

2021 WEDA PACIFIC CHAPTER VIRTUAL MEETING

2019-20 FEDERAL RULE-MAKING & DREDGING

Prepared by Kate Bliss, *Pacific Ocean Division*, Wade Eakle, *South Pacific Division* & David Gesl, *Northwestern Division*,
Regulatory Program Managers

29 OCT 2020

"The views, opinions and findings contained in this report are those of the author(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation."



**US Army Corps
of Engineers.**



WHAT'S NEW AFFECTING DREDGING OPERATIONS?

1. USFWS/NMFS Endangered Species Act section 7 coordination – *84 FR 44976-45018*, effective 26 SEP 2019
2. EPA/USACE Navigable Waters Protection Rule (Clean Water Act jurisdiction) – *85 FR 22250-22342*, eff. 22 JUN 2020
3. EPA 401 CWA Water Quality Certification – *85 FR 42210-42287*, eff 11 SEP 2020
4. CEQ National Environmental Policy Act implementation – *85 FR 43304-43376*, eff 14 SEP 2020
5. USACE 2020 Nationwide Permits reissuance – SEP 2020



US Army Corps
of Engineers.



ENDANGERED SPECIES ACT

Revisions to implementing 50 CFR Parts 424, 402 & 17.
Response to EO 13771 (30 JAN 2017).

Section 7 of the Act provides requirements for Federal agency cooperation and consultation procedures.
Implementation regulations at 50 CFR 402.

Changes to 50 CFR 424 for listing, delisting, or reclassifying species; and criteria for designating critical habitat.

Changes to 50 CFR 402 revised definitions of “destruction or adverse modification” and “effects of the action”.

Established a standalone definition for “environmental baseline”.



ENDANGERED SPECIES ACT CONT.

“Environmental baseline” 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.

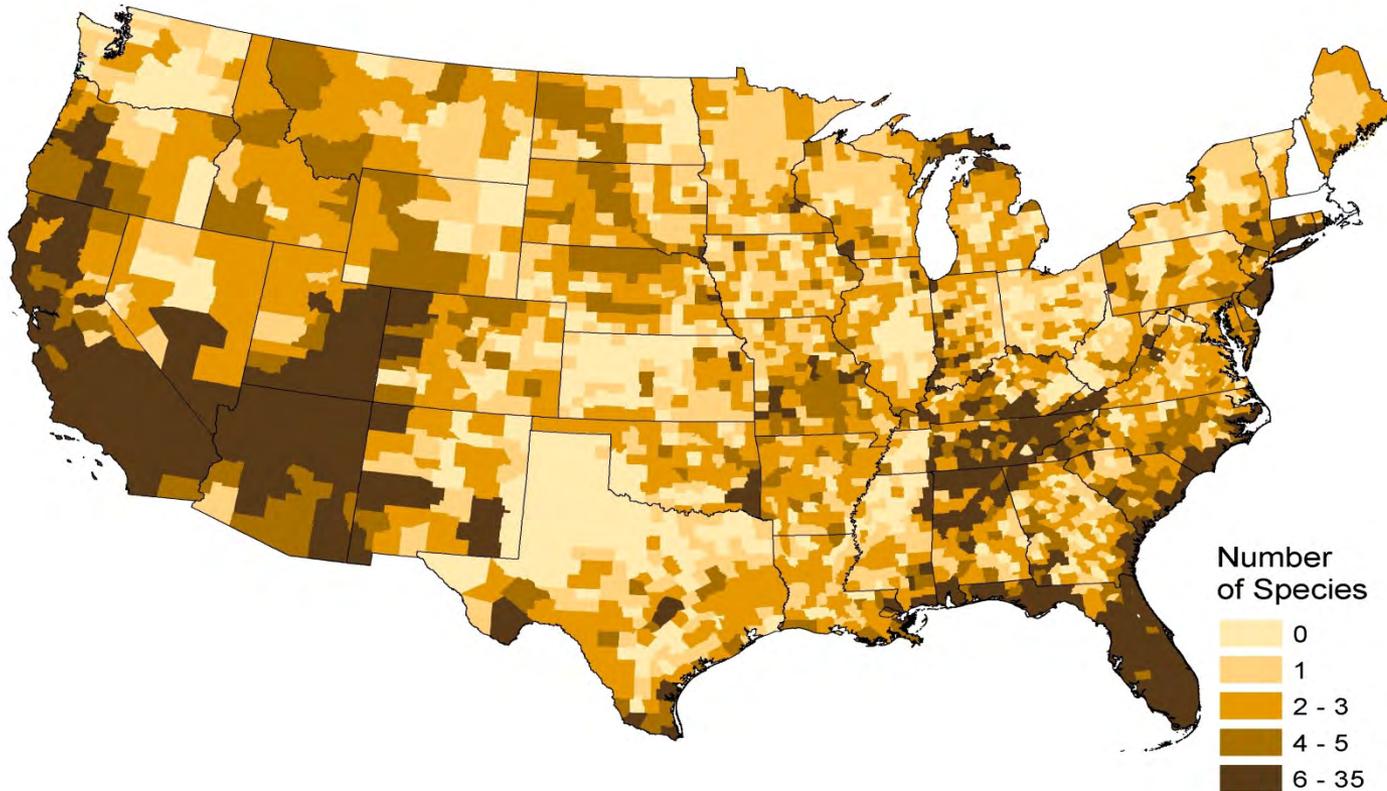
The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within agency’s discretion to modify are part of the environmental baseline.

