

REGULATORY OUTREACH 2025

Nick Laskowski P.G.
Chief, Regulatory Division

Galveston District,
Jadwin Building
February 5, 2025



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WELCOME



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MEETING OUTLINE

0800-0830 – Networking

0830-0835 – Safety Briefing

0835-0845- Welcome and Opening Remarks

0845-0915 – State of the Regulatory Program

0915-1015 -Hot Topics

1015-1030 – Break

1030-1130 – Jurisdiction

1130-1300 – Lunch (on your own)

1300-1330- Regulatory Request System

1330-1500- Special Public Notice & ESA

1500-1530- Section 408

1530-1545- Break

1545-1600- Reg Division Remarks

1600-1700- Open Discussion/QA/Networking



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STATE OF THE REGULATORY PROGRAM



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1. Mission Statement
2. District Facts
3. Transformation
4. SWG Developments
5. The Future
6. The Ask
7. Questions





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Mission Statement

The mission of the Corps of Engineers Regulatory Program is to protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible, and balanced permit decisions.





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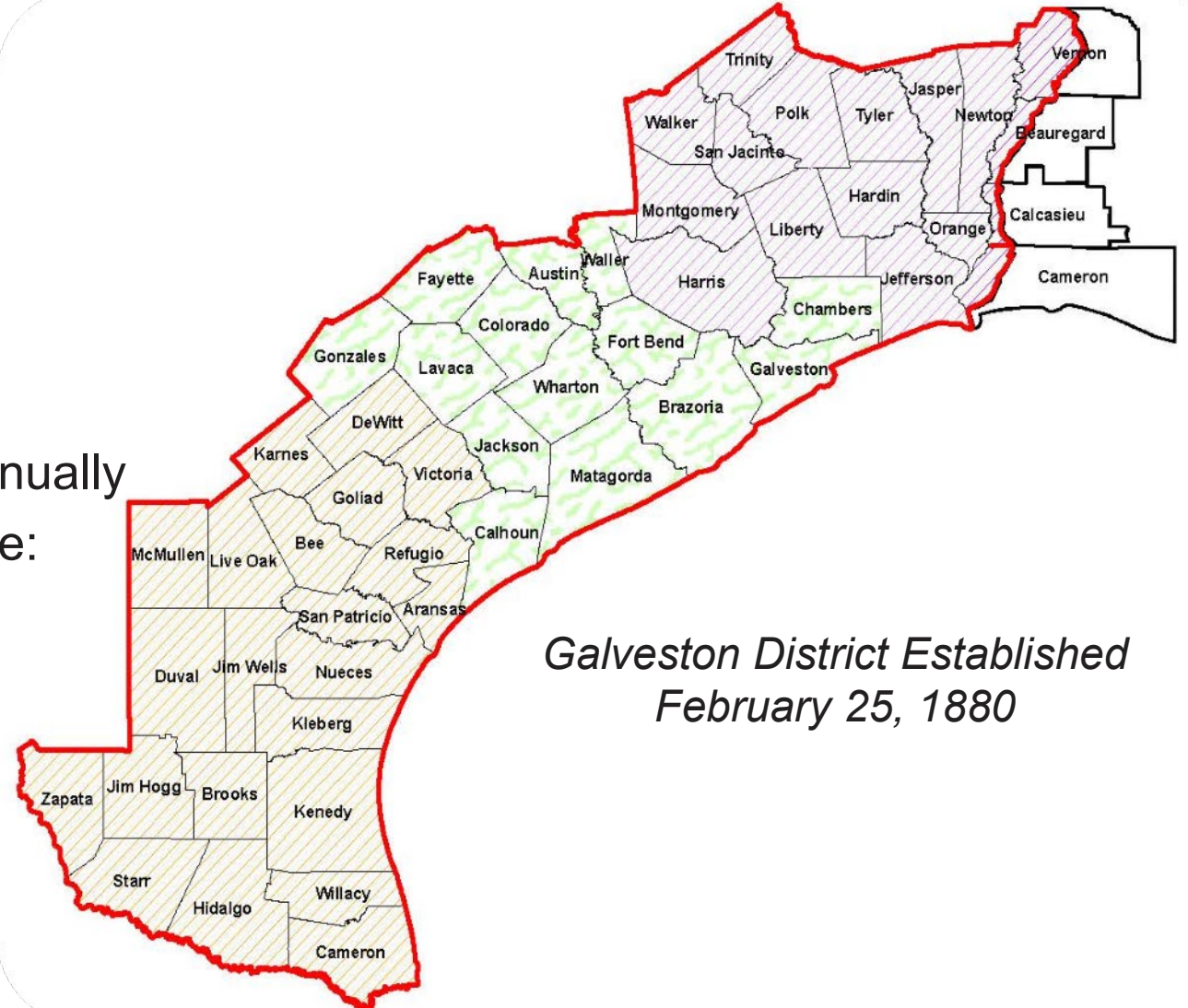
Regulatory Division - Facts



