

RECENT ENVIRONMENTAL STREAMLINING AND RISK INFORMED DECISION MAKING

PCoP WEBINAR SERIES

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US Army Corps
of Engineers®



Executive Order 13807 – Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

NEPA Compliance

3x3 Compliance

Section 1005 of WRRDA 2014

How do they all fit together?

“One Federal Decision”

*SMART Planning Guide for
Coordination with the Services*

*Operationalizing risk-informed
decision making*



Before I can tell
you that story...



...I have to tell
you this story



NEPA COMPLIANCE FOUNDATIONS



40 CFR 1500.1(b) *“Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail”*

40 CFR 1500.1(c) *“NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action.”*

40 CFR 1500.4 *“Reducing paperwork. Agencies shall reduce excessive paperwork by:...(b) Preparing analytic rather than encyclopedic environmental impact statements...(c) Discussing only briefly issues other than significant ones...(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly”*

WHAT ARE THE ENVIRONMENTAL RISKS?

- The critically endangered Cheshire Cat is known to occur within your study area. Its preferred habitat is baobab trees in close proximity to aquatic habitats (ponds, lakes, streams, wetlands).
- If Cheshire Cats have been observed or there is preferred Cheshire Cat habitat within the construction footprint FWS generally requires adherence to construction conditions in order to issue a no jeopardy opinion, which limits any ground or vegetation disturbance to between January 15th and March 15th. Getting the BiOp usually takes a year and could include costly mitigation.
- If a survey confirms no observed Cheshire Cats and construction can avoid preferred habitat, FWS typically provides a quick “not likely to adversely affect” concurrence with no environmental restrictions, usually in 30-60 days.
- Surveying for Cheshire Cats is very costly, as the cats are nocturnal and surveys must be done at night. Surveying for habitat can be done during the day, but only during growing season.





WHAT WOULD YOU DO?



Survey for Cheshire Cat before the TSP. Survey results will provide better information to evaluate and compare alternatives' environmental effects and project costs.

Assume the Cheshire Cat is present and comply with the restrictions, acknowledging that some alternatives may not be justified due to the increased construction & potential mitigation cost.

Assume the Cheshire Cat is present leading up to the TSP, but survey before the final report to see if the construction restrictions can be eliminated, acknowledging that the TSP could change.

Research other Cheshire Cat surveys conducted within the study area and use the results of those surveys to evaluate and compare alternatives, acknowledging that FWS may still require the BiOp & restrictions.



THE MAIN AGENDA



- Risk informed decision making for environmental compliance
- Section 1005 of WRRDA 2014
- SMART Planning Guide with the Services
- E.O. 13807 – “One Federal Decision”
- Putting it all together



RISK-INFORMED DECISION MAKING: ENVIRONMENTAL



What it IS

- Critically evaluating what and how much information you need to get to the next step in the planning process
- Integrating environmental compliance with the feasibility study process to the extent practicable
- Engaging resource agencies before the AMM to support early scoping for us to determine type of NEPA document
- Focusing limited resources on data gathering and analysis of those environmental resources that most affect decision making
- Using feedback from the resource agencies to gauge risks within the environmental discipline

What it's NOT

- Deferring environmental compliance requirements to PED because design is conceptual during feasibility
- Arbitrarily limiting the number of alternatives or gathering of critical data to “save costs”
- Focusing on universal risks, like whether a resource agency will be supportive of the recommended plan
- Waiting until there's “enough information” to engage resource agencies
- Assuming that our studies typically require EISs and issuing the NOI right after FCSEA signing



SECTION 1005 OF WRRDA 2014 (33 USC 2348)



- Implementing guidance issued 20 March 2018 – many “new” requirements for studies with Environmental Impact Statements (EIS)
- Interagency meeting within 90 days of study initiation
- Invite your cooperating agencies early – there are limited circumstances for declining an invitation
- Develop a plan and schedule for environmental review, while coordinating with your cooperating agencies
- DEIS comment period shall not exceed 60 days, other comment periods no more than 30 days
- Environmental compliance completed prior to the final report
- Issue resolution procedures
- Financial penalties for other agency delays

