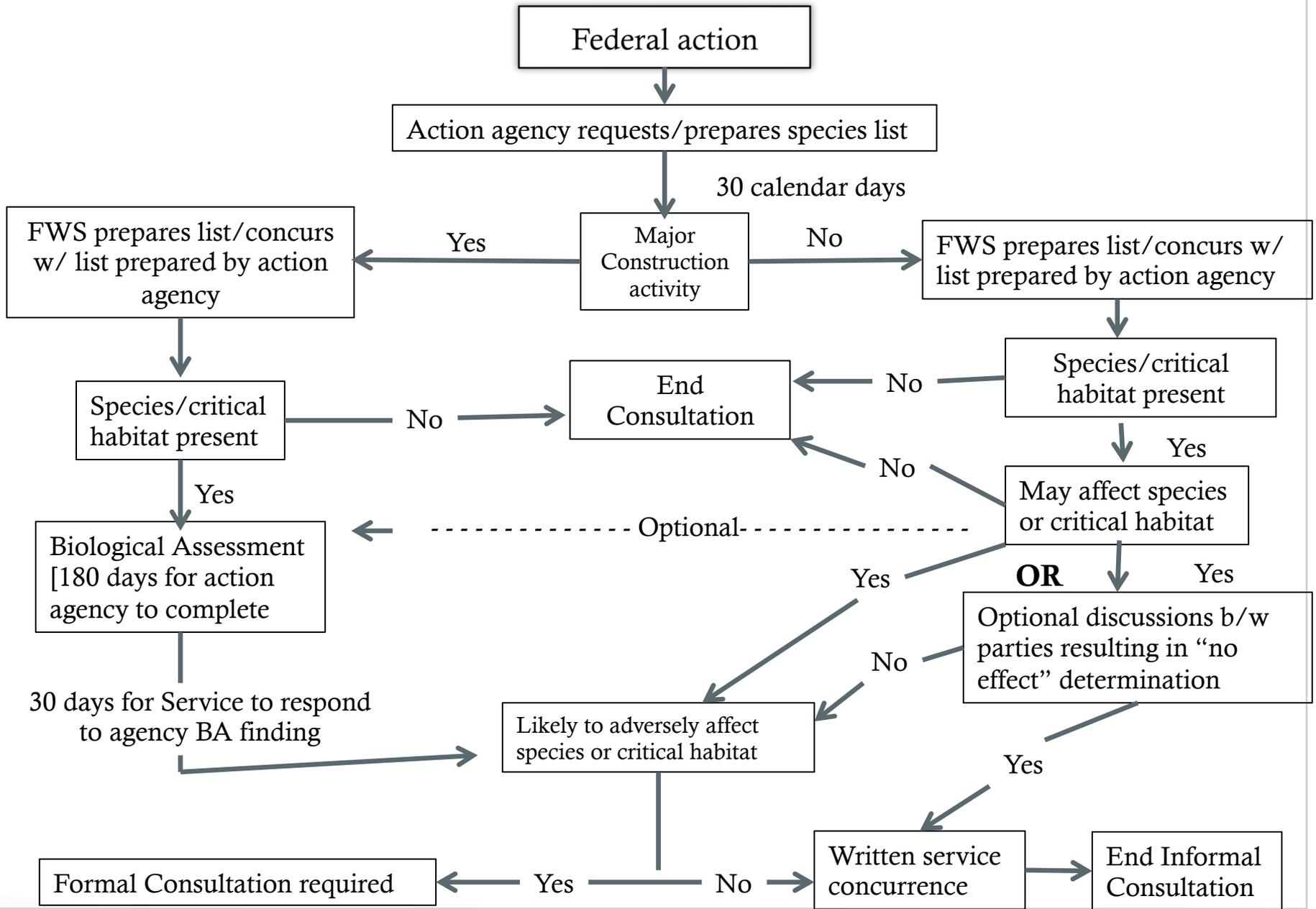
ESA Consultation

- Informal vs. Formal
- Species Survey of Action Area: Section 10(a)(1)(A) permit
- FWS vs NMFS

Informal Consultation

- Purpose:
 - Clarification of what/where in action area
 - Determine effects;
 - Explore alternatives actions;
 - Determine whether formal consultation warranted; and
 - Explore the design or modification of action benefit the species.
- Data assembly





Biological Assessment

- Required if listed species/critical habitat may be present in action area
- Optional if *only* proposed species or critical habitat
- May be prepared by non-Federal representative
- Contents are discretionary
- Discuss all listed species found in the action area
- Not required to analyze alternatives to proposed actions

Listed Species / Critical Habitat

- No effect
- Is not likely to adversely effect (beneficial, insignificant, discountable effects)
- Nonconurrence
- Is likely to adversely effect



Formal Consultation

- Initiated by written request from USACE
- "initiated" on the date the request is received, if the USACE provides all the relevant data required by 50 CFR §402.14(c). If not, the clock starts after all required information has been received.
- Within 30 working days of receipt of an initiation package, the Services should provide written acknowledgment of the consultation request, advise the action agency of any data deficiencies, and request either the missing data or a written statement that the data are not available.
- Reliable, credible, and represents the best scientific and commercial data available.

Action agency determines proposed action may affect listed species or designated critical habitat

Action Agency requests initiation of formal consultation

Information is complete

N

Y

Within 30 days notify
Agency of missing 50
CFR 402.14(c) data

Consultation clock
starts from date of
receipt

Data is received
and complete

90 days

Service formulates BO and incidental
take statement in conjunction with
Agency/Applicant

90 days

Review of draft Biological Opinion by Action
Agency and/or Applicant, if any

Delivery of final biological opinion and incidental take statement to Action Agency
end formal consultation

Biological Opinion

- I. Description of proposed action
- II. Status of the species/critical habitat
- III. Environmental Baseline
- IV. Effects of the action
- V. Cumulative effects
- VI. Conclusion
- VII. Reasonable and Prudent Alternatives

Biological Opinion Findings

- Action agency determines whether and how to proceed with its proposed action in light of the Services' biological opinion, even though the terms and conditions of incidental take statements are non-discretionary.
- Must be delivered 45 days after formal consultation is complete
- If a **jeopardy** or **adverse modification** determination results from the consultation, the action agency may:
 - adopt one of the reasonable and prudent alternatives for eliminating the **jeopardy** or **adverse modification** of critical habitat in the opinion;
 - decide not to grant the permit, fund the project, or undertake the action;
 - request an exemption from the Endangered Species Committee;
 - reinitiate the consultation by proposing modification of the action or offering reasonable and prudent alternatives not yet considered; or
 - choose to take other action if it believes, after a review of the biological opinion and the best available scientific information, such action satisfies section 7(a)(2).

Incidental Take Statement

- Section 9
- Contents:
 - Amount/extent of take anticipated
 - Effect of the take
 - Reasonable and Prudent Measures
 - Terms and Conditions
 - Coordination of incidental take statements with other laws, regulations, and policies

Species Mitigation

- Relocation
- Monetary
- Site Restoration and/or Preservation
- Purchase of Species Credits



Satisfaction of ESA

Until circumstances change....then re-initiation

Mitigation

- March 2008, the *Compensatory Mitigation for Losses of Aquatic Resources: Final Rule* (commonly referred to as the “Mitigation Rule”) was approved becoming effective on June 9, 2008.
 - Mitigation Bank Selection
 - In Lieu Fee
 - SOP