

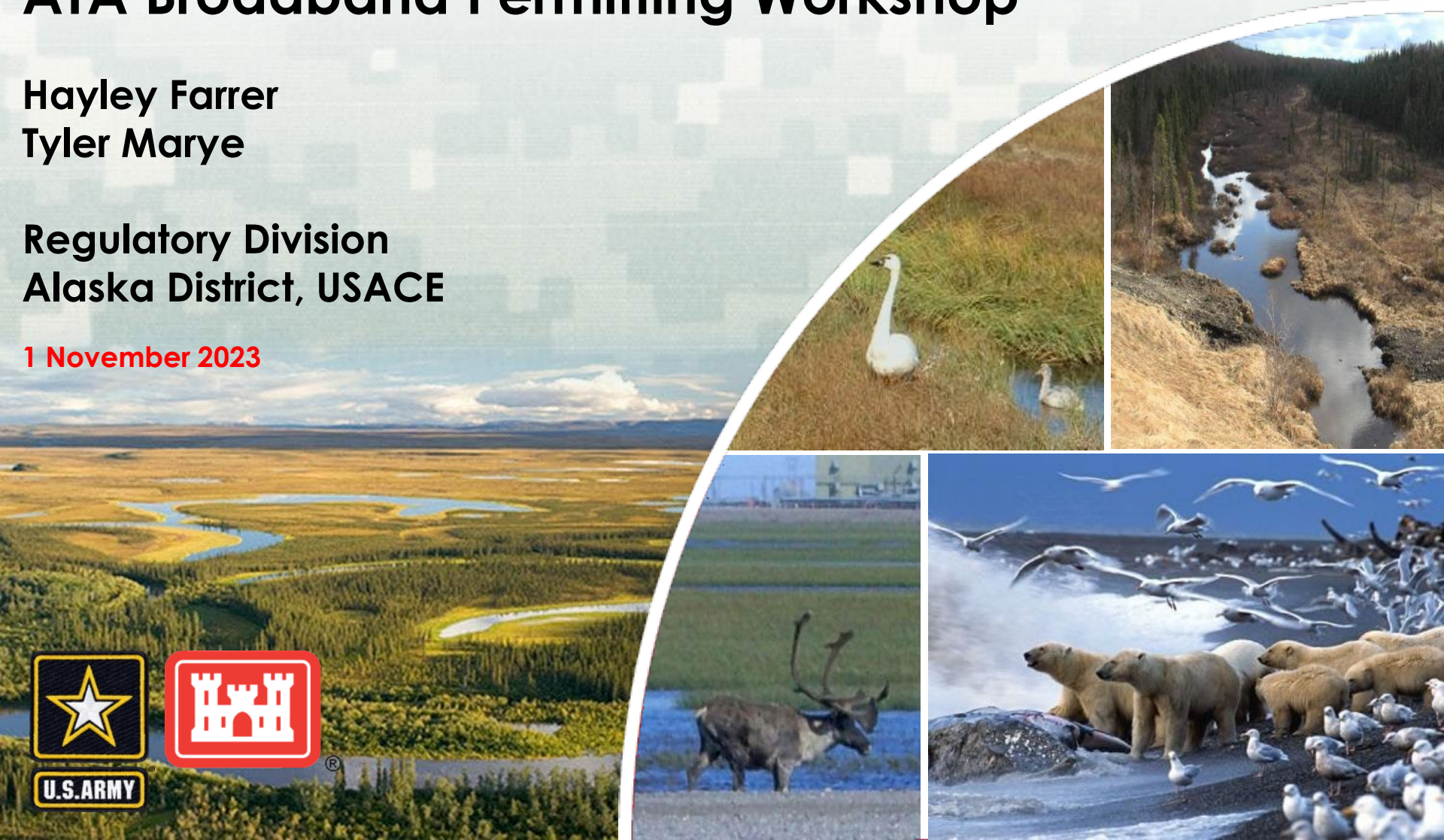
U.S. ARMY CORPS OF ENGINEERS ALASKA DISTRICT, REGULATORY PROGRAM

ATA Broadband Permitting Workshop

Hayley Farrer
Tyler Marye

Regulatory Division
Alaska District, USACE

1 November 2023



U.S. ARMY



®

Meet Your Presenters

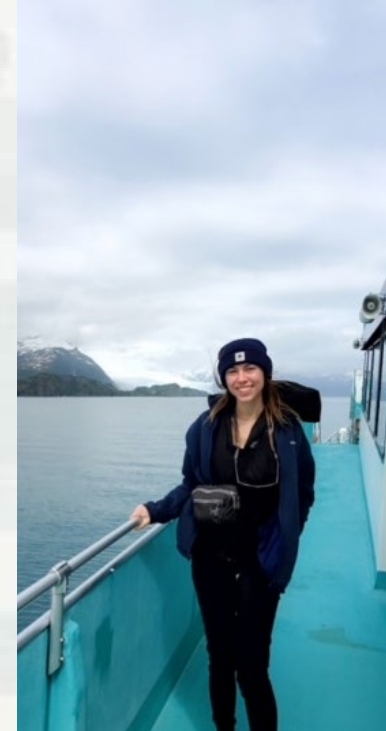
Tyler Marye



Project Manager/ Biologist
US Army Corps of Engineers
Alaska District
Regulatory Division
North Section



