

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) AND ENVIRONMENTAL COMPLIANCE

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TOPICS

- What Does Environmental/Planning Branch do
- NEPA and Environmental Compliance Overview
 - Emphasis on NEPA process and Endangered Species process
- How/Why NEPA and Environmental Compliance Fits with Master Planning



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KEY ROLES

Environmental Resources/MRRP Plan Formulation Section

- Prepares Environmental Impact Statements (EISs) and Environmental Assessments (EAs) for Civil Works Planning Projects

- Coordinates with Operations on development of plans
 - 408 Modifications
 - Non-Routine Maintenance Activities
 - Section 216 – Re-examination of Completed Civil Works
 - Master Planning



ENVIRONMENTAL COMPLIANCE - O&M

- 408 Environmental Compliance
 - Easements on project lands (oil/gas development; other improvements)
- Lands Management and Master Plans
 - Lake projects
- Routine/Non-routine activities requiring EAs/EISs
 - Outside existing Master Plan coverage
 - Do not fit CATEX
- Studies
 - Water supply
 - Major maintenance
 - “216’s” - Re-examination of Completed Civil Works



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NEPA AND ENVIRONMENTAL COMPLIANCE



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HISTORY OF NEPA

- Rachel Carson...1963
- Cuyahoga River...1969



- Santa Barbara oil spill...1969
- Senator Jackson introduces S. 1075...1969
 - Lynton Caldwell (architect of NEPA)
 - Signed by President Nixon...January 1, 1970

PURPOSE OF NEPA

“...to declare a national policy which would encourage productive and enjoyable harmony between man and his environment...”

Environmental Operating Principles (EOPs) 1, 2 and 3 recognize this concept.

EOP 1 – Strive to achieve environmental sustainability.

EOP 2 – Recognize the interdependence of life and the physical environment.

EOP 3 – Seek balance and synergy between human development and natural systems.



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NEPA – POLICY GOALS

Section 101 of NEPA

“...overall welfare and development of man...productive harmony of man and nature...current and future generations, such that the nation may...”

Section 102 of NEPA

“...federal agencies shall utilize an interdisciplinary approach, identify methods and procedures to ensure environmental values are appropriately considered, prepare a ‘detailed statement’ for ‘major Federal actions’...”



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NEPA – 40 CFR PARTS 1500 - 1508

- Applies to all Federal actions
 - Federal projects
 - Federal funding
 - Federal permit or authorization

- Requirements
 - Environmental Impact Statement
 - Record of Decision
 - Environmental Assessment
 - Finding of No Significant Impact (FONSI)
 - Categorical Exclusion (CATEX)
 - Rulemaking for specific categories of actions with no significant effect.