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Galveston District

- 49 Staff Members
- 50,000+ square miles
- 700 miles of coastline
- 50+ Counties
- Portions of 4 Louisiana Parishes
- 16 Congressional Districts
- Issues over 1,000 Permit Authorizations Annually
- Average Pending Actions At Any Given Time:
 - EIS – 5+
 - Standard Permits – 125+
 - Letters of Permission – 50+
 - General Permits – 200+
 - Compliance Actions – 125+
 - Enforcement Actions 150+
 - Jurisdictional Determinations – 200+



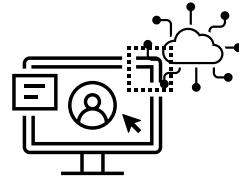
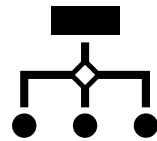
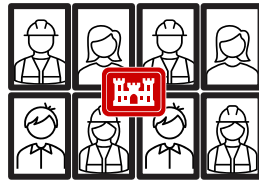
*Galveston District Established
February 25, 1880*



Transforming the USACE Regulatory Program

Our Goal

Develop the relationships, processes, and technology that will enable USACE Regulatory Program to continue to effectively deliver decisions that balance natural resource protection with the need for progress and economic growth.



- **Agile Workforce and Organizational Structure**

Leverage expertise to enhance delivery of efficient, collaborative, coordinated environmental reviews and permit decisions.

Lead interagency efforts in recruiting, on-boarding, and training new generation of permitting professionals.

- **Innovative Processes**

Facilitate implementation of cutting-edge concepts (e.g., Regulators without Borders).

- **Technology**

Identify, fund, and implement technology to for process improvement.

- **Strengthen Relationships**

Meet action agencies (Fed/State/Tribal/Local) where funding/priority decision-making occurs to maximize agility in resource allocation and execution.



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FUNDS CREATE A CATALYST FOR CHANGE



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Infrastructure investment and Jobs Act (IIJA)

- **\$160M IIJA Funding Received**
- Technical Regional Execution Centers established in 7 Divisions
 - Workload balancing
 - **Common Level of Service**
- Focused on Mission Success Criteria and Reducing Backlog
- Developing Skills for Success
- Shaping the Future State of Regulatory for Sustainability

Identify how to build & resource district and regional capacity to better manage and deliver work for a common level of service to the public



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SWG DEVELOPMENTS



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1. Regulatory Request System (RRS)
2. Fully Electronic Records (No more paper)
3. Programmatic Focus on Permits (JD prioritization Structure)
4. Templates/Models for Mitigation Banks/Permittee Responsible sites.
5. Threatened and Endangered Species Programmatic Contract
 - A. NMFS Programmatic Activities (14 commonly performed activities)
 - B. USFWS Effects Determination Guide (EDGE) & Standard Local Operating Procedures (SLOPES) (26 species)
6. Development of Regional General Permits
 - A. Rookery Islands
 - B. Fill in wetlands adjacent to tidal waters
 - C. Single Family development along GIWW
 - D. Beach Nourishment



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THE FUTURE

- The Regulatory Division is ***ready*** and ***resilient*** to adapt to change.
- We will continue to ***serve*** the public and ***fulfill*** our mission responsibilities the best we are able to.
- We are committed to ***maintain open communications*** as change occurs.
- ***Deliver*** a Common Level of Serve Across the Enterprise



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THE ASK

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- ***Please don't ask project specific questions in open forum***, if you have project specific questions ask a Regulator and we can have a separate project specific meeting.
- ***Be patient with us***. We know a lot, but not everything. We anticipate receiving additional guidance as developments occur.
- ***Hold your questions*** to the end of the presentation.
- Take this time to ***get to know your Regulators*** in person and ***build relationships***.



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QUESTIONS



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HOT TOPICS

FEBRUARY 5, 2025

Kara Vick
Team Lead/Technical Expert
Compliance Branch, Regulatory Division
2000 Fort Point Road
Galveston, Texas 77550

Office: 409-766-6354
USACE cell: 409-926-1090
Email: Kara.D.Vick@usace.army.mil



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HOT TOPICS

[HTTPS://WWW.SWG.USACE.ARMY.MIL/MISSIONS/REGULATORY/](https://www.swg.usace.army.mil/missions/regulatory/)



Special Public Notices

Programmatic Emphasis on Permit Applications & JD Request Form – August 8, 2024

PN Located: <https://www.swg.usace.army.mil/Media/Public-Notices/Article/3865765/special-public-notice-programmatic-emphasis-on-permit-applications/>

Compensatory Mitigation Memo – March 22, 2024

Memo Location:

<https://www.army.mil/article/274729/?fbclid=IwAR0K7K5Gq1u3Dj3KacWmeD57M3Kwrzj87FOTcMBSgdLhDtdeAzhW5ZnOWKo>