Hayley Farrer



Regulatory Specialist
US Army Corps of Engineers
Alaska District
Regulatory Division
South Section



PRESENTATION OUTLINE

Regulatory Division

- **Authorities**
- **Jurisdiction**
- **Permits**
 - **Pre-Applications**
 - **Types of Permits**
 - **Avoidance/Minimization**
- **NEPA**
- **Compliance and Enforcement**



MAJOR PROGRAMS



F-22 Squad Operations Hangar

MILITARY/INTERAGENCY & INTERNATIONAL SERVICES



Harbor in Aleutian Islands

CIVIL WORKS



Wetlands Determination

REGULATORY



Rapid Optical Screening Tool (ROST)

ENVIRONMENTAL ENGINEERING



EMERGENCY MANAGEMENT



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Regulatory Office Boundaries Alaska District U.S. Army Corps of Engineers



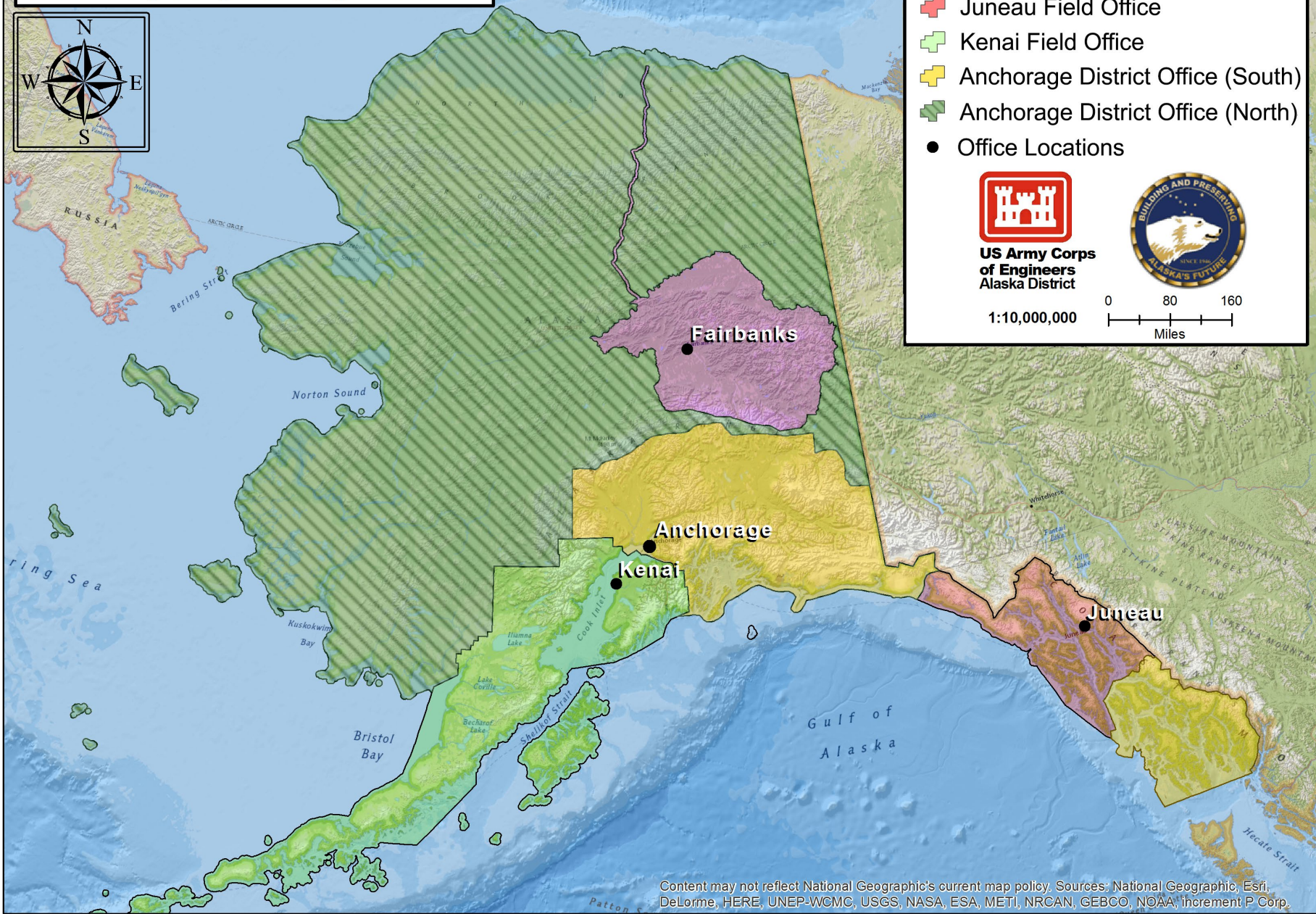
Legend

- Fairbanks Field Office
- Juneau Field Office
- Kenai Field Office
- Anchorage District Office (South)
- Anchorage District Office (North)
- Office Locations

**US Army Corps of Engineers
Alaska District**

0 80 160
Miles

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Content may not reflect National Geographic's current map policy. Sources: National Geographic, Esri, DeLorme, HERE, UNEP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, increment P Corp.