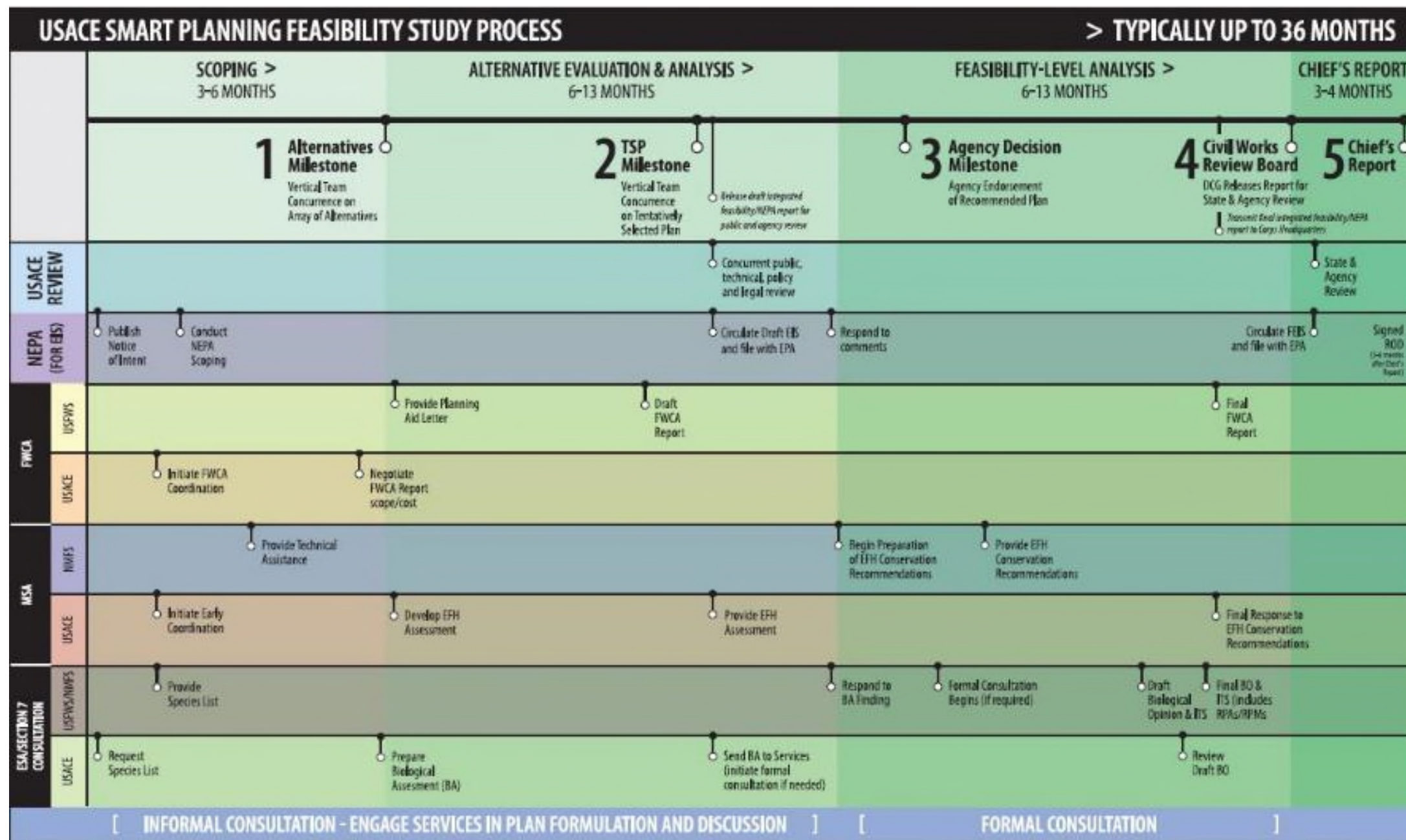
Coordinate early & often



SMART PLANNING GUIDE WITH THE SERVICES

- Issued in September 2015 & available on the Planning Community Toolbox
- Specifically, the Guide walks through engagement with the Services at and between each feasibility study milestone
- “SMART Planning does not eliminate the detail necessary to do a proper environmental impact analysis or mitigation planning; it is about developing the appropriate data at the right time to make the next decision.”
- “It is crucial that involved agencies coordinate early in the study process to collect and analyze the data needed to inform environmental evaluations and consultations. Early coordination also leads to early problem solving when project designs are the most flexible.”