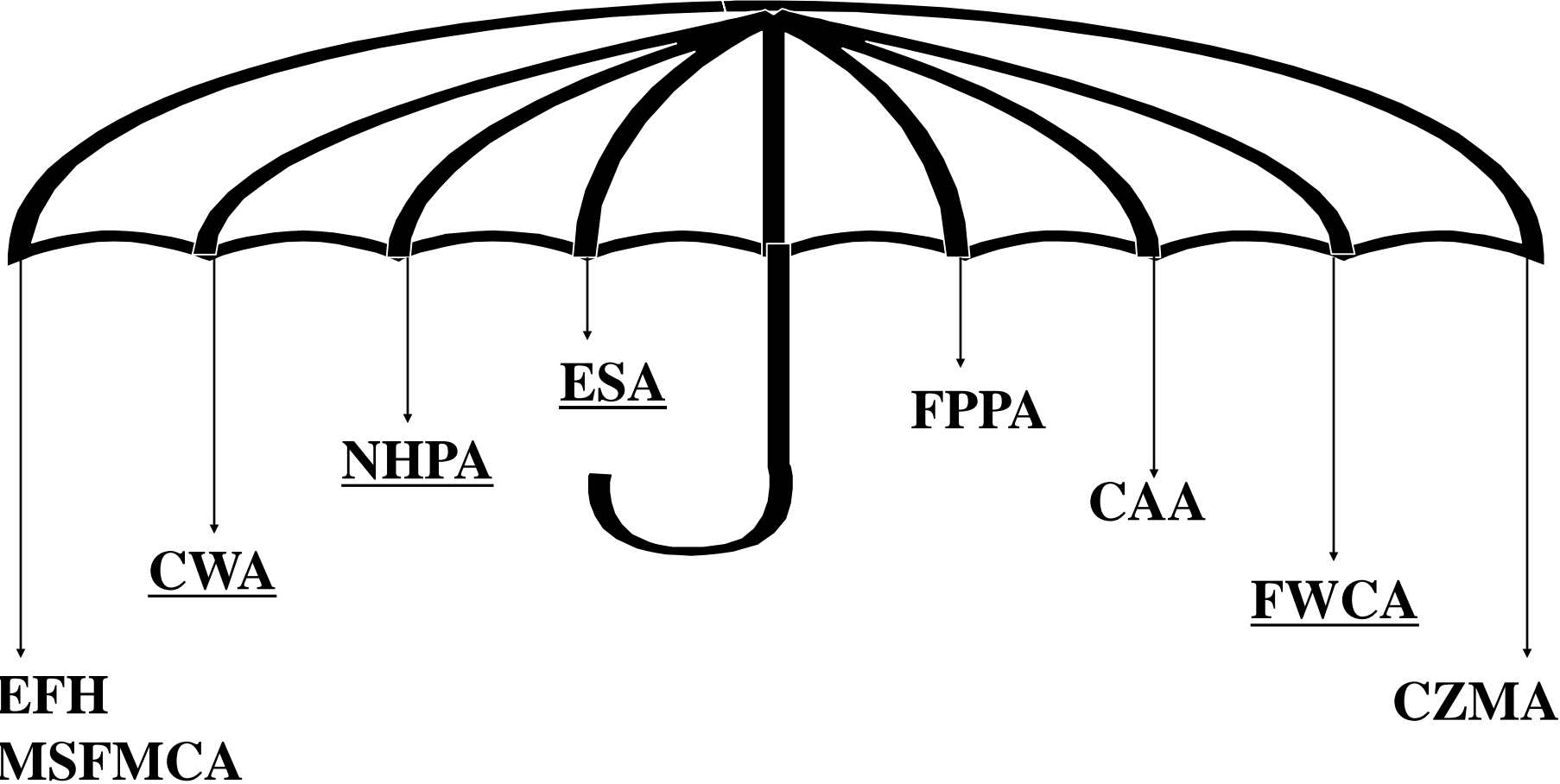
- Emergency Procedures



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NEPA – OVERARCHING CONCEPT



40CFR 1502.25



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NEPA – THE SUPREME COURT

The Supreme Court has held that NEPA does not require agencies to take the environmentally preferable action; it only requires them to consider the effects of their actions.



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NEPA – PROCESS OVERVIEW

- Authorization to initiate planning of a federal action
- Determine if the action is Categorically Excluded
- Determine if there are significant impacts. If not, then prepare an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI).
- Determine there are significant impacts. If so, then initiate the Environmental Impact Statement (EIS) process.

