

REGULATORY 101

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Portland District

23 October 2018



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NOTE:
TAMTER GATE

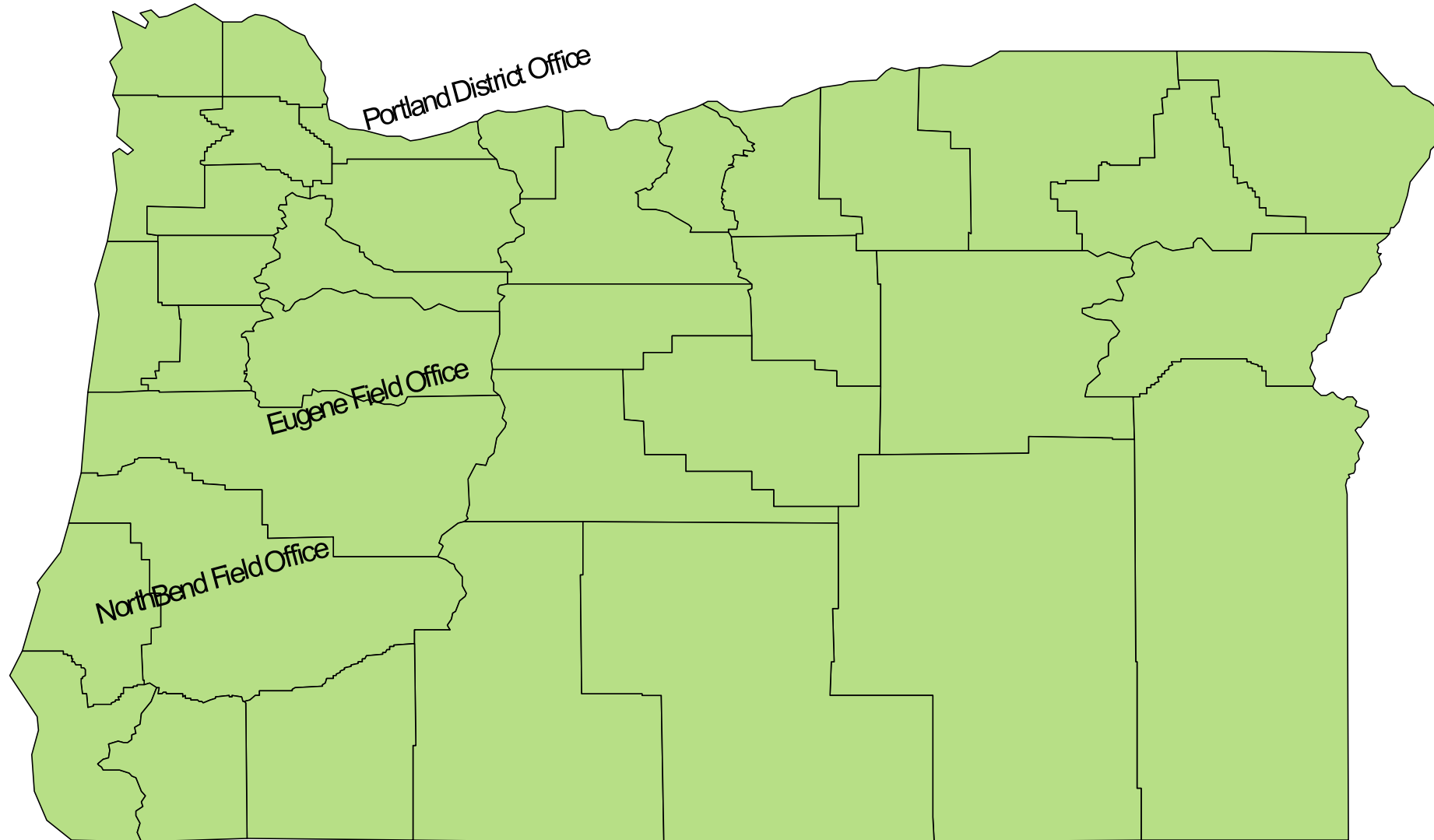
WHERE WE ARE — U.S. ARMY CORPS OF ENGINEERS



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REGULATORY BRANCH AOR – (INCLUDES 12 PORTS ON THE LOWER COLUMBIA RIVER WITHIN THE STATE OF WASHINGTON)



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REGULATORY POLICIES AND PRINCIPLES

- District Engineers make permit decisions
- Fair, timely and balanced permit decisions
- Small-routine to large-highly visible, and sometimes complex and controversial projects
- Corps holds line on “no net loss” of wetlands
- Balanced, transparent, multi-perspective, and timely permit evaluations constitute sound public service
- CUSTOMER SERVICE IS PARAMOUNT. THIS IS BEST REFLECTED BY RESPONSIVENESS AND A PUBLIC SERVICE COMMITMENT.