SWG Mitigation Banking Instrument Template – December 12, 2024

PN Located: <https://www.swg.usace.army.mil/Media/Public-Notices/Article/3999314/special-public-notice/>

Notice of Availability of the Regional Streamflow Duration Assessment Methods of the Arid West, Western Mountains, and Great Plains – October 28, 2024

PN Located: <https://www.swg.usace.army.mil/Media/Public-Notices/Article/3948353/joint-public-notice-notice-of-availability-of-the-regional-streamflow-duration/>

Ordinary High Water Mark Manual – January 8, 2025

PN Located: <https://www.usace.army.mil/Media/Announcements/Article/4024232/8-january-2025-the-us-army-corps-of-engineers-and-the-us-environmental-protecti/>

Tools and Technical Guidelines for Delineating the Extent of Tidal Waters

Location: <https://erdc-library.erdc.dren.mil/server/api/core/bitstreams/71cecaeb-680b-459e-ace4-85e35ab764b5/content>



Programmatic Emphasis on Permit Applications

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<https://www.swg.usace.army.mil/Media/Public-Notices/Article/3865765/special-public-notice-programmatic-emphasis-on-permit-applications/>

The Regulatory Division is refining its process to emphasize review of Department of the Army (DA) permit applications and requests associated with pending DA permit applications.

Why?

- RD is reviewing over 250 pending Stand Alone JDs, avg 20 pending per PM.
- Increasing mandates by state & local governments to require corps verified delineations and/or JDs unrelated to DA permit apps.
- RD already has a heavy workload, delaying the RDs ability to provide efficient reviews of DA permit apps and JDs.
- JD is not required for evaluating a Department of the Army (DA) permit application.





Programmatic Emphasis on Permit Applications

SWG's Prioritization of Work

1. Review & processing new DA permit apps (IPs/ GPs/Mitigation Banks)
2. Mod of existing DA permits/DA permit transfers
3. JD requests and/or delineation concurrences not associated with a DA permit app (Stand Alone JDs/DCs) submitted with sufficient supporting





Programmatic Emphasis on Permit Applications

An AJD is not required prior to applying for a permit.

Things to consider:

- Get an accurate aquatic resource basemap.
 - If aquatic resource boundary are questionable can ask for a delineation concurrence.
- Design project to avoid aquatic resources.
- If resources must be impacted, is it a GP?
- If impacts larger than GP allows, will be an IP.

When does an AJD make Sense:

- Eliminate the need for a permit.
- Reduce the level of Review (IP to GP)
- Reduce Compensatory Mitigation
- Reduce need to demonstrate sequencing.
- Reduce Scope (ESA/NHPA).





SWG JD REQUEST AND JD CHECKLIST – JULY 25, 2024

<https://www.swg.usace.army.mil/Media/Public-Notices/Article/3865765/special-public-notice-programmatic-emphasis-on-permit-applications/>

U.S. Army Corps of Engineers – Galveston District - Regulatory Division REQUEST FOR CORPS JURISDICTIONAL DETERMINATION (JD) / DELINEATION (For Jurisdictional Status and Identifying Wetlands and Other Aquatic Resources)

The Regulatory Division is now offering paperless/electronic documents as a primary means of accepting project submittals and responding to requests. While electronic submittals are preferred, we will continue to accept paper documents that meet our file requirements in order to accommodate those with limited computer access. Depending on the project location, requests should be submitted to the appropriate office below. Please visit <https://www.swg.usace.army.mil/Missions/Regulatory/Permits/> for additional information on electronic submittals. The Galveston District recommends submittal via <https://rrs.usace.army.mil/rrs>

Galveston Office 2000 Fort Point Road Galveston, TX 77550 409-766-3869 CEGWORegulatoryInbox@usace.army.mil	Corpus Christi Regulatory Office: 5151 Flynn Parkway Corpus Christi, TX 78411 361-814-5850 CEGWORegulatoryInbox@usace.army.mil
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I. PROPERTY AND AGENT INFORMATION

A. Site Details/Location:

Site Name: _____ Date: _____
City/Township/Parish: _____
County: _____ Latitude: _____
Longitude: _____ Acreage: _____
Property Address(es): _____
An accurate depiction of the review area must be provided (survey, tax map, OR GPS coordinates). **See the attached Checklist for information that should be submitted for a complete and proper submittal.**

B. Requestor of Jurisdictional Determination/Delineation (if there are multiple property owners, please attach additional pages)

Name: _____ Company Name (if applicable): _____
Address: _____
Phone: _____ Email: _____
Check one: ☐ I currently own this property ☐ I plan to purchase this property ☐ Other: _____

C. Agent/Environmental Consultant Acting on Behalf of the Requestor (if applicable):

Consultant/Agent Name: _____
Company Name: _____
Address: _____ Phone: _____
Email: _____