AUTHORITY

RIVERS AND HARBORS ACT OF 1899 SECTION 10: NAVIGABLE WATERS

Authorizes the U.S. Army Corps of Engineers to issue permits for **structures or work in or affecting the navigable waters of the United States**

**PRIMARY GOAL:
MAINTAIN NAVIGATION**



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AUTHORITY: RIVERS AND HARBORS ACT OF 1899 SECTION 10

NAVIGABLE WATERS OF THE UNITED STATES

- Waters subject to tidal ebb and flow, and/or
- Those waters that are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce



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AUTHORITY: RIVERS AND HARBORS ACT OF 1899 SECTION 10

NAVIGABLE WATERS INCLUDE:

- Tidal waters landward to the **Mean High Water Mark (MHWM)**
- Non-tidal waters below the **Ordinary High Water Mark (OHWM)**
- Waters identified as a result of navigability studies, listed on our website



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AUTHORITY: RIVERS AND HARBORS ACT OF 1899 SECTION 10

REGULATED (JURISDICTIONAL) ACTIVITIES

Any work affecting the course, condition, location or capacity of the navigable waterbody:

Examples:



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AUTHORITY: CLEAN WATER ACT SECTION 404: WATERS OF THE UNITED STATES (WOTUS)

- The U.S. Army Corps of Engineers is authorized to issue permits for the discharge/placement of dredged or fill material into waters of the United States (WOTUS)

PRIMARY GOAL CWA:

RESTORE AND MAINTAIN THE PHYSICAL,
CHEMICAL, AND BIOLOGICAL INTEGRITY OF
THE NATION'S WATERS



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AUTHORITY: CLEAN WATER ACT SECTION 404

REGULATED (JURISDICTIONAL) ACTIVITIES

- Discharge/placement of dredged or fill material into waters of the U.S.
- Includes mechanized land clearing/leveling



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AUTHORITY: SECTION 404 CLEAN WATER ACT

JURISDICTIONAL WOTUS

Includes:

- All Section 10 waters
- Rivers, tributaries, lakes, ponds, adjacent wetlands

Boundaries:

- Tidal waters landward to the **High Tide Line (HTL)**
- Non-tidal waters below the **Ordinary High Water Mark (OHWM)**
- Wetlands: **limit of wetlands**



**AUTHORITY: CLEAN WATER ACT
SECTION 404**

WETLANDS – WHAT ARE THEY?

USACE & EPA JOINT DEFINITION:

“Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”



