

July 2, 2020

Via e-mail to: nfrancis@legvi.org

The Hon. Novelle E. Francis, Jr.- Senate President
Legislature of the Virgin Islands
Capitol Building, Charlotte Amalie
P.O. Box i690
St. Thomas, Virgin Islands 00804

RE: Legislature of the Virgin Islands Committee of the Whole
Major Coastal Zone Permit No. CZJ-04-14(W)
Status of Federal Permit Application No. SAJ-2004-12518 (SP-JCM)

Dear President Francis:

As you may recall, this firm represents The Summer's End Group, LLC (SEG), in regard to Federal Application Number SAJ-2004-12518 (SP-JCM) (Application). SEG submitted the Application to the United States Army Corps of Engineers (Corps) seeking authorization to construct a marina in Coral Harbor on Saint John ("Project"). The project requires a permit from the Corps pursuant to Section 10 of the Rivers and Harbors Act of 1899 ("Federal Permit") and that application is pending.

As you know, this project requires authorizations from both the Virgin Islands and the Federal Governments before construction can begin. As stated in my previous testimony, the Federal permit cannot be issued until the Virgin Islands approves a coastal zone management authorization for the Project which includes the Legislature's approval of a submerged lands lease for the Project. This letter is provided to explain the Federal Permit needed for the Project and the role the submerged land lease plays in the issuance of the Federal Permit.

The Federal permitting process is lengthy and appears to be quite complex, but the goal of the process is very simple. The Federal permitting process is intended to refine a proposed project down to the essential elements of the project which, together with sufficient mitigation to protect natural resources on site, result in a permitted project that is both economically viable and protective of the environment. To that end, projects that receive a permit issued

under Section 404 of the Clean Water Act and under Section 10 of the Rivers and Harbors Act are required to do three things, in this order:

1. Avoid impacts to the extent reasonably possible when the site for the project is chosen;
2. Minimize impacts to natural resources within the project footprint on site; and
3. Mitigate for any impacts that cannot be avoided.

Federal permits also show that the project complies with the protections of the Endangered Species Act. In the Federal permitting process, the Army Corps of Engineers, which issues permits under both the Clean Water Act and the Rivers and Harbors Act, consults with the agencies charged with protecting listed species to assure that the project as authorized does not jeopardize the continuing existence of those species. When the Corps determines an application is complete for its purposes, it initiates consultation with the United States Fish and Wildlife Service and/or the National Marine Fisheries Service to assure that the project complies with the Endangered Species Act as well as the Act(s) under which the project is being permitted. Due to our project's location and the listed species in the area, the Corps initiated consultation on the project with both the United States Fish and Wildlife Service and the National Marine Fisheries Service.

Consultation with the Fish and Wildlife Service is complete for the Project. Consultation with the National Marine Fisheries Service on the Project is proceeding. We have spent the last year and half working to identify the scoping for the studies and undertaking the field work and analysis needed to answer the questions posed by staff at the National Marine Fisheries Service. All of that information has been submitted, in accordance with that agency's requests, to the Corps reviewer for the Project. For your reference, I have included the flowchart of the Section 7 species review process as Exhibit "A".

Despite the chaos caused by Hurricanes Maria and Irma, the Corps permitting process has continued. The application is now housed in the Army Corps of Engineers' Palm Beach Gardens office. The Corps' Puerto Rico office is struggling to meet the demand for permits authorizing critical infrastructure repairs on the islands after losing experienced staff to other agencies. Recognizing the length of time this application has been pending, the Corps moved the file to Palm Beach Gardens because that office had the capacity to complete application review expeditiously. Our new Corps reviewer has a comprehensive submittal in hand including the extensive geotechnical and circulation studies requested by National Marine Fisheries Service previously mentioned. The submittal was assembled with the goal of

completing consultation with National Marine Fisheries and obtaining a Federal permit for the project from the Corps. Unfortunately, even if the submittal satisfies the Corps and the National Marine Fisheries Service completely, the Corps cannot grant the Federal permit because our application is missing one essential document: the submerged lands lease authorization from the Legislature of the Virgin Islands. Even if we have answered every single question to both agencies' satisfaction, we still cannot obtain a permit until we submit the Legislature's authorization of the submerged lands lease for the Project.