II. REASON FOR REQUEST (check all that apply):

- ☐ I intend to construct/develop a project or perform activities on this site which would be designed to avoid all aquatic resources.
- ☐ I intend to construct/develop a project or perform activities on this site which would be designed to avoid all jurisdictional aquatic resources under Corps authority.
- ☐ I intend to construct/develop a project or perform activities on this site which may require authorization from the Corps, and the Jurisdictional Determination would be used to avoid and minimize impacts to jurisdictional aquatic resources and as an initial step in a future permitting process.
- ☐ I intend to construct/develop a project or perform activities on this site which may require authorization from the Corps; this request is accompanied by my permit application and the jurisdictional determination is to be used in the permitting process.
- ☐ I intend to construct/develop a project or perform activities in a navigable water of the U.S. which is subject to the ebb and flow of the tide.
- ☐ A Corps jurisdictional determination is required in order to obtain my local/state authorization.
- ☐ I intend to contest jurisdiction over a particular aquatic resource and the request the Corps to confirm that jurisdiction does/does not exist over the aquatic resource on the parcel.
- ☐ I believe that the site may be comprised entirely of dry land.
- ☐ Other: _____

III. TYPE OF REQUEST:

¹**Delineation Concurrence (DC)** – A DC provides concurrence that the delineated boundaries of wetlands on a property are a reasonable representation of the aquatic resources on-site. A DC does not address the jurisdictional status of the aquatic resources. (NOTE: A DC is generally the quickest type of standalone request for the Corps to review and process.)

²**Approved** – An AJD is defined in Corps regulations at 33 CFR 331.2. As explained in further detail in RGL 16-01, an AJD is used to indicate that this office has identified the presence or absence of wetlands and/or other aquatic resources on a site, including their accurate location(s) and boundaries, as well as their jurisdictional status. AJDs are valid for 5 years.

³**Preliminary** – A PJD is defined in Corps regulations at 33 CFR 331.2. As explained in further detail in RGL 16-01, a PJD is used to indicate that this office has identified the approximate location(s) and boundaries of wetlands and/or other aquatic resources on a site that are presumed to be subject to regulatory jurisdiction of the Corps of Engineers. Unlike an AJD, a PJD does not represent a definitive, official determination that there are, or that there are not, jurisdictional aquatic resources on a site, and does not have an expiration date.

⁴**"No Permit Required" (NPR) Letter** – A NPR letter may be provided by the Corps to notify the requestor that an activity will not require a permit (authorization) from the Corps; this letter can only be used if the proposed activity is not a regulated activity, regardless of where the activity may occur. A NPR letter cannot be used to indicate the presence or absence of wetlands and/or other aquatic resources, nor can it be used to determine their jurisdictional status.

NOTE 1: Pre-approved Delineations and/or JDs are **NOT** a pre-requisite for submitting a DA permit application. Requests for JDs and/or DCs that are not associated with a DA permit application (Standalone Delineation / JD requests) will be reviewed and processed as time allows and based on available resources.

NOTE 2: Although not a requirement, it is recommended that Standalone requests be prepared and submitted by an environmental consultant to expedite the review process.

Select the Appropriate Request:

☐ Pre-Construction Notification or Department of the Army permit application

- ☐ with Delineation only (no written concurrence of delineation)
- ☐ with Delineation Concurrence¹
- ☐ with Preliminary Jurisdictional Determination (PJD)³
- ☐ with Approved Jurisdictional Determination (AJD)²

☐ Standalone Delineation / Jurisdictional Determination

Standalone Delineation / Jurisdictional Determination requests will be reviewed and processed as time allows and based on available resources.

- ☐ Delineation Concurrence¹
- ☐ Preliminary Jurisdictional Determination (PJD)³

☐ Approved Jurisdictional Determination (AJD)²

☐ I request that the Corps delineate the wetlands and/or other aquatic resources that may be present on my property.

These requests have historically been conducted as a courtesy for private property owners for minor actions. Due to current workload and priorities, the Charleston District Regulatory Division will only provide this service on a limited basis for private individuals on small tracts of land (typically 1 acre or less).

- ☐ with the attached Pre-Construction Notification or Department of the Army permit application
(This may delay processing times. The review of the permit application will not start until the delineation has been completed by the Corps.)
- ☐ with a Delineation Only, an AJD or PJD

☐ "No Permit Required" (NPR) Letter as I believe my proposed activity is not regulated⁴

☐ Unclear and require additional information to inform my decision.

IV. LEGAL RIGHT OF ENTRY

By signing below, I am indicating that I have the authority, or am acting as the duly authorized agent of a person or entity with such authority, to and do hereby grant U.S. Army Corps of Engineers personnel right of entry to legally access the property(ies) subject to this request for the purposes of conducting on-site investigations (e.g., digging and refilling shallow holes) and issuing a jurisdictional determination. I acknowledge that my signature is an affirmation that I possess the requisite property rights to request a jurisdictional determination on the properties subject to this request.