AUTHORITY: CLEAN WATER ACT SECTION 404

WETLANDS CRITERIA

- Hydrophytic vegetation
- Hydric soils
- Hydrology

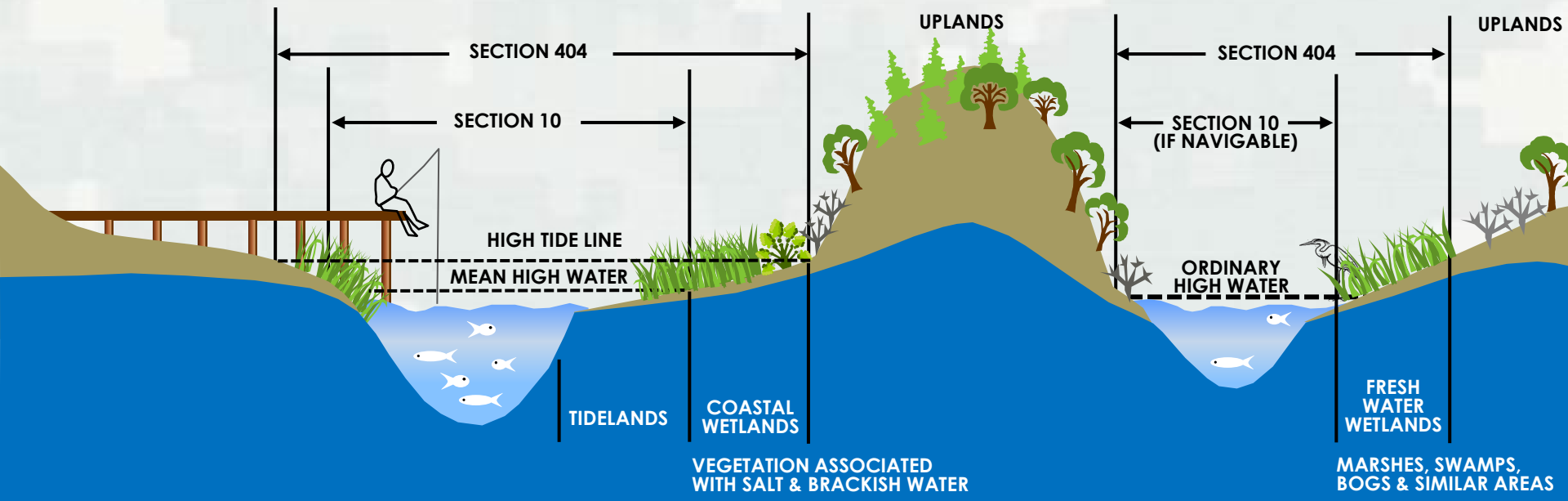
*** ALL THREE MUST BE PRESENT!!**



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AUTHORITIES: CLEAN WATER ACT SECTION 404 RIVERS & HARBOR ACT OF 1899 SECTION 10 JURISDICTIONAL AREAS

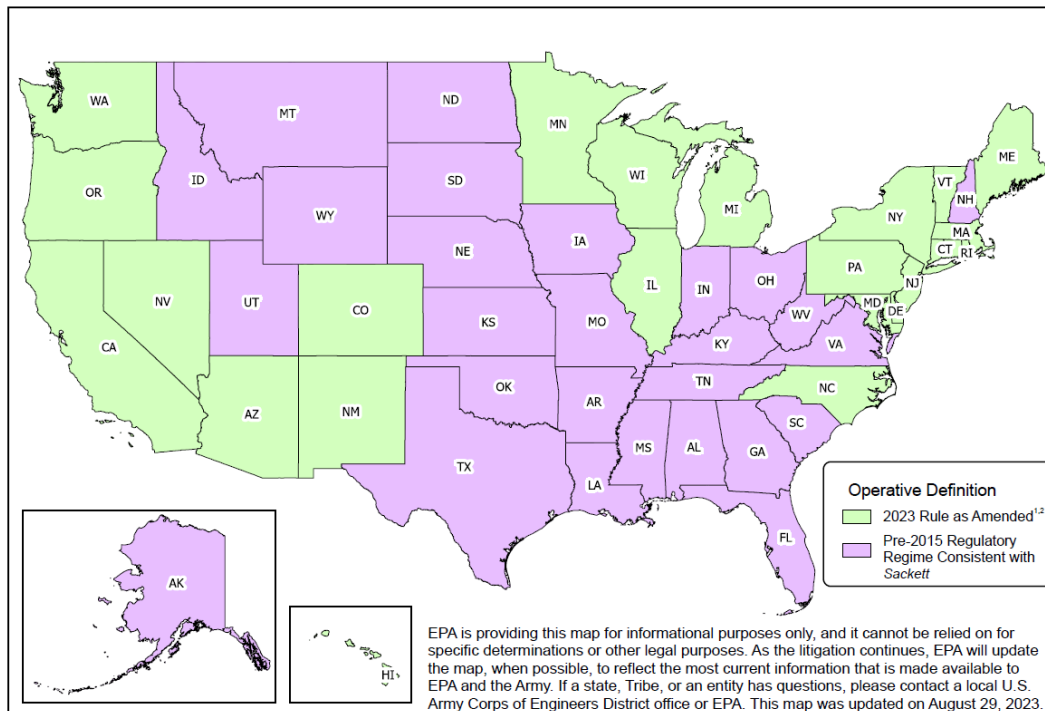
REGULATORY PROGRAM JURISDICTION



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Operative Definition of "Waters of the United States"

Operative Definition of "Waters of the United States"



¹Also operative in the U.S. territories and the District of Columbia
²The pre-2015 regulatory regime implemented consistent with *Sackett* is operative for the Commonwealth of Kentucky and Plaintiff-Appellants in Kentucky Chamber of Commerce, et al. v. EPA (No. 23-5345) and their members (Kentucky Chamber of Commerce, U.S. Chamber of Commerce, Associated General Contractors of Kentucky, Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce).



Alaska's Operative Definition

About the Pre-2015 Regulatory Regime

The "pre-2015 regulatory regime" refers to the agencies' pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Where the January 2023 Rule, as amended, is not currently operative, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice. Additionally, the agencies will interpret the phrase "waters of the United States" consistent with the Supreme Court's decision in *Sackett*.



www.epa.gov/wotus/pre-2015-regulatory-regime



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AUTHORITY: CLEAN WATER ACT SECTION 404

WHEN IS A SECTION 404 PERMIT NOT REQUIRED?

- One step excavation – upland disposal
- Pilings / structures in Section 404 only WOTUS or above MHW in Section 10 navigable waters (unless pilings would have the effect of fill)
- Directional Boring under Section 404 waters with upland entry points
- Certain agricultural, logging, ranching activities – 404(f) exemptions



AUTHORITY

1972 MARINE, PROTECTION, RESEARCH & SANCTUARIES ACT – SECTION 103

- Ocean waters outside of territorial seas
- Transportation of dredged material for the purpose of disposal into ocean waters



**U.S. ARMY CORPS OF ENGINEERS
APPLICATION FOR DEPARTMENT OF THE ARMY PERMIT**
33 CFR 325. The proponent agency is CECW-CO-R.