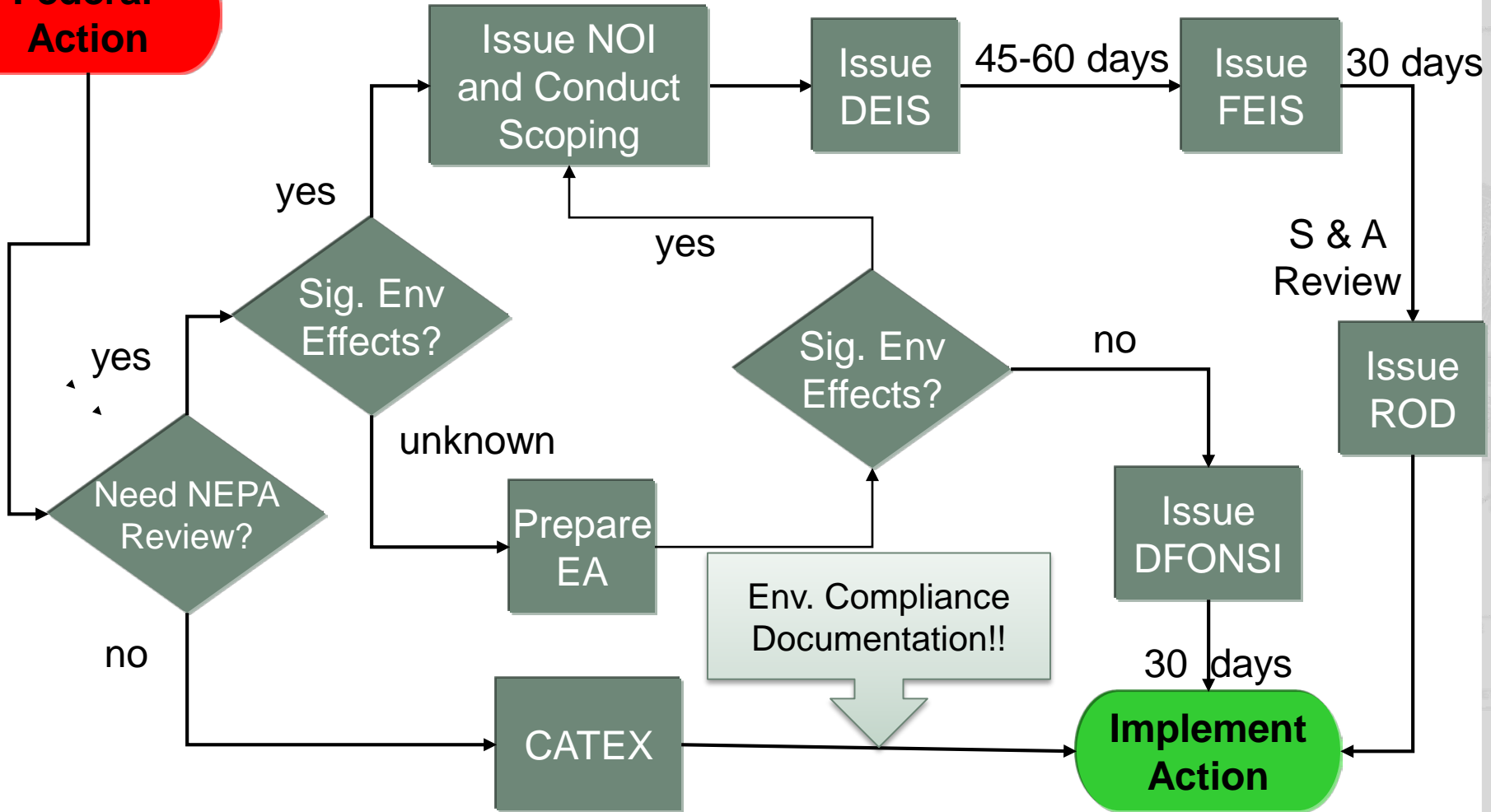


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NEPA PROCESS FLOWCHART

Federal Action



CONSEQUENCES OF NOT FOLLOWING NEPA PROCESS

- Cannot award construction contract
- Cannot allow an easement
- Basically, can't implement our projects
- If someone wants to challenge us in court, procedure is their first target



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NEPA – DOCUMENT CONTENTS

Environmental Assessment (EA)

- No formal format
- 15 pages is the recommended page limit
 - FR 18037 March 23, 1981
 - See CEQ Q+A #36
- CEQ Modernization Task Force in 2003 did identify a need for guidance regarding the range in size of EAs and the complexity of environmental issues



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ENVIRONMENTAL ASSESSMENT (CONT.)