The lands under navigable waters adjacent to uplands (submerged lands) are owned by the state or territorial government and only the owner of submerged lands can authorize the use of those lands for a project. A Corps permit cannot and does not convey property rights to use submerged lands owned by the Virgin Islands. An applicant does not have to secure this authorization prior to submitting an application, but must obtain it before the Federal Permit can be issued. As you know, the Territory has an approved coastal zone management program with which the Project has complied, so only the Legislature's authorization of the submerged lands lease is needed to complete the certification of compliance with the Territory's program. Once the certification is issued, the Corps can issue a permit for the project, but not before.

There has been considerable confusion regarding this Application because the U.S. Army Corps of Engineers (the Corps) administers two different programs to authorize activities in waters of the United States:

- ▶ Section 404 of the Clean Water Act (CWA 33 U.S.C. §1344) which authorizes the Corps to issue permits regulating the discharge of dredged or fill material into waters of the United States, including wetlands and territorial seas; and
- ▶ Section 10 of Rivers and Harbors Act (RHA, 33 U.S.C. §403) which authorizes the Corps to regulate structures and work in navigable waters.

When the application for this Project was filed, this Project as proposed required both Section 404 and Section 10 permits. As part of the normal process of refining the Project to minimize impacts, a Section 404 permit is no longer required because dredging or filling activities have been eliminated. Even before the SEG's application was transferred to Palm Beach Gardens, the Corps reviewer in the Puerto Rico office, together with his supervisor, told SEG that the Project, as modified, only requires a Section 10 permit under the Rivers and Harbors Act. Please see the flowchart of the permitting process for Section 10 included as Exhibit "B". I specifically address your attention to the second page of Exhibit "B" which shows the requirement for the CZM authorization before the Corps can begin to prepare the documents

supporting the permit decision. The Legislature's approval of the submerged land lease will address that requirement.

As a matter of law, pilings do not have the effect of fill if they meet certain requirements. The specific rule at issue here is 33 CFR 323.3 (c) which explains when pilings require both a Section 404 permit and a Section 10 permit and when they don't. The rule provides the following analysis and examples.

► Pilings in waters of the United States require a Section 404 permit if the pilings have the effect of a discharge of fill material, for example:

- a. The pilings are so closely spaced that sediments accumulate in the area of the pilings;
- b. The pilings are so dense that they replace the bottom of a water-body;
- c. The placement of the pilings reduce the size or impair the circulation of waters of the United States; or
- d. The placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

► Placement of pilings in waters of the United States do not require a Section 404 permit if the pilings do not have the effect of a discharge of fill material, for example:

- a. Pilings for linear projects, such as bridges, elevated walkways, and power line structures; or
- b. Pilings for piers, wharves, and an individual house on stilts

All pilings placed in navigable waters of the United States require an authorization under Section 10 of the Rivers and Harbors Act of 1899. Also, all Section 10 permits must comply with the same guidelines to protect water quality and listed species as Section 404 permits, including the requirement for consultation with the fish and wildlife agencies.

The difference between a Clean Water Act Section 404 permit and a Rivers and Harbors Act Section 10 permit is this: the agency with final authority to issue a Section 10 permit is the Corps; in contrast, a Section 404 permit is issued by the Corps, subject to veto by the United States Environmental Protection Agency (EPA). The difference is the grant of statutory authority to the agencies by Congress in the respective acts. Congress specifically empowered EPA to exercise veto power over Section 404 permits issued by the Corp in Section 404(c) of

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the Clean Water Act; in contrast, the Rivers and Harbors Act does not include any such authorization for the EPA to veto Section 10 permits although it can comment.

You have heard a lot about EPA and this project, but let's be clear, even if a 404 permit is required, EPA has only exercised its veto power over 13 projects since the adoption of the Clean Water Act almost 50 years ago and never over a marina project. Since 1990, EPA has only exercised its veto power over three projects out of the thousands of permits the Corps has issued:

1. Yazoo Backwater in Mississippi - a proposed flood control project that would have impacted 67,000 acres (over 100 square miles) of Mississippi wetlands;
2. Spruce No. 1 Mine in West Virginia - a proposed mountaintop-removal coal mine in Logan County, West Virginia, which would have altered 2,278 acres (almost 3.5 square miles) and filled 7.48 miles of streams; and
3. Pebble Mine in Alaska – a proposed copper and gold mine that would destroy at least 1,100 acres of wetlands, lakes, and ponds, (almost 2 square miles) and five miles of streams.