Collection of information is estimated to average 11 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to Department of Defense, Executive Services and Communications Directorate, Information Management Division and to the Office of Management and Budget, Paperwork Project (0710-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be required to comply with a collection of information if it does not display a currently valid OMB control number. Please DO NOT send responses to these addresses. Completed applications must be submitted to the District Engineer having jurisdiction over the location of the proposed activity.

PRIVACY ACT STATEMENT

The Privacy Act, Section 552, 5 U.S.C. 552; Clean Water Act, Section 404, 33 USC 1344; Marine Protection, Research, and Sanctuaries Act, 16 USC 1413; Regulatory Programs of the Corps of Engineers; Final Rule 33 CFR 320-332. Principal Purpose: Information provided on this application is voluntary, however, if information is not provided the permit application cannot be evaluated nor can a permit be issued. Submission of information is voluntary, however, if information is not provided the permit application cannot be evaluated nor can a permit be issued. One set of good reproducible copies which show the location and character of the proposed activity must be attached to this application (see instructions) and be submitted to the District Engineer having jurisdiction over the location of the proposed activity. An application not in full will be returned.

1. NO.		2. FIELD OFFICE CODE		3. DATE RECEIVED		4. DATE APPLICATION COMPLETE	
(ITEMS 1 THRU 4 TO BE FILLED BY THE CORPS)							
(ITEMS BELOW TO BE FILLED BY APPLICANT)							
APPLICANT'S NAME		8. AUTHORIZED AGENT'S NAME AND TITLE (agent is not required)					
First - _____ Middle - _____ Last - _____		First - _____ Middle - _____ Last - _____					
Company - _____		Company - _____					
E-mail Address - _____		E-mail Address - _____					
9. AGENT'S ADDRESS:							
Address - _____		City - _____		State - _____		Zip - _____ Country - _____	
10. AGENT'S PHONE NOS. w/AREA CODE							
a. Residence _____		b. Business _____		c. Fax _____			

STATEMENT OF AUTHORIZATION

I hereby authorize _____ to act in my behalf as my agent in the processing of this application and to furnish, upon request, all information necessary for the completion of this permit application.

SIGNATURE OF APPLICANT

DATE

NAME, LOCATION, AND DESCRIPTION OF PROJECT OR ACTIVITY

PROJECT NAME OR TITLE (see instructions)

14. PROJECT STREET ADDRESS (if applicable)

State - _____ Zip - _____

PERMITS



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Pre-application Consultations

- Pre-application consultation usually involves one or more meetings between an applicant, Corps of Engineers Regulatory staff members, interested resource agencies (federal, state and/or local), and sometimes the interested public.
- Fiber Optic projects are highly encouraged to participate in Pre-application consultation with the Corps before submitting a PCN/Application.
 - ▶ Help in the planning process to avoid and minimize impacts to aquatic resources
 - ▶ Discuss and understand methodology and best management practices
 - ▶ Understand any cooperating agency roles and/or assign non-federal designees to coordinate for ESA, EFH, and Section 106 consultations
- Overall, help streamline the permitting process and help the process as smooth as can be



Cooperating Agencies

- If the project qualifies for a NWP, the NEPA analysis was already completed for the issuance of the NWP, therefore the Corps may or may not participate as a cooperating agency.
- If evaluating the application as an Individual Permit action and upon request of the lead agency, the Corps shall be a cooperating agency.