Mailing Address _____

Property Address / TMS #(s) _____

Email Address _____

Daytime Phone Number _____

*Signature: _____

Printed Name and Date _____

¹**Authorities:** Rivers and Harbors Act, Section 10, 33 USC 403; Clean Water Act, Section 404, 33 USC 1344; Marine Protection, Research, and Sanctuaries Act, Section 103, 33 USC 1413; Regulatory Program of the U.S. Army Corps of Engineers; Final Rule for 33 CFR Parts 320-332.

Principal Purpose: The information that you provide will be used in evaluating your request to determine whether there are any aquatic resources within the project area subject to federal jurisdiction under the regulatory authorities referenced above.

Routine Uses: This information may be shared with the Department of Justice and other federal, state, and local government agencies, and the public, and may be made available as part of a public notice as required by federal law. Your name and property location where federal jurisdiction is to be determined will be included in the approved jurisdictional determination (AJD), which will be made available to the public on the District's website and on the Headquarters USACE website.

Disclosure: Submission of requested information is voluntary; however, if information is not provided, the request for an jurisdictional determination cannot be evaluated nor can a jurisdictional determination be issued.



SWG JD REQUEST AND JD CHECKLIST – JULY 25, 2024

<https://www.swg.usace.army.mil/Media/Public-Notices/Article/3865765/special-public-notice-programmatic-emphasis-on-permit-applications/>

JURISDICTIONAL DETERMINATION AND DELINEATION CHECKLIST:

This checklist is to assist prospective requesters in submitting complete and proper information. This is NOT a comprehensive list nor are all items mandatory for all projects. However, the list contains general information typically necessary for this office to confirm jurisdictional and/or wetland delineations as part of the permitting process. Required items are indicated by an asterisk (*). To reduce delays in verifying Jurisdictional Determinations and Delineations, it is recommended that the information provided is a complete and true representation of wetlands and other aquatic resources that may be present onsite. It is also recommended that submissions be prepared and submitted by an environmental consultant. Although this is not a requirement, it will significantly expedite the review process.

Following these standards will help to expedite our review. Flexibility of these standards may be determined by the Regulatory Division on a case-by-case basis only. Please note the Corps has the ability to reject delineation work that is incomplete or inaccurate.

☐ *Completed Request For Corps Jurisdictional Determination (JD) / Delineation AND Legal Right of Entry

☐ Site Information:

- ☐ *Location Maps: large-scale and small-scale maps, including streets, intersections, cities and an accurate depiction of the site boundary shown.
Note: Only contiguous/adjoining parcels can be submitted under one JD request. If there is an area not within the JD request that separates the areas of review (i.e., a road, utility line, etc.), a separate JD request should be submitted each area.
- ☐ *Overlay of site boundary on aerial photo, USGS topographic map, soil survey, NWI Map, etc.
- ☐ *Site's coordinates should be based on a standard coordinate system, i.e., Geographic (at least to the nearest tenth of a second), State Plane or UTM. Indicate the coordinate system (and zone for UTM), units (English or metric) and the corresponding geodetic datum, either NAD27 or NAD83.
- ☐ *Property lines with measurements illustrating all existing land features, including streams, ditches, trails, etc.
- ☐ Landscape photos of representative upland areas and aquatic resources, with the photo locations and directions of photos marked on a depiction.
- ☐ Current land use and plant communities located on and adjacent to the area under review (i.e., agricultural, industrial, residential, cropland, lawn, forested, etc.). If known, a brief history of the previous land use will be helpful.
- ☐ Proposed & existing structures clearly defined as such.
- ☐ Dimensions of proposed structures such as a driveway, house, garage, and other structures which are proposed in wetlands.
- ☐ Sewage/septic system: location, dimensions and type.
- ☐ Drainage ditches and/or berms: location and dimensions.

☐ *Wetland Determination Data Forms: Record wetland delineation information for both the upland and wetland side of various points along the boundary. Current version from appropriate Regional Supplement found at: https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/

☐ Elements for Depictions of All Sites:

- ☐ *Title Block with project name, applicant, county, state, date.
- ☐ *North arrow
- ☐ *Solid bold line depicting project area boundary with label. The project area boundary should be accurate and may be represented by survey, tax map, or GPS coordinates with coordinates provided. Please note that a survey is NOT required. Tax maps may only be used if the project area includes the entire parcel(s). Include the Tax Map Parcel Numbers, Property Identification Numbers, etc., the source of the map, and date of preparation (print date).
- ☐ *Clearly marked boundaries of all wetlands and/or other aquatic resources and other pertinent features that are present (Wetlands, Tributaries, Lakes, Borrow Pits, Ponds, Rivers, Drainage Features, Ditches) and have been flagged in the field. Surveyed or GPS coordinates of the boundaries should be provided. (At a minimum, potentially non-jurisdictional linear features should be included on a supplement sketch/depiction.)
- ☐ *Labels of wetlands and/or other aquatic resources. Refer to the below tables for the standardized labels that should be used for A/JDs, PJDs and/or Delineation Concurrence.
- ☐ *Size (acres) and length (linear feet) of each individual wetlands or aquatic resource included on the depiction.
- ☐ *Wetland Determination Data Form point locations with labels. (At a minimum, this should be included on a supplement sketch/depiction.)