The Project is on track with its Federal Permit application. If the Legislature acts swiftly to complete the approval of the submerged land lease, we have every expectation that the federal permitting process will be completed expeditiously, permitting this Project to move forward with investment and job creation.

As I noted in my previous testimony, the Corps cannot issue a decision in regard to the Application until a Coastal Zone Permit is issued by the Virgin Islands. The Virgin Islands' authorization of the Applicant's use of submerged lands within Coral Harbor through its permitting process is a condition precedent to the Corps' issuance of a decision on the Application pending before it. Therefore, we respectfully request the approval of the submerged land lease identified as Major Coastal Zone Permit No. CZJ-04-014(W).

Very truly yours,



Katherine R. English

cc: Client

encl: Exhibits A and B

EXHIBIT "A"

Figure 4-1. Formal consultation process.

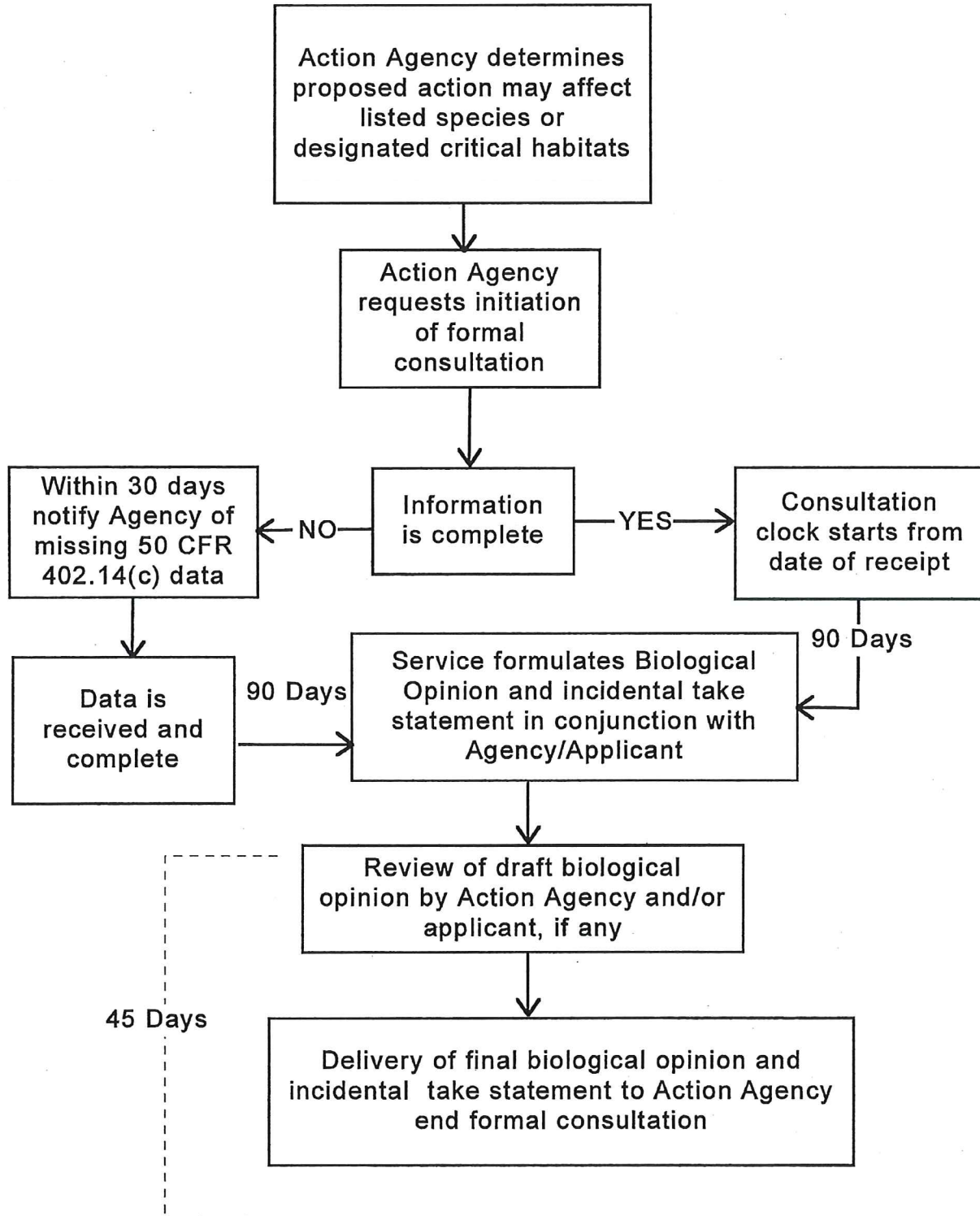
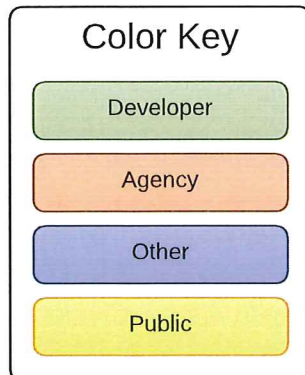
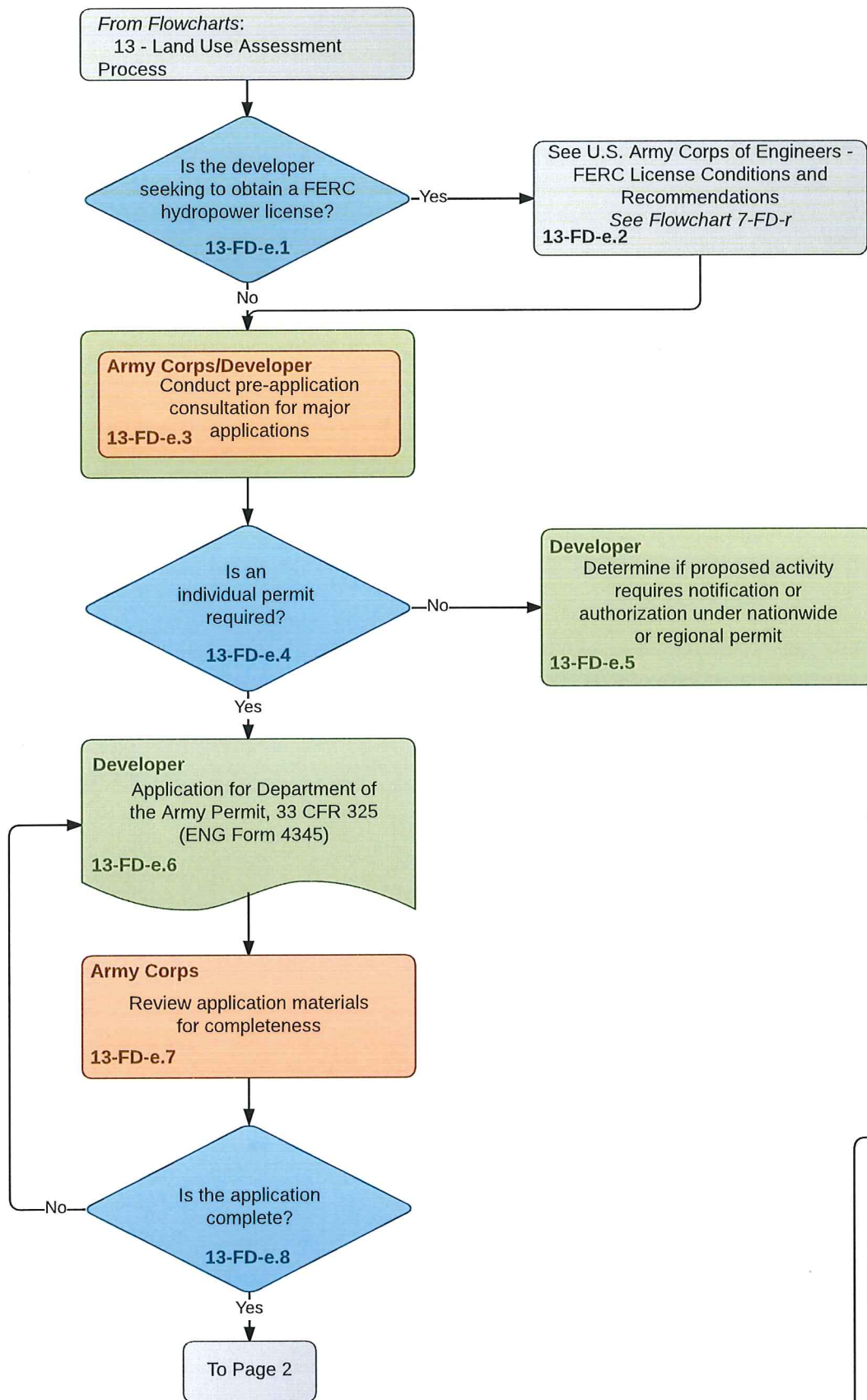