- Screening tool
 - Assesses the need for an EIS
- First document in the process
- Determines significance of impacts on the human environment
 - Natural/physical environment and the relationship to people)
- A FONSI is prepared if an EIS is not required
 - Signed by the District Commander



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SUGGESTED EA FORMAT

- Title
- **Purpose** and **Need** for the Proposed Action*
- Proposed Action and **Alternatives***
- Environmental Setting**
- Environmental **Impacts** and Their Significance Relative to the Human Environment*
- Status of Environmental Compliance
- List of Agencies/Tribes and Public **Consulted***

* Mandatory 40 CFR 1508.9b

** 1502.10 EIS format



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FONSI CONTENT

- Briefly present reasons why action will not have significant impact on the human environment
- State an EIS is not required
- Reference any other related environmental documents
- Mitigation measures (if required)
 - Note Mitigative EA



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ARE PUBLIC MEETINGS NEEDED?

- CEQ regulations encourages public involvement
 - Helps to meet intent of the national policy spelled out in Section 101
- Not Required for EA's, but...
 - Keep in mind that public engagement is important to understand key issues upon which analysis would be focused



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SCOPING

- Process to define affected public and agency concerns and issues
- Deters future legal challenges
 - First occasion for opposition to make case. Becomes increasingly more difficult as process evolves.
- Determines scope and significance of resources and issues to be analyzed in the EIS
- Recommended but not required for an EA



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SCOPE OF ANALYSIS

■ Actions

- Connected
- Cumulative
- Similar

■ Alternatives

- No Action
- Reasonable courses of action
- Actions by others

■ Impacts

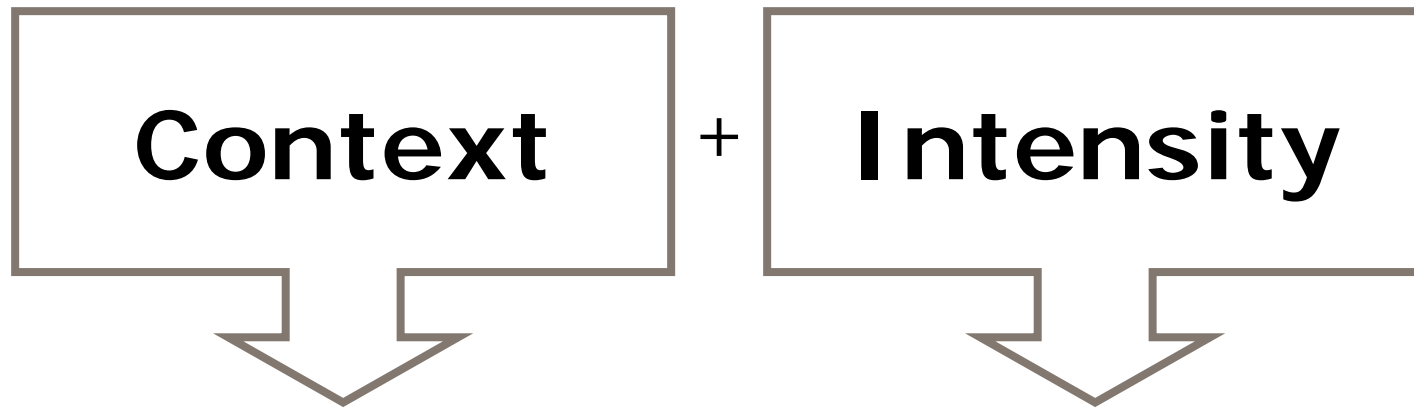
- Direct
- Indirect
- Cumulative



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IMPACT SIGNIFICANCE



**Significant
Impact**



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CONTEXT

Context refers to the affected environment in which the proposed action would take place and is based on the specific location of the proposed action.