TYPES OF PERMITS

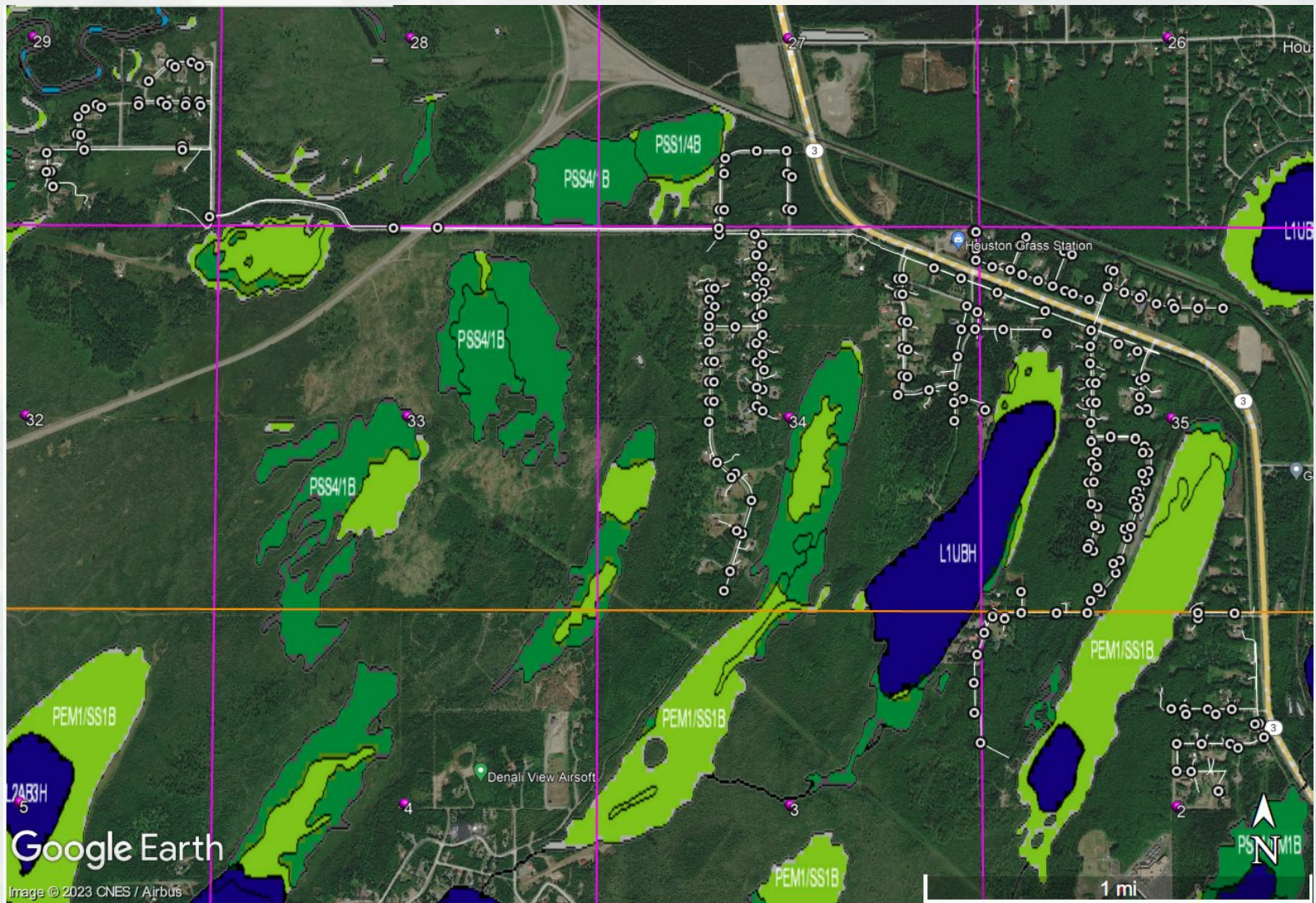
1. **Nationwide General Permits (NWPs)- EA**
2. **Regional General Permits (RGPs)- EA**
3. **Letters of Permission (LOPs) - Cat Ex.**
4. **Standard/Individual Permits – EIS or EA**



Nationwide Permits (NWP)

- Fiber Optic Cable (FOC) projects could be authorized under NWPs 3, 6, 18, 39, & 57
- For linear projects, the “single and complete project” (*i.e.*, single and complete crossing) will apply to each crossing of a separate WOTUS (*i.e.*, single waterbody) at that location;
 - ▶ except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project.
 - ▶ individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies (33 CFR 330.2(i)).





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Nationwide Permits (NWP) Continued

- Nationwide permits authorize specific activities in areas under Corps' Regulatory jurisdiction.
 - ▶ Activities must be minor in scope and must result in no more than minimal adverse impacts, both individually and cumulatively.
 - ▶ Individuals wishing to perform work under a nationwide permit must ensure their project meets all applicable terms and conditions, including the regional conditions specific to Alaska. If the conditions cannot be met, a regional general permit or individual permit will be required.



2021 Nationwide Permits

Index of 2021 Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions¹

Nationwide Permits

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Oil or Natural Gas Pipeline Activities
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Response Operations for Oil or Hazardous Substances
21. Surface Coal Mining Activities
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
29. Residential Developments
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities

¹ The 2021 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions were published in the *Federal Register* on January 13, 2021 (86 FR 2744), and the correction at 86 FR 27274 and December 27, 2021 (86 FR 73522).



NWP 57

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes	Other Information
NWP 57 – Electric Utility Line and Telecommunications Activities	10/404	<ul style="list-style-type: none"> 1/2-acre 	<ul style="list-style-type: none"> a section 10 permit is required discharges that result in the loss of >1/10 acre 	yes, if PCN required	all waters of the U.S.	new NWP	Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations.
electric utility lines and telecommunications lines					all waters of the U.S., including navigable waters		Must restore area to pre-construction contours.
electric utility line and telecommunications substations					non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters		
foundations for overhead electric utility line or telecommunication line towers, poles, and anchors					all waters of the U.S.		
access roads					non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters		Access roads must be constructed to minimize adverse effects to waters of the U.S.



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Impacts (2021 NWP Definitions)

Direct

- Effects that are caused by the activity and occur at the same time and place. Best management practices can minimize these effects.

Indirect

- Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.. Best management practices can minimize these effects.

Temporary

- Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.
- May include an adaptive management plan or monitoring plan to ensure the area is fully restored to pre-construction contours.