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CORPS AUTHORITIES

Section 10 Rivers and Harbors Act (1899)

Section 404 Clean Water Act (1972)

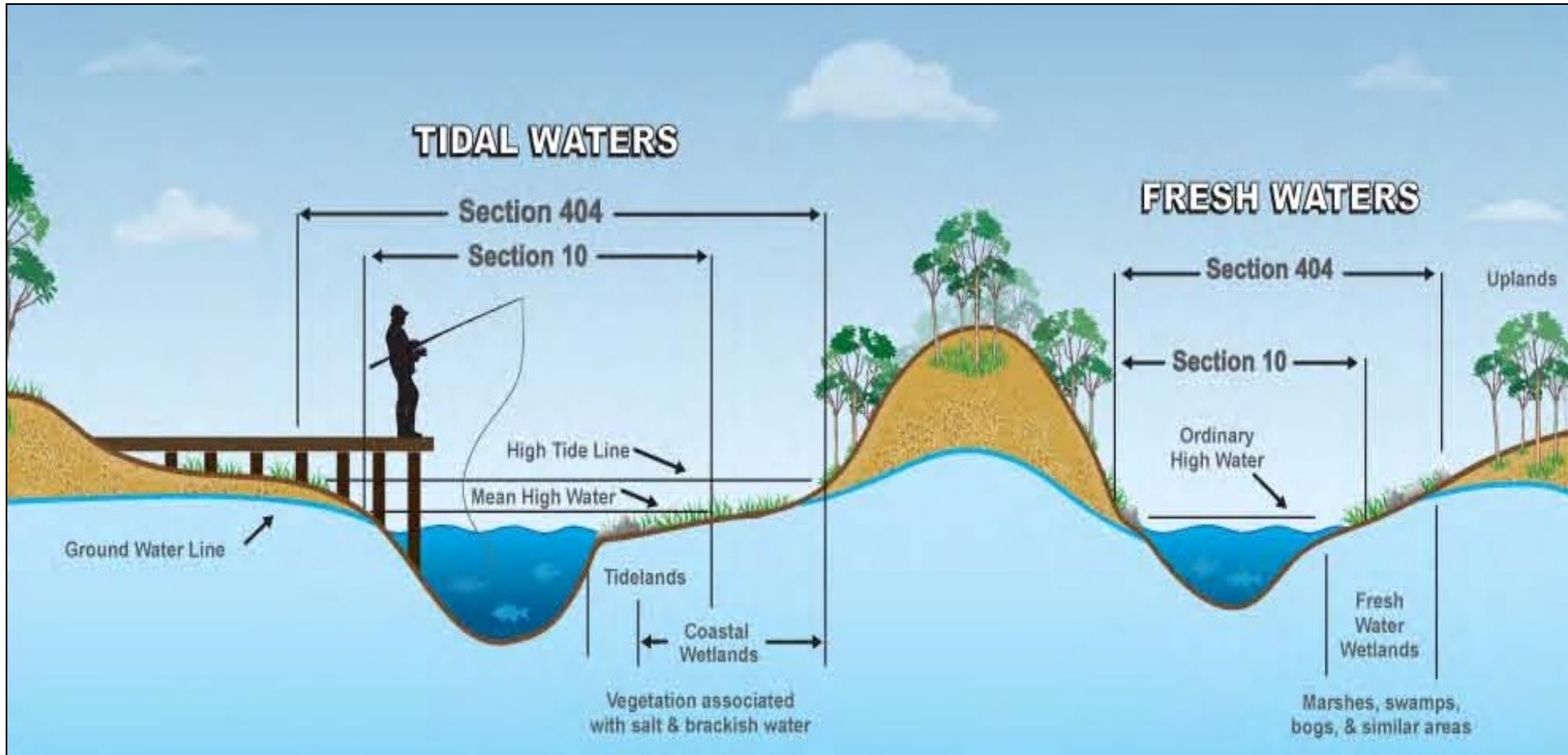
Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972



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JURISDICTION



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WATERS OF THE UNITED STATES

- Navigable waters
- Ocean
- Rivers
- Streams
- Wetlands - Not all wetlands are regulated. Always check with the Corps first.