New River



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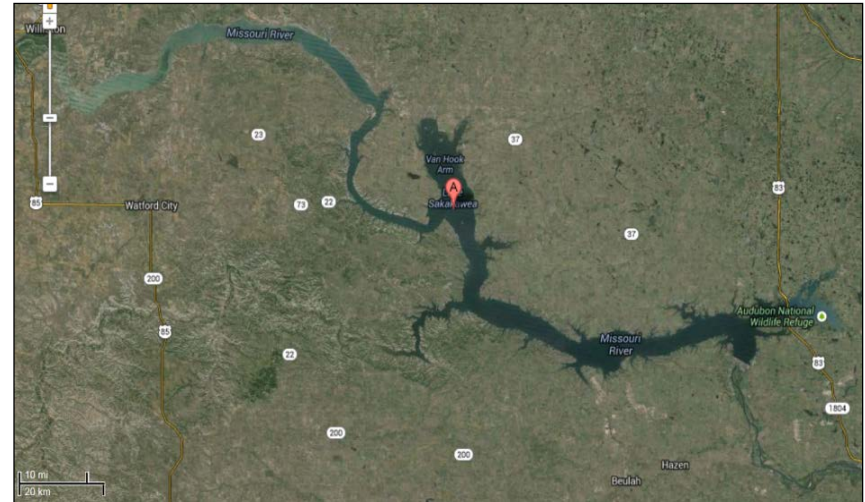
INTENSITY

Intensity refers to the magnitude of change that would result if the proposed action was implemented.



20,600 AF Storage Reallocation at Chatfield - Total Storage 230,000AF

Large Effect



100,000 AF Storage Reallocation at Lake Sakakawea - Total Storage is 23MAF

Immeasurable Effect



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SIGNIFICANCE OF IMPACTS (40 CFR § 1508.27)

- May be adverse
- May be beneficial
- May be both beneficial and adverse
- May be significant even if on balance the effect is beneficial



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CATEGORICAL EXCLUSION

- Civil Works (33 CFR 230.9 19) - Categorical Exclusions cover a variety of actions from disposal of federal lands to “minor maintenance dredging”
- The Corps requires documentation of a CATEX for the record, some agencies do not.
 - Important that the administrative record documents compliance with other laws/regs
 - **Record of Environmental Consideration (REC)** is a good tool to document how compliance has been met
 - “memo for the record”... our back-up info on compliance



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DOCUMENTING COMPLIANCE

■ 404 Clean Water Act

- Avoid, minimize, mitigate discharge into Waters of US (wetlands) or navigable waters
- Corps doesn't permit itself, but process is similar to regulatory processes
- 404(b)1 documents effects to aquatic resources
- Are your regulatory offices involved, or planning offices?

■ Endangered Species Act (ESA)

- Be careful in “checking the box” - this law, in particular, really requires good documentation
- Not only civil penalties, but also criminal



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DOCUMENTING COMPLIANCE (CONT.)

- Section 106 of National Historic Preservation Act
 - Any federal undertaking – Examine potential to cause effects to historic properties
 - Identify/coordinate with SHPO/THPO and/or other consulting parties
 - Seeks to avoid impacts to properties listed/eligible on National Register
 - Letter(s) of concurrence, otherwise Advisory Council on Historic Preservation
 - Anybody have an existing Programmatic Agreement to deal with Recurring Operational Activities?



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DOCUMENTING COMPLIANCE (CONT.)

- Fish and Wildlife Coordination Act
 - Assure consideration of wildlife impacts of federal water development projects
 - Done with FWS/NMFS/State wildlife agency with objective of seeking to conserve wildlife resources
 - Helps us identify “significant resources” that we should be focused on protecting or enhancing
 - Agency is required to give full consideration to the recommendation
 - Planning Aid Letter & Coordination Act Report



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TAKE AWAY POINTS

- NEPA implements National Policy of productive harmony between man and his environment
- There is an umbrella concept with compliance
- Action Forcing Provisions require a NEPA document for major federal actions
- NEPA is procedural not prescriptive
- A Council on Environmental Quality oversees the NEPA process
- Challenges occur via EPA review and APA court actions



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TAKE AWAY POINTS (CONT.)

- NEPA provides for PUBLIC AWARENESS and INPUT regarding significant impacts to the human environment resulting from a federal action
- The NEPA process begins with a proposed federal action and ends with one of three results:
 - CATEX, FONSI or ROD



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Let's look at Endangered Species Act (ESA) as it might take place parallel to following our NEPA and planning processes.