Potential Ways to Minimize FOC Impacts

- Vibratory plow
- Horizontal Directional Drill (HDD)
- Minimize mechanized land clearing
- Avoid/minimize placing splice and handholes in wetlands
- Tundra lay



MITIGATION SEQUENCING

1. **Avoidance** – avoid impacts to Waters of the United States, including wetlands, whenever possible
2. **Minimization** – minimize impacts that can't be avoided
3. **Compensation** – may be required to compensate for any impacts that remain **AFTER** avoidance and minimization
 - This is through the purchase of credits from a Mitigation Bank or an In-Lieu Fee (ILF) Provider or offset impacts through a Permittee-Responsible Project



RESTRICTIONS ON DISCHARGES CWA 404(b)(1) GUIDELINES

Discharges shall not be permitted if there is a practicable alternative with less adverse impacts on aquatic ecosystem

- **Practicable** – “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose”
- **Alternative** - does not have to be owned by applicant to be considered practicable
- **Burden of proof** - always on applicant to demonstrate no available practicable alternatives
- **Alternative Analysis** – An analysis that identifies the least environmental damaging practicable alternative that meets the overall project purpose (LEDPA). Unlike a FONSI determination, mitigation is not taken into account when determining the LEDPA.



RESTRICTIONS ON DISCHARGES CWA 404(b)(1) GUIDELINES

Alternatives Test includes two presumptions when discharges are proposed for special aquatic sites including wetlands:

- 1) “for activities which are not water dependent, practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise”

 - 2) “where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve discharge into special aquatic site are presumed to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise”
- Water Dependency – project requires access or proximity to or siting within a special aquatic site to fulfill its basic purpose



Tips for Work in Marine Waters

- Applicant to overlay the positions of buoys and take that into consideration when selecting the cable route
- Ensure that as-laid coordinates for cables are properly submitted to the Corps to enable display on nautical charts after the permitting process



Discretionary Authority

- The Corps may assert discretionary authority by modifying, suspending, or revoking NWP authorization if a specific activity covered by an NWP would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest (33 CFR 330.4(e)(2))



Individual Permits

- Individual permits are issued following a full public interest review of an individual application for an Army permit. The permit decision is generally based on the outcome of a public interest balancing process, where the benefits of the project are weighed against the detriments
 - ▶ A public notice, usually lasting 30 days, is distributed to all known interested persons..
 - ▶ A permit will be granted unless the proposal is found to be contrary to the public interest or fails to comply with the EPA's 404(b)(1) Guidelines. The 404(b)(1) Guidelines allow the Corps to permit only the least environmentally damaging practicable alternative.
- Processing time usually takes 90 to 120 days, unless a public hearing is required or an environmental impact statement must be prepared.



NEPA?

Pearls Before Swine by Stephan Pastls for August 06, 2016



US Army Corps
of Engineers®



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CORPS NEPA PROCEDURES

33 CFR Part 325 Appendix B of Corps Regulations implements the NEPA procedures found in 40 CFR Parts 1500 – 1508

- **Corps can be Lead Federal Agency or Cooperating Agency**
 - Jurisdiction by law or special expertise
- **Scope of Analysis – Federal Action**
 - Control & responsibility for portions of project beyond limit of Corps jurisdiction if larger action is a product of Corps permit action
 - Extent to which entire project within Corps jurisdiction
- **Contracting**
 - Information required for EIS may be furnished by applicant's consultant
 - Corps approves applicant consultant selection, applicant pays cost
 - Corps responsible for independent evaluation and accuracy of information
- **Purpose and Need**
 - Exercise independent judgement in defining the purpose and need for project from both applicant and public perspective

****Recent changes to NEPA require agencies to revise implementing regulations (currently in process)****



NEPA vs. CWA

NEPA

- ✓ Procedural law
- ✓ Does not regulate decisions agencies make only procedures
- ✓ Disclosure of Impacts
- ✓ Agencies free to select any alternative regardless of impact
- ✓ Failure to comply results in injunction until agency complies

CWA

- Substantive law
- Specific requirements must be met or specific actions must be taken (compliance with 404(b)(1) guidelines; LEDPA & mitigation)
- Failure to comply (violation) can include civil and criminal penalties



CORPS NEPA PROCEDURES

Alternatives

- Corps neither an opponent nor a proponent of proposed project
 - Applicant's final proposal identified as the "applicant's preferred alternative"
 - Corps can only permit the LEDPA
- **NEPA (reasonable) vs. CWA (practicable)**
 - *Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant. (1508.1(z))*
 - Practicable - available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose.
- **Alternative Analysis for NEPA**
 - Must also be thorough enough for Corps to use for both the public interest review and 404(b)(1) guidelines