*Standardized Labels for Depictions of Wetlands and Aquatic Resources

Table 1: Labels for PJDs and Delineation Concurrence

Label	Description
Wetland X (tidal, non-tidal)	All wetlands, including tidal wetlands.
Non-wetlands waters X (tidal, non-tidal)	All non-wetland aquatic resources (ponds, linear features, tributaries, tidal open water).
Upland	Uplands should be labeled
Non-aquatic resource X (Optional) *	Features determined by the Corps to be non-aquatic resources.

Table 2: Labels for A/JDs

Jurisdictional Feature Label	Description
TNW X	Traditionally Navigable Water, tidal wetland, or and/or OCRM Critical Area Wetland
Jurisdictional Tributary X	Tributary, relatively permanent water, or stream bed
Jurisdictional Wetland X	Meeting 3-parameters per 1987 Delineation Manual
Other Waters of the United States such as ponds, lakes, ditches, impoundments, etc.	
Non-jurisdictional Wetland X	Wetland determined by the Corps to be non-jurisdictional
Non-jurisdictional Feature X (Optional)*	Non-jurisdictional ponds, borrow-pits, linear features, ditches, etc.
Upland	Uplands should be labeled when wetlands or other waters, regardless of jurisdictional status, are present. When no wetlands or other waters are present, the "Upland" label is not necessary.

**** This is not a document provided in RRS, you have to attach it as a separate file if you want to provide it.**

*Authorities: Rivers and Harbors Act, Section 10, 33 USC 403; Clean Water Act, Section 404, 33 USC 1344; Marine Protection, Research, and Sanctuaries Act, Section 103, 33 USC 1413; Regulatory Program of the U.S. Army Corps of Engineers; Final Rule for 33 CFR Parts 320-332.

Principal Purpose: The information that you provide will be used in evaluating your request to determine whether there are any aquatic resources within the project area subject to federal jurisdiction under the regulatory authorities referenced above.

Routine Uses: This information may be shared with the Department of Justice and other federal, state, and local government agencies, and the public, and may be made available as part of a public notice as required by federal law. Your name and property location where federal jurisdiction is to be determined will be included in the approved jurisdictional determination (AJD), which will be made available to the public on the District's website and on the Headquarters USACE website.

Disclosure: Submission of requested information is voluntary; however, if information is not provided, the request for an jurisdictional determination cannot be evaluated nor can a jurisdictional determination be issued.

*Authorities: Rivers and Harbors Act, Section 10, 33 USC 403; Clean Water Act, Section 404, 33 USC 1344; Marine Protection, Research, and Sanctuaries Act, Section 103, 33 USC 1413; Regulatory Program of the U.S. Army Corps of Engineers; Final Rule for 33 CFR Parts 320-332.

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Disclosure: Submission of requested information is voluntary; however, if information is not provided, the request for an jurisdictional determination cannot be evaluated nor can a jurisdictional determination be issued.

OPTIONS FOR JDS

Approved Jurisdictional Determination

- Official Corps determination.
- An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the CWA/RHA if a delineation is also submitted.
- Good for 5 years
- Can be used and relied on by the recipient of the approved JD if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other "affected party," challenging the legitimacy of that JD or its determinations; and process.
- Must be used to determine if a site contains uplands.
- Applicant or Agent can appeal, no third party can appeal.
- Coordinate with EPA for nonadjacent wetlands

No Jurisdictional Determination (No JD)

- Authorizations by non-reporting NWP
- Where Corps verifies GP or issues LOP and/or SP and no jurisdictional questions arise

Preliminary Jurisdictional Determination

- PRESUMES jurisdiction over ALL waters
- Sets aside question of jurisdiction in order to expedite the permit process
- DOES NOT involve adjacency or EPA Coordination
- CANNOT make a determination of "no jurisdiction" over a water (disputing jurisdiction requires an AJD)
- Use 1987 WDM and its supplement manual for all delineations for over 5 acres tracts
- CAN request an AJD later
- CANNOT appeal

DELINEATION CONCURRENCE VS. PRESENCE/ABSENCE

Delineation Concurrence

- Use of the proper manual and supplement is required.
- No statement or determination jurisdiction.
- Cannot appeal.
- Designed to verify acreages of aquatic resources on site to help determine IP vs NWP.
- Meant to get you through the NWP permit process.