Coordinate early & often





EXECUTIVE ORDER 13807

It's NOT about a 2 year deadline!!!

- Issued August 15, 2017 – not retroactive
- References 33 USC 2348
- “Major infrastructure projects” – require preparation of an EIS, require multiple Federal permits/approvals/licenses, AND there is reasonable availability of funds to complete the project
- Several requirements for “major infrastructure projects”
 - Development of strict permitting timetables
 - Use of “One Federal Decision” for multiple Fed. permits
 - OMB’s disciplinary/accountability system involving upward reporting and elevated dispute resolution
- Overall **goal** of an **average** of no more than 2 years to complete

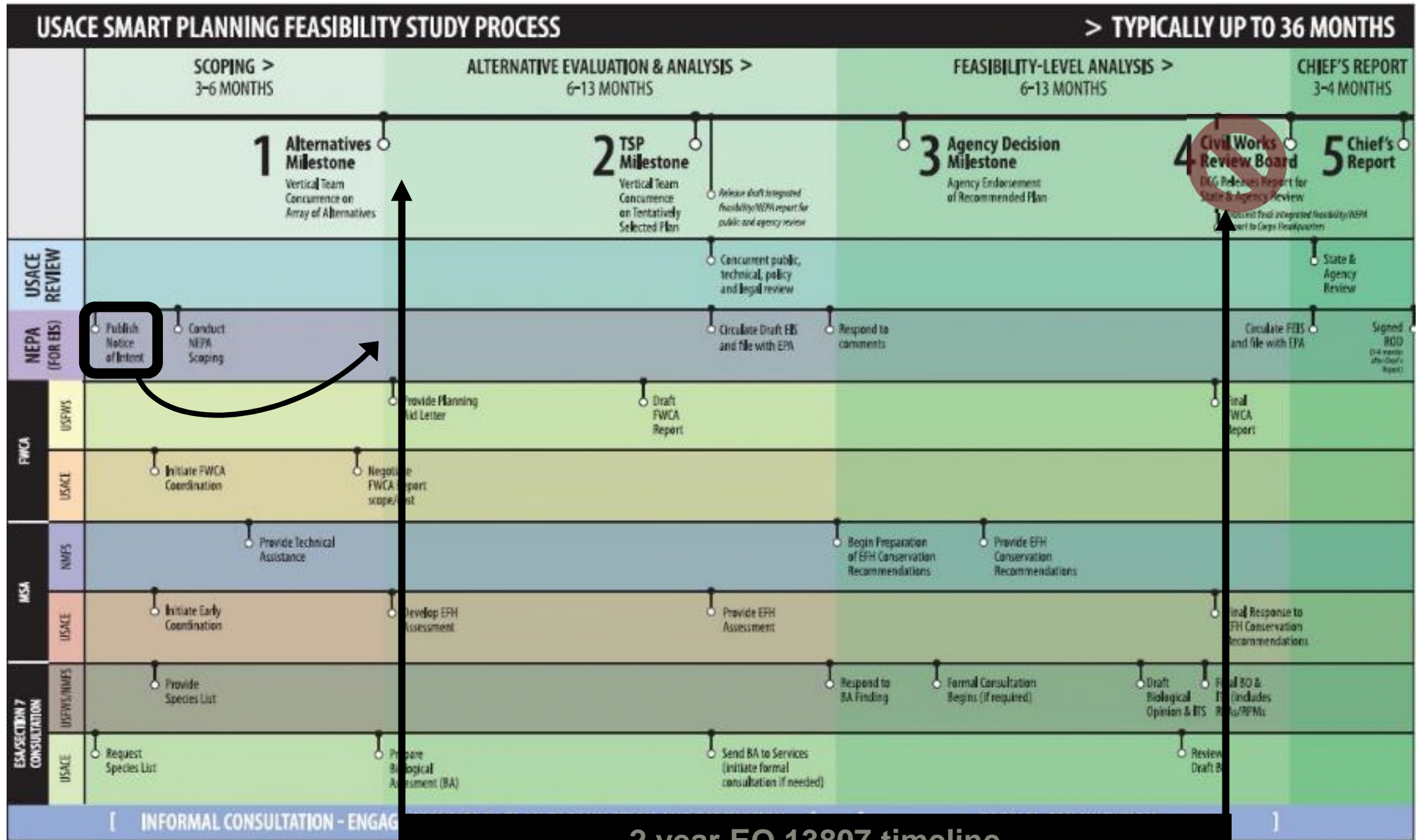
Instead, coordinate early & often



“ONE FEDERAL DECISION” GUIDANCE FOR FEASIBILITY STUDIES – 26 SEPTEMBER 2018



- Districts determine which studies are “major infrastructure projects”
- Use the VT and OC for awareness and issue resolution
- Follow requirements in Section 1005 of WRRDA 2014 to satisfy permitting timetable and agency coordination
- 2 year timeline is nested within a 3x3 compliant schedule
- Wait to issue a NOI until early scoping with resource agencies and first iteration of planning can be completed (after AMM, prior to TSP)
- “One Federal Decision” is receiving all applicable environmental compliance for Federal agency permits/approvals/licenses by DE’s transmittal of final feasibility report



2 year EO 13807 timeline



PERMITTING ACCOUNTABILITY SYSTEM

- OMB issued memo M-18-25 on 26 September 2018
- Purpose is to track agencies' compliance with the EO through a series of metrics for major infrastructure projects (MIPs):
 1. Whether MIPs are using One Federal Decision
 2. Whether MIPs have a complete permitting timetable
 3. Whether agencies are meeting permitting timetable milestones
 4. Whether delays follow an elevation process
 5. The length of time to complete environmental compliance
 6. The cost of environmental reviews and authorizations
- Quarterly reporting to OMB through HQUSACE for metrics 1-3
- Use of Federal Agency Portal (the "back end" of the Permitting Dashboard) for permitting timetables and metric 5



PUTTING IT ALL TOGETHER

- All of these initiatives/requirements are geared at effective coordination early and often throughout a study to avoid last minute issues that can hold up completion