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PERTINENT SECTIONS OF THE ESA

- **Section 2** – Congressional Findings and Declaration of Purposes and Policy
- **Section 4** – Listing of Species, Designation of Critical Habitat, and Recovery Planning
- **Section 6** – Agreements and Funding for States
- **Section 7** – Interagency Coordination and Consultation
- **Section 9** – Prohibits Take of Listed species
- **Section 10** – Scientific and Incidental Take Permitting and Habitat Conservation Plans



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INTERAGENCY COOPERATION

Affirmative Conservation Mandate

Section 7(a)(1) – Federal agencies shall use their authorities to carry out their programs for the **conservation** of endangered & threatened species

Conservation: The use of methods and procedures to bring an endangered or threatened species to the point where provisions of the ESA are no longer necessary.



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INTERAGENCY COOPERATION DUTY TO AVOID JEOPARDY AND ADVERSE MODIFICATION OF CRITICAL HABITAT

Section 7(a)(2) – Federal agencies must ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat.



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WHAT ULTIMATELY TRIGGERS CONSULTATION?

- When a **proposed** federal action, “may affect” a listed species and/or designated critical habitat
 - Actions that cause impacts to:
 - Reproduction
 - Numbers
 - Distribution

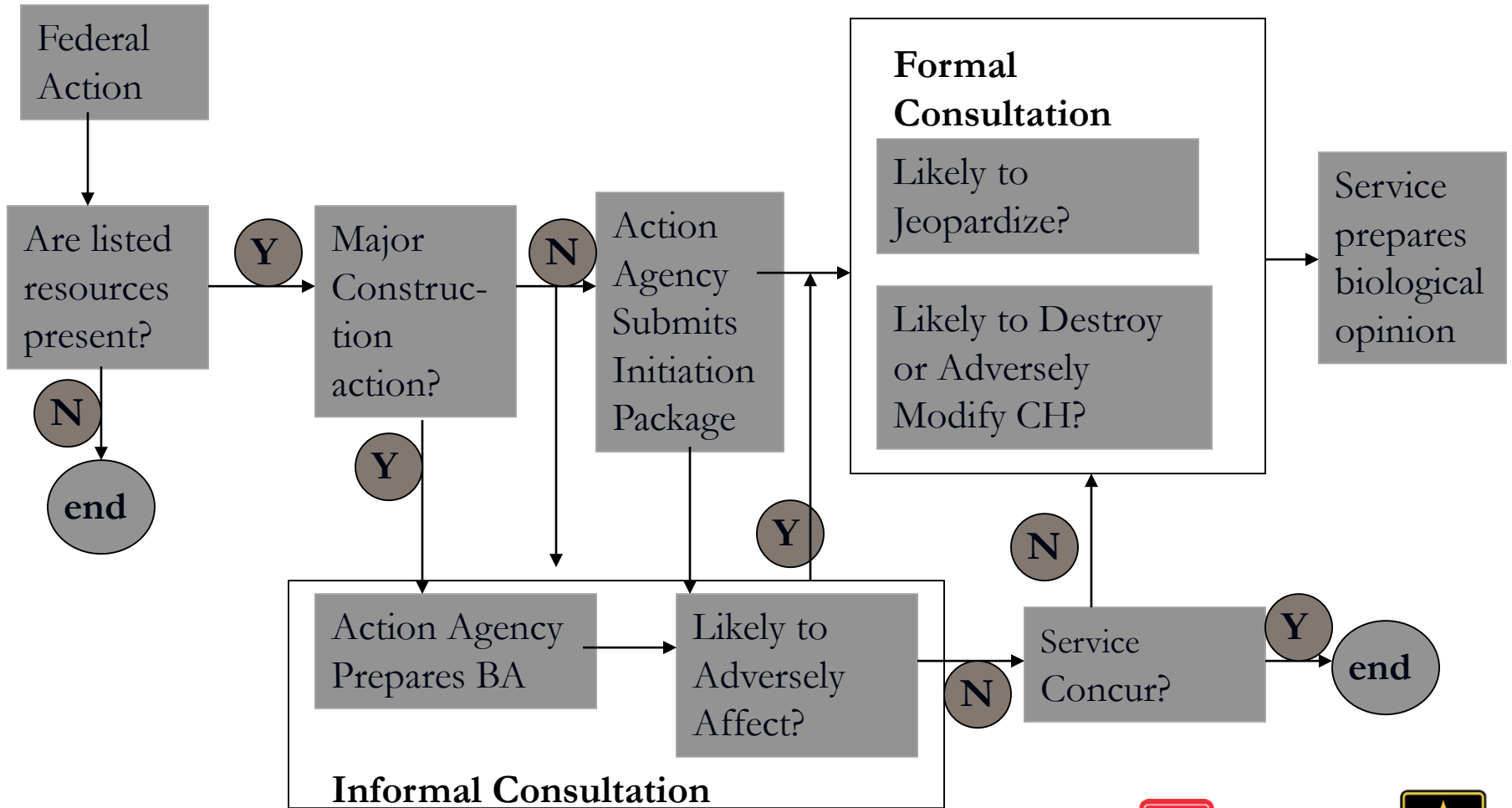
- The effects determination is the Federal action agency’s responsibility
 - Agency completes a Biological Assessment