WETLAND DELINEATION



Presence/Absence

- No delineation is required.
- Jurisdictional finding
- If no delineation is provided or the delineation is not per the 87 WDM then we can ONLY give a YES or NO (Presence/Absence) AJD because the Corps cannot verify the limits or verify the delineation.
- Does not tell you which aquatic resource, if multiple, is jurisdictional.
- Is appealable.



NO PERMIT REQUIRED (NPR)

NPR Activity Based

- Proposed **activity** is not regulated
- Proposed **activity** is exempt under Section 404(f)
- Letter clearly states it is not addressing geographic jurisdiction.

PREFER to avoid the aquatic resources:

Does your project fit in with the following scenario?: *"I don't plan on impacting any wetlands, streams, ponds, or other water bodies, but in order to get a construction permit, or disaster recovery grant, etc. I need a letter from your office."*

NO impacts to aquatic resources will occur as a result of a proposed action (ie. Painting a house, elevating a house, demolition of a house, etc);

*The activity you are proposing meets one of the exemptions spelled out in [33 CFR part 323.4](#).

NPR Jurisdiction Based

If impacts will occur to aquatic resources and an Approved Jurisdictional Determination has been issued indicating that the water in question is not regulated under the Clean Water Act or under Section 10 of the Rivers and Harbors Act of 1899; **i.e discharging dredge or fill into a non-jurisdictional wetland.**

Remember:

If you state the aquatic resources are non-jurisdictional, then you are still requesting an AJD; therefore, it may be a NPR; however, the wetlands will most likely be coordinated with EPA if they are nonadjacent.



SWG JD REQUEST AND JD CHECKLIST – JULY 25, 2024

II. REASON FOR REQUEST (check all that apply):

- ☐ I intend to construct/develop a project or perform activities on this site which would be designed to avoid all aquatic resources.
- ☐ I intend to construct/develop a project or perform activities on this site which would be designed to avoid all jurisdictional aquatic resources under Corps authority.
- ☐ I intend to construct/develop a project or perform activities on this site which may require authorization from the Corps, and the Jurisdictional Determination would be used to avoid and minimize impacts to jurisdictional aquatic resources and as an initial step in a future permitting process.
- ☐ I intend to construct/develop a project or perform activities on this site which may require authorization from the Corps; this request is accompanied by my permit application and the jurisdictional determination is to be used in the permitting process.
- ☐ I intend to construct/develop a project or perform activities in a navigable water of the U.S. which is subject to the ebb and flow of the tide.
- ☐ A Corps jurisdictional determination is required in order to obtain my local/state authorization.
- ☐ I intend to contest jurisdiction over a particular aquatic resource and the request the Corps to confirm that jurisdiction does/does not exist over the aquatic resource on the parcel.
- ☐ I believe that the site may be comprised entirely of dry land.
- ☐ Other: _____



COMPENSATORY MITIGATION MEMO



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SACW

22 March 2024

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision

1. References:

- a. Revised Definition of "Waters of the United States"; Conforming (88 FR 61964) (Conforming Rule)
- b. *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) (*Sackett*)
- c. Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (73 FR 19594) (2008 Mitigation Rule)

2. Background.

The Clean Water Act set forth goals and objectives for the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. "Waters of the United States" is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act, but the Act does not define the term. The Environmental Protection Agency and the Department of the Army have defined "waters of the United States" through regulations since the 1970s, including most recently in a rule issued on September 8, 2023 (reference 1.a.). The definition affects most programs that protect waters under the Act, including the U.S. Army Corps of Engineers (Corps) permitting program for the discharge of dredged and/or fill material under Section 404 of the Clean Water Act.

All our Nation's waters and wetlands are valuable resources, regardless of jurisdictional status under the Act. They provide vital functions in protecting and improving water quality; absorbing and reducing flood waters; providing critical habitat for an abundance of species; and storing water in an era of water scarcity. As a result, wetlands support economic activity; supply drinking water; maintain essential agricultural and industrial water supplies; and improve opportunities for people to enjoy nature and hunt and fish. The *Sackett* decision (reference 1.b.) limited federal protections under the Clean Water Act over the Nation's waters and wetlands by narrowing which wetlands fall under the definition of "waters of the United States" (WOTUS). Wetlands without a continuous surface connection to jurisdictional

SACW

SUBJECT: Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision

waters are no longer covered under this ruling. Despite the lack of protection under the Act, these aquatic resources continue to be of vital importance to the functioning of healthy watersheds and ecosystems. As a result, this memorandum directs the Corps, in carrying out its Civil Works missions, to use applicable authorities and available resources to engage in specific actions to protect, restore, and enhance our Nation's waters and wetlands that are now more vulnerable, in addition to implementing the Regulatory Program in compliance with all laws and regulations. Specific examples of how to carry-out this directive to appropriately respond to the limited interpretation of WOTUS contained in the *Sackett* decision follows.



Non jurisdictional aquatic resources can be used for mitigation and mitigation bank instruments.