- The environmental review process should be fully integrated and concurrent with the feasibility study process – it's in WRRDA, CEQ regulations, and an EO.
- Listen to your cooperating agencies to understand the study and implementation risks within the environmental discipline. But remember that if USACE is the lead agency, there is heightened accountability to lead the feasibility study effort towards timely completion.
- Use risk-informed decision making to effectively complete environmental compliance within your control, including collecting only the data necessary to advance to the next planning decision.



TROUBLESHOOTING FOR REAL LIFE SITUATIONS



We're doing an EA, so we don't need to worry about any of this, right?

- Not exactly. For studies with an EA, you may not be mandated to comply with many of these requirements, but the expectation of USACE and Army leadership is that those study teams will conduct themselves in a similar manner to deliver decision documents that are informed by all applicable environmental compliance in a timely manner. So go ahead and mimic the early coordination and scheduling from Section 1005 of WRRDA and EO 13807 on your study with an EA.



But the resource agencies' local offices are short staffed and unresponsive. How are we supposed to coordinate when no one is there?

- Keep reaching out and make sure to document your attempts at coordination. We recognize the resource strain on many agencies limits their ability to continually participate on our studies. Do the best you can and if an agency is unwilling to cooperate or unable to work with a realistic schedule, then elevate that issue to the VT and/or MSC. All of our sister agencies are equally engaged with EO 13807 and are well aware that unresponsiveness or delays without good cause on infrastructure projects may be elevated.



Our study area is really large with a lot of complex issues. We're going to need a 3x3 exemption, so 2 years for environmental compliance is not reasonable.

- Remember that 2 years is a goal, not a deadline. If senior leaders decide to approve an exemption for your study, that is acknowledgement that we may not meet the 2 year goal due to overriding factors. But that doesn't mean that you get to create a longer schedule at the start of the study. We must try our best to meet that goal. If a study is overly complex or large at initiation, tiering of NEPA documents can help with fitting environmental compliance within desired timelines and budgets.