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GENERALIZED CONSULTATION PROCESS



BIOLOGICAL OPINION - PROCESS

- 90-day consultation period
- 45 days to write the biological opinion
- Conclusion is “jeopardy” or “no jeopardy” and/or “adverse modification” or “no adverse modification”
- Jeopardy conclusion requires development of “reasonable and prudent alternatives”



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JEOPARDY/ADVERSE MODIFICATION

- Jeopardy:
 - “Jeopardize the continued existence of” means an action would be expected to reduce likelihood of the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

- Adverse Modification:
 - Adverse modification would occur if the listed critical habitat does not remain functional to serve the intended conservation role for the species.



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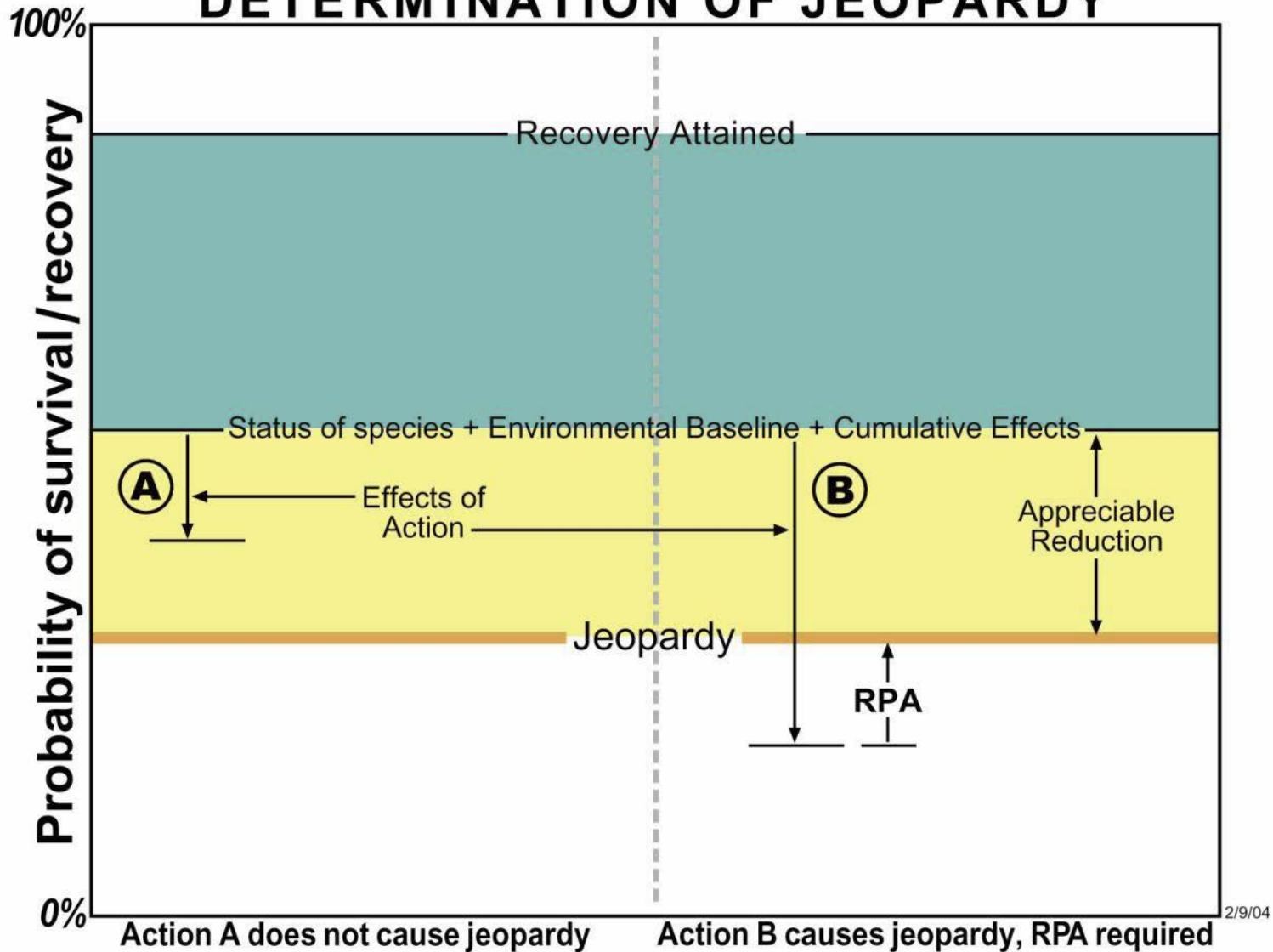
REASONABLE AND PRUDENT ALTERNATIVES (RPA)