OTHER LEGAL REQUIREMENTS



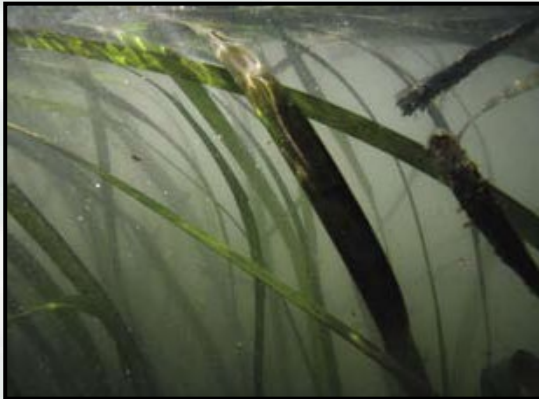
**ENDANGERED SPECIES
ACT**



**FISH & WILDLIFE
COORDINATION ACT**



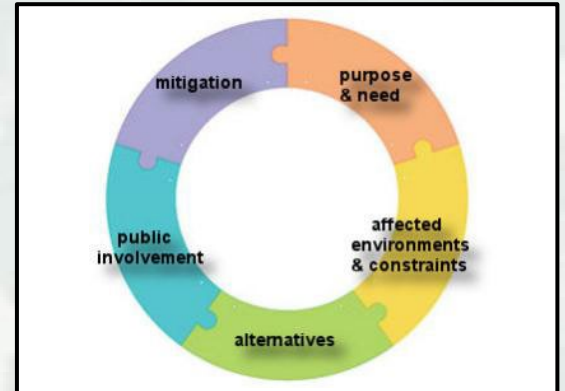
**COASTAL ZONE
MANAGEMENT ACT***



**MAGNUSON-STEVENS
FISHERY CONSERVATION
& MANAGEMENT ACT**



**NATIONAL HISTORIC
PRESERVATION ACT**



**NATIONAL ENVIRONMENTAL
POLICY ACT**



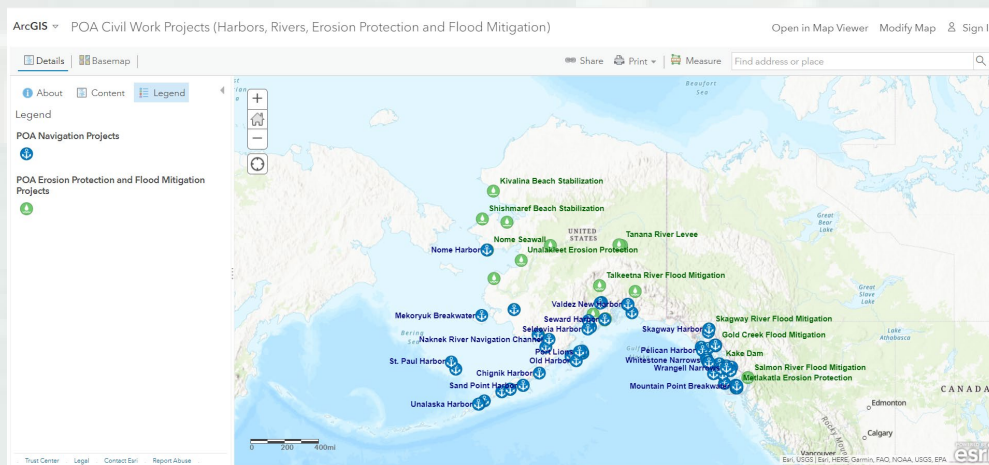
Tribal Consultation

- The U.S. Army Corps of Engineers (Corps), as part of the federal government, has a unique 'Trust relationship' with each tribe based on the U.S. Constitution, treaties, statutes, court decisions and executive orders. That 'Trust relationship' requires the Corps to protect and preserve tribal resources to the greatest extent possible.
- Department of Defense Native American and Alaska Native Policy



Section 408

- This requirement was established in Section 14 of the Rivers and Harbors Act of 1899, which has since been amended several times, and is codified at 33 U.S.C. 408—the section of U.S. Code that gives the program its name.
- Verifies that changes to authorized USACE Civil Works projects will not be injurious to the public interest and will not impair the usefulness of the project.



<https://www.poa.usace.army.mil/About/Offices/Construction-Operations/Erosion-and-Flood-Mitigation/>



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COMPLIANCE

Projects must follow the terms and conditions in permit authorization. This includes special conditions.

- **General Conditions Include:**
 - ▶ Navigation
 - ▶ Aquatic Life Movements
 - ▶ Removal of Temporary Structures
- **Special Conditions May Include:**
 - ▶ Monitoring
 - ▶ Use of HDD under streams
 - ▶ Notifying NOAA, Coast Guard of working starting and ending.



ENFORCEMENT & COMPLIANCE

Unauthorized Activity

- Referral to the U.S. Environmental Protection Agency (EPA)
- Order corrective measures
- Voluntary restoration
- ATF Permit
- Legal action

Permitted Activities

- Compliance inspections
- Voluntary compliance
- Compliance Orders
- Suspend/revoke permit
- Administrative penalties
- Legal action



Questions?

Alaska District Office

General: 907-753-2712

Email: regpagemaster@usace.army.mil

Fairbanks Field Office

General: (907) 753-2520

Email: regpagemaster@usace.army.mil

Kenai Peninsula Field Office

General: 907-753-2689

Email: CEPOA-RD-KENAI@usace.army.mil



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<http://www.poa.usace.army.mil/Missions/Regulatory.aspx>



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