Can we get an exemption or waiver from EO 13807?

- No, there is no exemption process or waiver from the EO.

Our State won't issue water quality certification during feasibility. How are we supposed to comply with One Federal Decision?

- "One Federal Decision" under EO 13807 addresses permitting/licensing decisions by Federal agencies, not state or local decisions
- Also, it's recognized that some States need to see the design level typically achieved during PED in order to render a decision on water quality certification. Study teams should bring this up early in the study with the vertical team to get endorsement to defer this requirement to PED and get a conditional letter during feasibility from the certifying State agency regarding water quality certification. Note that this does not affect the requirement to prepare a 404(b)(1) guidelines analysis during feasibility.

NORFOLK COASTAL STORM RISK MANAGEMENT STUDY



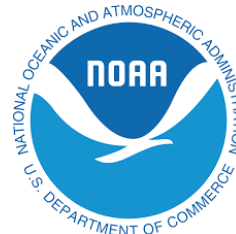
- Non-Federal Sponsor: City of Norfolk
- Recommended plan includes storm surge barriers, floodwalls, levees, living shorelines, oyster reefs, and non-structural measures ~\$1.37B
- Multiple Federal, State, and local agencies have participated throughout the study
- 3x3x3 compliant schedule and budget, Chief's Report scheduled for Dec 2019
- NOI issued 4/2016
- Final Report transmitted 6/2018
- All coordination necessary for NEPA complete: CZMA, CWA coordination, EFH, ESA, 106 (Programmatic Agreement), FWCA



Approximate time from NOI to District Commander transmittal of final feasibility report/FEIS to HQUSACE: 26 months

COORDINATION AND PUBLIC INVOLVEMENT

- Planning Workshop with Vertical team: March 2016
- Three public meetings:
 - Initial NEPA Scoping: May 2016
 - Array of alternatives: June 2017
 - Selected Plan Meeting: January 2018
- Met separately with NGOs such as Elizabeth River Project and Chesapeake Bay Foundation to explain project and discuss their concerns and ideas
- Cooperating Agency Meetings throughout (US Navy and EPA officially accepted invite to be Cooperating Agency – others participated)

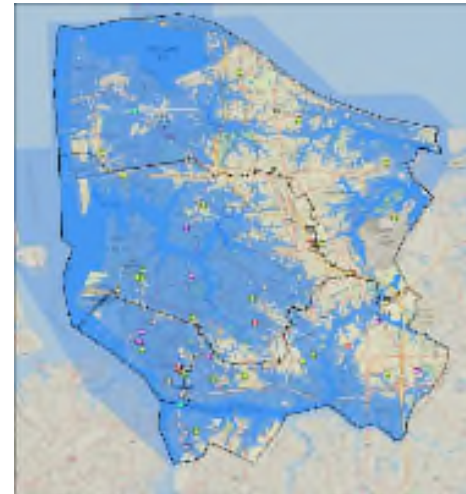


LESSONS LEARNED

- Coordination EARLY and OFTEN!!
- Invite Cooperating agencies early
- Draft EIS can be less detail than Final EIS. Disclose up front that detail will increase in final and increase again in PED
- Use interim and range of impact analysis for TSP in Draft EIS. All impacts may not be fully captured until Final EIS is complete— note this clearly in risk register and project presentations. Example: benthic impacts based on storm surge barrier operational plan which was not yet developed for draft EIS
- Extrapolate where possible – for Norfolk CSRM did water quality modeling in some but not all waterways



Future Without Project



Future With Project



Extensive discussion with the resource agencies should happen at the beginning to describe that the level of detail will continue to evolve and that appropriate level of detail for each phase of the study will be utilized.



CONSIDER THE CHESHIRE CAT SITUATION AGAIN



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information to evaluate and compare
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WOULD YOU HAVE THE SAME COA AS BEFORE?



Yes

No

New CoA

Questions?

Type questions in the chat box.
We will answer as many
as time allows.

This webinar will be posted to the
Planning Community Toolbox:
<http://www.corpsplanning.us>



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