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NAVIGABLE WATERS OF THE U.S. FOR SECTION 10 JURISDICTION (33 CFR 329)

“...waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”

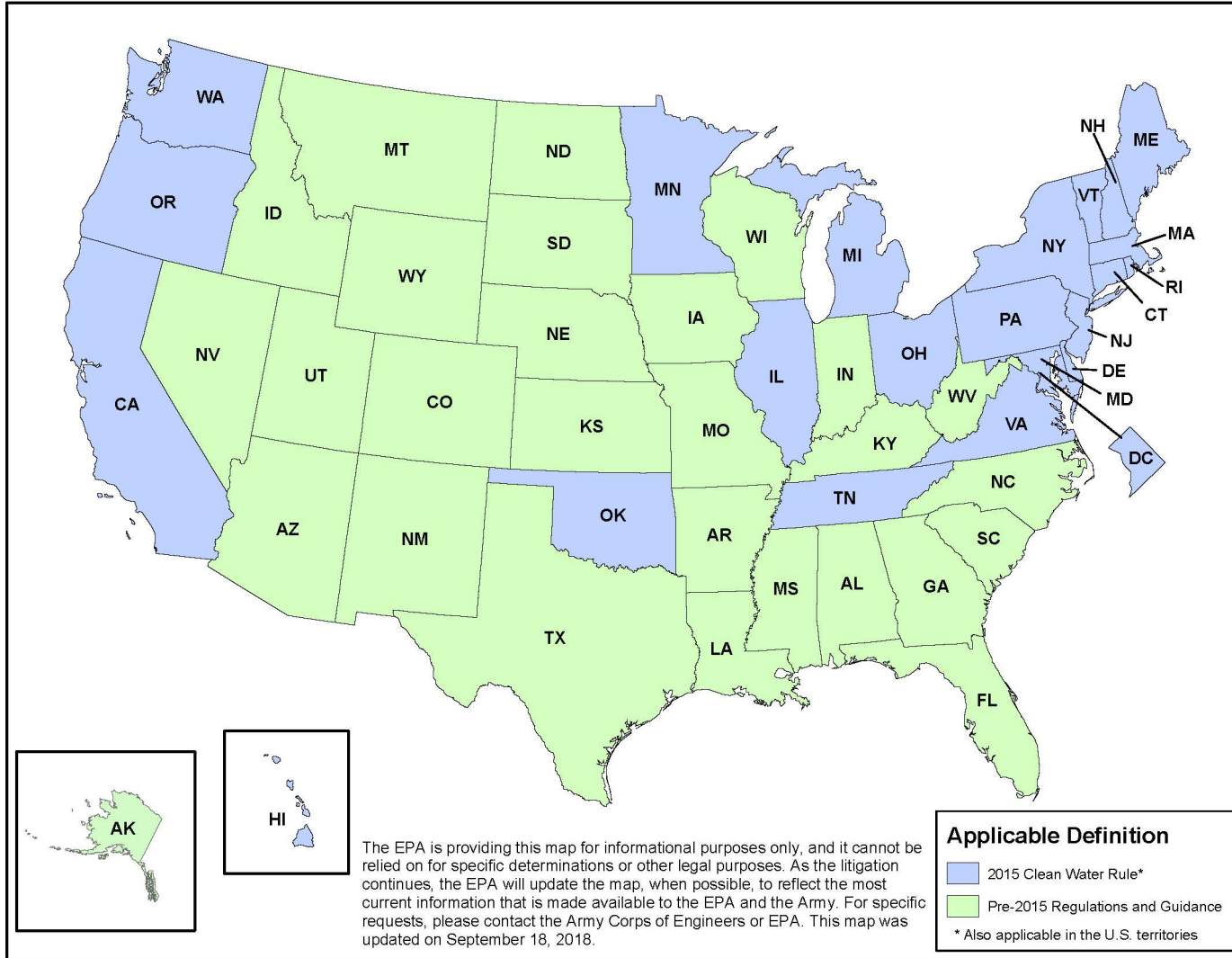


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WATERS OF THE U.S. - JURISDICTION UNDER SECTION 404 OF THE CLEAN WATER ACT (33 CFR 328)

Currently Some States are under the 2015 Clean Water Rule and some are under the Pre-2015 Regulations and Guidance.