- Must be:
 - consistent with the intended purpose of the action;
 - consistent with the scope of the Federal agency's legal authority;
 - economically and technologically feasible; and must
 - avoid jeopardy/adverse modification

- Important to understand authority and appropriations when identifying RPA with the U.S. Fish & Wildlife Service
 - Cannot commit the Corps to actions where we do not have authority or responsibility
 - Understand fiscal constraints when negotiating with the Service
 - Must meet “certainty to occur” definition
 - End result of formal consultation: Cost effective measures within our authority and responsibility



DETERMINATION OF JEOPARDY



MASTER PLANNING

- Great way to “think ahead” about what we want to do
- Use the process to our advantage
 - If we know details of what or how we might do something, we can complete all or at least part of our compliance at this stage
 - Set conditions of how things will be done
 - Seasonality of construction
 - “Grease the skids” for successful compliance



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MASTER PLANNING (CONT.)

- Per Chapter 3 of [Engineering Regulation 1130-2-550](#) and [Engineering Pamphlet 1130-2-550](#) Corps policy, it is the “...document that conceptually establishes and guides the orderly development, administration, maintenance, preservation, enhancement, and management of natural, cultural, and recreational resources of a Corps water resource project.”



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MATER PLANNING/NEPA/ENV COMPLIANCE

- Fits well with NEPA

- Frames analysis around the issues via scoping
- Effects/outcomes
 - Alternatives meet purpose & need?
 - » Effects of new construction/management
 - » Effects of long term operation/maintenance
- Compliance with authorized purpose
- Compliance with environmental laws
- Identifies reasonable foreseen actions
 - Tiered analysis from original master plan / NEPA



In Summary NEPA is Planning...

NEPA	Master Planning
Purpose	Description of project; provide MP update; programmatically meet contemporary needs
Need	Contemporary issues; new/different demands/factors influencing resources; new regulations and requirements
Alternatives Including No Action and Proposed Action	Formulation and comparison of alternatives that meet need
Affected Environment	Inventory and forecast project conditions
Environmental Consequences	Evaluation/assess affects; impacts and benefits
Public Involvement	Document public involvement; expectations; input to planning process
Environmental Compliance	Plan meets requirements



TIERING

- Optional use of broad based programmatic analysis followed by subsequent site-specific documentation
- Eliminates repetitive discussions and focuses on issues at hand
- Ties together inter-related projects in a common environment
- Support cumulative impact analyses



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QUESTIONS



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Omaha District

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