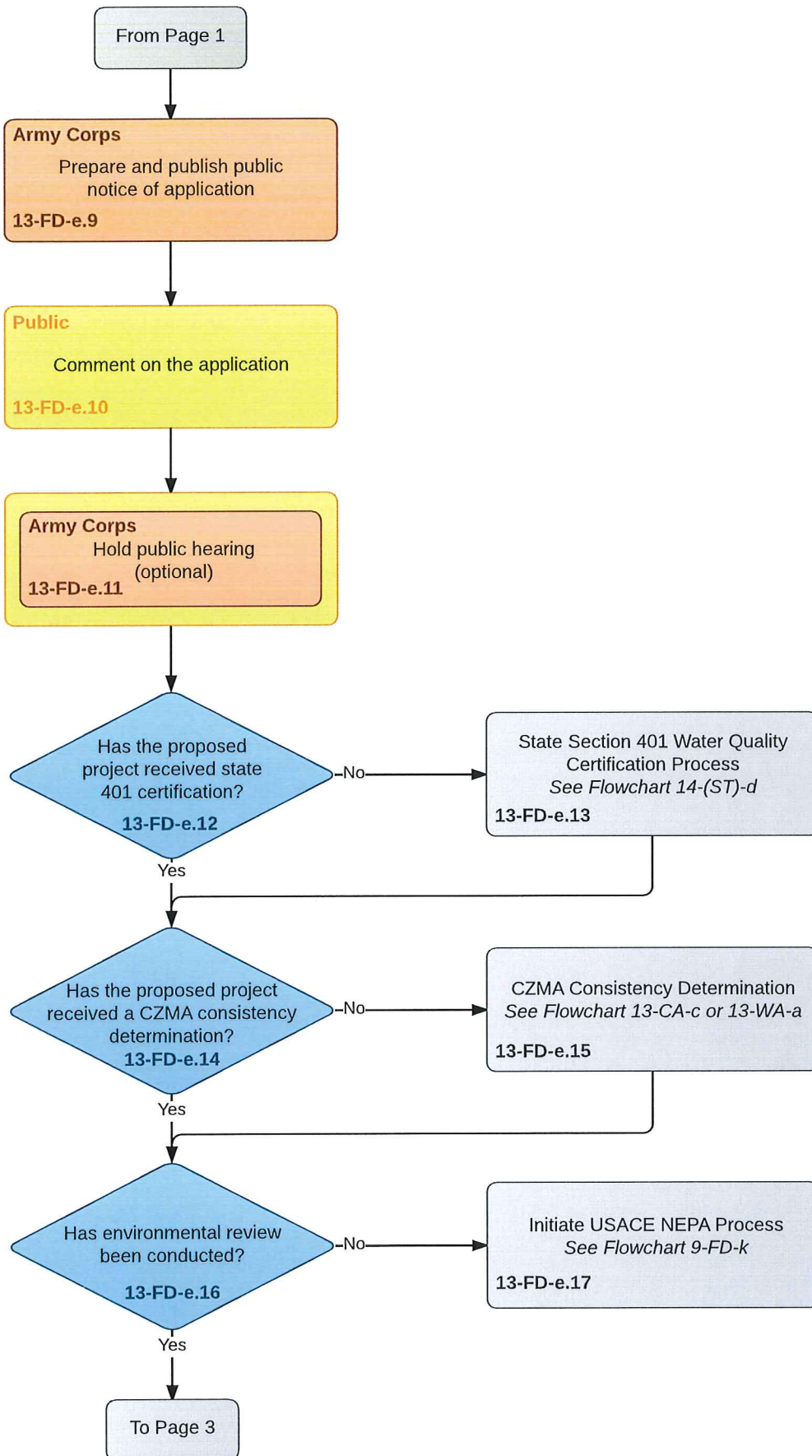
EXHIBIT "B"

Flowchart 13-FD-e: Rivers and Harbors Act Section 10 Permit

Version: 14 April 2016



Flowchart 13-FD-e (continued):
Rivers and Harbors Act Section 10 Permit



Color Key

- Developer
- Agency
- Other
- Public

Flowchart 13-FD-e (continued):
Rivers and Harbors Act Section 10 Permit