The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on September 18, 2018.



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TYPICAL WORK REQUIRING PERMITS

Under Section 10

- Piers
- Boat docks
- Piles
- Mooring buoys
- Floats
- Dredging



Under Section 404

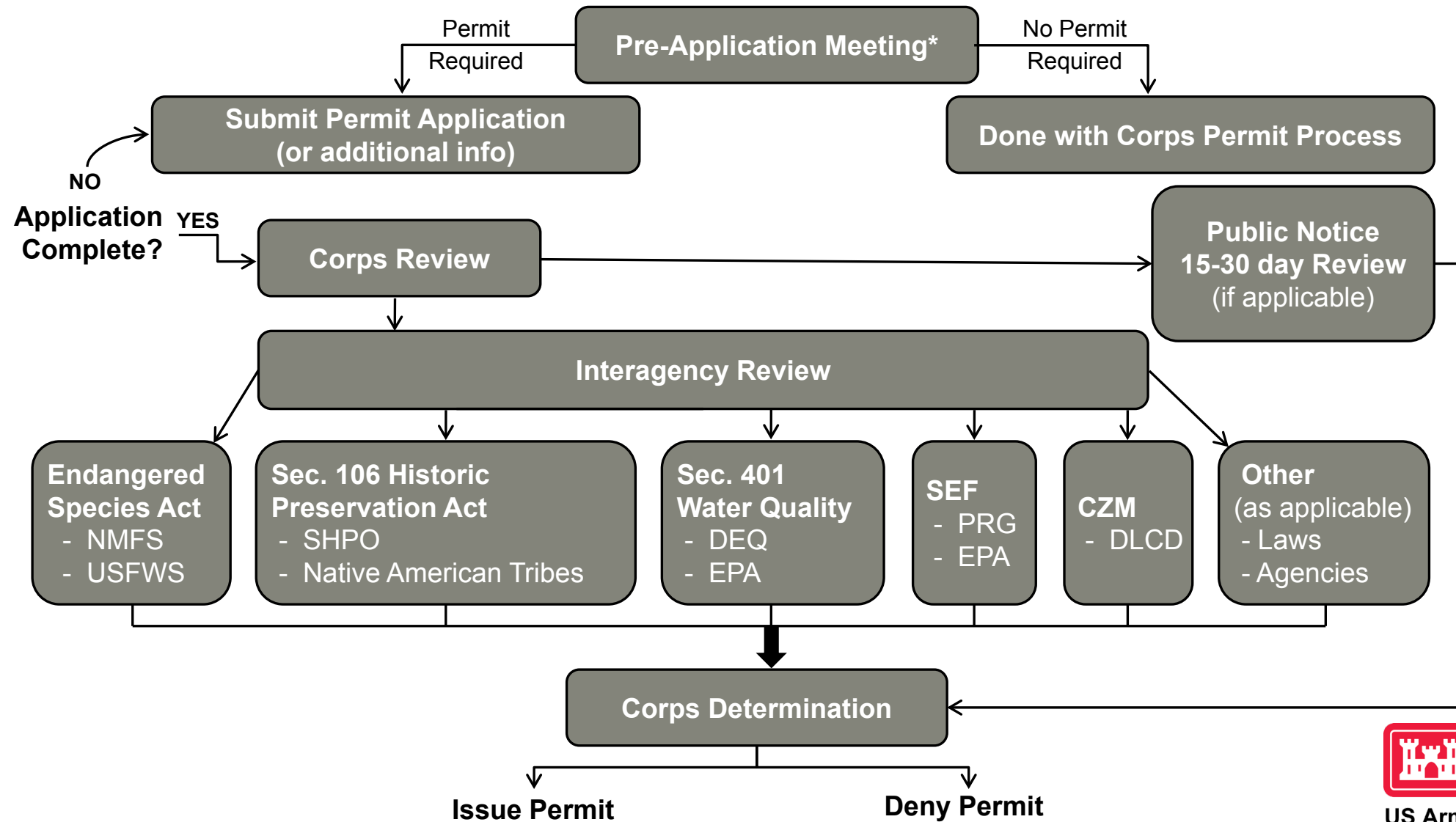
- Road construction
- Residential developments
- Bank stabilization
- Utility lines
- Restoration projects