402.13 Informal consultation, addition of 60-day timeline for concurrence letters.



GEOGRAPHIC PATTERNS OF AT-RISK SPECIES

Threatened and Endangered Species



D:\USER\FLATHER\NATURESERVE\UPDATE_OF_TE_COUNTS\TE_AT_RISK\TE_COUNTS_0.MXD



US Army Corps
of Engineers.



NAVIGABLE WATERS PROTECTION RULE

The Navigable Waters Protection Rule: Definition of “Waters of the United States” became effective on 22 JUN 2020.

Currently in effect nationwide (including U.S. territories) except for Colorado due to litigation.

Extensive pending litigation challenging the NWPR.

The NWPR reduced the scope of geographic jurisdiction under the Clean Water Act relative to prior rules (1986 regs or 2015 Clean Water Rule).



NAVIGABLE WATERS PROTECTION RULE CONT.

4 categories of “Waters of the United States”:

- (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
- (2) Tributaries;
- (3) Lakes and ponds, and impoundments of jurisdictional waters; and
- (4) Adjacent wetlands.

12 categories of excluded waters (i.e., non-jurisdictional waters).



CWA 401 WATER QUALITY CERTIFICATION

“Clean Water Act Section 401 Certification Rule” went into effect on 11 Sep 2020.

Section 401 of the Clean Water Act (CWA) requires that:

1. Any applicant for a federal license or permit
2. Which MAY result in a discharge into waters of the United States
3. Must obtain a water quality certification or waiver from the certifying authority
4. The discharge complies with all applicable water quality requirements



CWA 401 WATER QUALITY CERTIFICATION

Summary of New 401 Rule

- 401 certifying agency must respond in a “reasonable period of time” as defined by federal
- All project proponents must submit a request for a meeting with 401 agency at least 30 days prior to submitting a certification request.
- The scope of certification is limited to assuring that the discharge from a federally licensed or permitted activity will comply with water quality requirements.
- USACE is responsible for enforcing 401 certification conditions if they have been incorporated into a USACE permit.
- The federal agency (USACE) must notify the USEPA within 5 days of receiving the license or permit application and related certification, for purposes of section 401(a)(2).



US Army Corps
of Engineers.



NATIONAL ENVIRONMENTAL POLICY ACT

“Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act” (also known as the NEPA Modernization Rule) went into effect on 14 Sep 2020.

NEPA applies to a broad range of Federal agency actions, including Federally-funded construction projects, plans to manage and develop Federal lands, and Federal authorizations of non-Federal activities such as licenses and permits.

Per CEQ, the purpose of the update to NEPA regulations is to “simplify and clarify requirements...reflect current technologies and agency practices, eliminate obsolete provisions, improve the format and readability of the regulations...and accelerate the environmental review and permitting processes.”



NATIONAL ENVIRONMENTAL POLICY ACT

Summary of NEPA Modernization Rule

- Time Limits of 1 year to complete an Environmental Assessment (EA) and 2 years to complete an EIS.
- Page Limits – 75 pages for an EA and 150 pages for an EIS (not inclusive of all sections or appendices)
- When multiple Fed agencies are involved, requires a joint schedule, single EIS, and joint Record of Decision, where appropriate
- Allows Fed agencies to adopt each others' Categorical Exclusions, where appropriate
- Eliminated definition of cumulative effects
- Must track costs for an EIS



2020 NATIONWIDE PERMITS

Currenting re-authorizing the Nationwide permits

Published in the Federal Register 15 September 2020

Aggressive schedule to publish a Final Rule

OBJECTIVES OF THE PROPOSED CHANGES

- Under E.O. 13783, reduce regulatory burdens on the production, distribution and use of energy, while maintaining environmental incentives and protections provided by the NWP
- Seek comment on ways to reduce duplication with federal agencies that use the NWP
- Simplify the terms and conditions of the NWP so that they can be implemented more consistently, with lower costs, and with no decline in environmental protection
- The NWP will continue to provide incentives to minimize impacts to aquatic resources, to qualify for a streamlined permit process