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REGULATORY PROCESS DIAGRAM




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PERMIT APPLICATION

Location
 Purpose and Need
 Project Description
 Fill and removal quantities
 Drawings



Joint Permit Application Form



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DATE STAMP

AGENCIES WILL ASSIGN NUMBERS

Corps Action ID Number Oregon Department of State Lands No

SEND ONE SIGNED COPY OF YOUR APPLICATION TO EACH AGENCY

US Army Corps of Engineers: District Engineer ATTN: CENWP-OD-GPPO Box 2946 Portland, OR 97208-2946 503-808-4373	DSL - West of the Cascades: State of Oregon Department of State Lands 775 Summer Street, Suite 100 Salem, OR 97301-1279 503-986-5200	DSL - East of the Cascades: State of Oregon Department of State Lands 1645 NE Forbes Road, Suite 112 Bend, Oregon 97701 541-388-6112	Send DSL Application Fees to: State of Oregon Department of State Lands PO Box 4395, Unit 18 Portland, OR 97208-4395 (Attach a copy of the first page of the application)
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(1) APPLICANT INFORMATION

Applicant Name and Address	Business Phone # Home Phone # Fax # Email
Authorized Agent Name and Address Check one Consultant <input type="checkbox"/> Contractor <input type="checkbox"/>	Business Phone # Home Phone # Fax # Email
Property Owner Name and Address If different from above ¹	Business Phone # Home Phone # Fax # Email

(2) PROJECT LOCATION

Street, Road or Other Descriptive Location	Legal Description (attach tax lot map ²)			
	Township	Range	Section	Quarter/Quarter
In or near (City or Town)	County	Tax Map #	Tax Lot # ²	
Wetland/Waterway (pick one)	River Mile (if known)	Latitude (in DD.DDDD format)	Longitude (in DD.DDDD format)	
Directions to the site				

¹ If applicant is not the property owner, permission to conduct the work must be attached.

² Attach a copy of all tax maps with the project area highlighted.

• *Italicized areas are not required by the Corps for a complete application, but may be necessary prior to final permit decision by the Corps.*

v. 07-07-09



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TYPES OF PERMITS

General Permits

- Nationwide permits
- Regional General permits
- 60 day review*

Standard Permits

- Individual permits
- Letter of Permission
- 120 day review*



* Review times may be longer, depending on complexity of project



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TYPES OF AUTHORIZATIONS

General Permits:

- Authority provided in Section 404(e) of the Clean Water Act
- Authorize activities with minimal adverse effects, individually and cumulatively
- Require review every 5 years (currently on 2017 iteration)
- Nationwide Permits (Currently 54 different nationwide permits tied to specific activities)
 - 85% of permit workload
 - Most have a ½ acre threshold for impacts
 - Land-based renewable energy generation facilities
 - Water-based renewable energy generation pilot projects
- 2017 Nationwide Permits have an individual review for an Oregon Department of Environmental Quality 401 water quality certification.
- Regional General Permits (RGP4 BLM & USFS, RGP 5 Vernal Pool Wetlands, RGP 6 Bonneville Restoration Projects, RGP 9 Southern Coastal Ports)



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TYPES OF AUTHORIZATIONS (CONT'D)

Individual Permits

- Letters of Permission (i.e., Section 10)
 - Not controversial
 - Minimal public notice
- Standard Individual Permits
 - Complex, can be controversial
 - Greater than ½ acre of impact
- Compliance with laws and regulations occurs during a case-specific analysis
 - Project-specific NEPA analysis
 - Project-specific 404(b)(1) Guidelines evaluation
 - Project-specific Public Interest Review



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THE EVALUATION

- Avoidance, minimization, compensation
- Public Notice
- National Environmental Policy Act
- Public Interest Review
- Clean Water Act Section 404(b)(1) Guidelines*
- Other Laws and Regulations



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PLAYERS & HOW THEY “PLAY”

Corps	Fair, Timely, Balanced Decisions for applications and compliance and enforcement actions.
EPA	Jurisdiction (Civiletti Opinion), 404(q), 404(c), MPRSA
USFWS	FWCA, Section 7 of the ESA, 404(q)
NMFS	Section 7 ESA and MSFCMA (EFH), 404 (q)
ACHP, SHPO	NHPA, Appendix C
Tribes	Tribal Trust Responsibilities, Treaty Rights, NHPA
States	401 & CZM certifications
Courts	SWANCC, Rapanos, 402/404 cases, NEPA & Scope
Interested Parties	Protect Resources, Facilitate Development
Regulated Community	Submit permit applications, subject to compliance and enforcement actions, can appeal decisions.



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CONTROL & RESPONSIBILITY: DEFINING THE BOUNDARIES OF OUR REVIEW

NEPA – Scope of Analysis/Appendix B

Section 7 of the ESA = “Action Area”

Section 106 of the NHPA = “Permit Area”



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NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

- NEPA is a procedural statute
- Corps determines scope of analysis
- Corps evaluates environmental effects, including direct, indirect, and cumulative effects
 - An EA is a concise NEPA document that either results in a finding of no significant impact (FONSI) or a determination that an EIS is warranted
 - An Environmental Impact Statement (EIS) is a detailed NEPA document that is required when an activity will have a significant effect on the human environment
- Analyze alternatives



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DETERMINING WHEN TO PREPARE AN EIS

- Determine whether the proposal is one which normally would require an EIS
- If the proposed action would not normally require an EIS, prepare an EA and then make a determination of whether an EIS will be prepared
- The significance of an action must be analyzed in several contexts, and the intensity/severity of the impact must also be analyzed.
- Broad actions or multiple actions may be evaluated in one EIS rather than multiple docs.



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PUBLIC INTEREST REVIEW

- The decision whether to issue a permit will be based on an evaluation of the probable impacts of the proposed activity and its intended use on the public interest.
- 20 Public Interest Review Factors
- Balance benefits against detriments to public
- Corps decision to issue unless “contrary to the public interest”



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PUBLIC INTEREST REVIEW FACTORS

- Conservation
- Economics
- Aesthetics
- General Environmental Concerns
- Wetlands
- Historic Properties
- Fish and Wildlife Values
- Flood Hazards
- Floodplain Values
- Land Use
- Navigation
- Shore Erosion and Accretion
- Recreation
- Water Supply and Conservation
- Water Quality
- Energy Needs
- Safety
- Food and Fiber Production
- Mineral Needs
- Property Ownership



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404(B)(1) GUIDELINES

- No discharge shall be permitted if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 230.10)
- **LEDPA** – **L**east **E**nvironmentally **D**amaging **P**racticable **A**lternative
 - Practicable in terms of cost, logistics & existing technology



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ENDANGERED SPECIES & ESSENTIAL FISH HABITAT

- Corps consults with U.S. Fish and Wildlife Service and National Marine Fisheries Service
- Consultation timelines 60-135 days (NMFS rarely meets this target)
- Cannot authorize permit until complete



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SEC. 106 - NATIONAL HISTORIC PRESERVATION ACT/TRADITIONAL CULTURAL PROPERTIES

- Consider effects to historic properties, cultural resources
- Cultural resource surveys
- Consultation with Native American Tribes and State Historic Preservation Office
- Tribal treaty rights (Usual & Accustomed)



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MITIGATION

Sequential

- Avoid, Minimize, Compensate
 - Lost Aquatic Resource Functions
 - Under both NEPA and the 404(b)(1) Guidelines

Mitigation Rule – Addresses compensation after avoidance and minimization for any authorized lost aquatic resource functions when determined appropriate

- For Individual or General Permits
- For Section 10 or 404
- National Policy of No Net Loss of wetlands
- Mitigation banks/in-lieu fees vs. permittee responsible



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THE DECISION – ISSUE OR DENY

- Balance in all ways – the heart of the program
- Regulations, guidance, and policy provide the outline
- Risk is inherent in every regulatory decision
- Make sure decision is well documented in the administrative record



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INIATIVES/CHALLENGES

- Kaizen Process
- Function-based mitigation
- New Definition of Waters of the US
- Section 408
- WRRDA
- 404 assumption
- Executive Order 13807 (Infrastructure)



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WILD AND SCENIC RIVERS ACT (WSRA)

The Act prohibits federal agencies from assisting in projects that would have a direct and adverse effect on a designated river.

Also includes a standard for projects below, above or on a stream tributary to a designated river.

Determinations are made by the river-administering agency.

Values to evaluate a projects effects to a Wild and Scenic River:

- Scenic
- Recreational
- Fish
- Wildlife

Administered to the National Park Service

- Some situations the River is managed by the another federal agency (Bureau of Land Management, U.S. Fish and Wildlife Service, and U.S. Forest Service)



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QUESTIONS?



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