SWG Mitigation Banking Instrument Template – December 12, 2024

PN Located: <https://www.swg.usace.army.mil/Media/Public-Notices/Article/3999314/special-public-notice/>



US Army Corps
of Engineers
Galveston District
Regulatory Division

Special Public Notice

Mitigation Banking
Instrument Template
December 12, 2024

Galveston District Mitigation Banking Instrument Template

PURPOSE OF PUBLIC NOTICE: To inform you of a new U.S. Army Corps of Engineers, Galveston District (SWG) Mitigation Banking Instrument Template for which you might be interested. Additional information may be found on the District's web site located at: <http://www.swg.usace.army.mil/BusinessWithUs/Regulatory/>.

INTRODUCTION: The purpose of the SWG Mitigation Banking Instrument Template is to disseminate established required standards and preferential criteria to expedite the effective review and approval of mitigation bank and in-lieu fee proposals by the SWG and the SWG Inter-agency Review Team (IRT).

LOCATION: This Mitigation Banking Instrument Template will be applicable to all mitigation bank and in-lieu fee proposals within the boundaries of SWG.

SUMMARY: As outlined in 33 CFR Part 332, Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, dated April 10, 2008, (Federal Register, Vol. 73, No. 70) (Mitigation Rule), the USACE and U.S. Environmental Protection Agency established a hierarchy for compensatory mitigation with a preference for mitigation bank credits. Pursuant to 33 CFR 332.8(b), the SWG IRT was established to review proposals submitted for the establishment and management of mitigation banks and in-lieu fee programs. The primary role of the IRT is to facilitate the establishment of mitigation banks and/or in-lieu fee programs through the development of mitigation banking or in-lieu fee program instruments. The IRT reviews the draft prospectus, complete prospectus, draft mitigation banking instrument (MBI), and final MBI with all associated documents (e.g. mitigation plan, long-term management plan, conservation easement, financial agreements, etc.), and provides comments to the Corps. SWG has received a large number of bank proposals, most of which have varied significantly in format, size, and approaches proposed. The SWG Mitigation Banking Instrument Template is intended to assist proponents of third-party mitigation projects in the development of technically sound, biologically successful compensatory mitigation projects. Providing the information in accordance with the template will help to get things to the Corps in a consistent manner which is intended to facilitate a smoother, more fast paced review process. The SWG Mitigation Banking Instrument Template was developed based on input from the IRT, along with elements of similar documents published by other Corps districts. It will serve to increase predictability and transparency for the public and allow for a more consistent and efficient SWG IRT review process.

CONCLUSION: By following the above guidelines for providing the level of documentation for each submittal required by 33CFR332.8 to the SWG IRT; and by including the requested information in the Appendices; sponsors will benefit from a streamlined and comprehensive review by the Corps and the IRT within a predictable timeframe. The SWG Mitigation Banking Instrument Template along with use of the SWG Checklist (found at:

<https://www.swg.usace.army.mil/Business-With-Us/Regulatory/>) will serve to increase predictability and transparency for mitigation banking activities, in addition to expediting the MB/ILF review process.

A standardized template created by internal PDT and SWG IRT.

- Increase & Accelerate the Review Process
- Increase Consistency
- Increase Transparency





An official website of the United States government [Here's how you know](#)

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HOW TO FIND THE TEMPLATE!

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Bank & ILF Establishment

Bank & ILF Establishment for USACE District: Galveston

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Federal, State, and Local regulations, policies, and guidance governing the wetland Mitigation Bank and species Conservation Bank establishment processes. This section contains information to guide the prospective Bank or In-lieu Fee Program Sponsor through the Bank or ILF program establishment process.

Galveston District Mitigation Bank Establishment Information

Guidelines, practices, and procedures for mitigation banking within the Galveston District

- Galveston District Mitigation Banking Instrument Template.docx | [Download](#)

Mitigation Banking & ILF Programs

National information on mitigation banking and in-lieu fee programs

- Requirements for a Complete Prospectus.pdf | [Download](#) | [Open File](#)
- Requirements for Mitigation Bank & ILF Instruments.pdf | [Download](#) | [Open File](#)
- IRT Timeline.pdf | [Download](#) | [Open File](#)
- Watershed Approach.pdf | [Download](#) | [Open File](#)
- Dispute Timeline.pdf | [Download](#) | [Open File](#)
- Mitigation Plan Requirements.pdf | [Download](#) | [Open File](#)
- Corps-EPA Mitigation Rule (33 CFR 332/40 CFR 230).pdf | [Download](#) | [Open File](#)
- Model in-lieu fee instrument (ELI 2010).pdf | [Download](#) | [Open File](#)

Historic Context

Documenting the history and development of mitigation banking and in-lieu fee programs

- 1995 Technical & Procedural Support to Mitigation Banking.pdf | [Download](#) | [Open File](#)
- 1996 Model Banking Instrument.pdf | [Download](#) | [Open File](#)
- 1995 National Survey of Commercial Mitigation Ventures.pdf | [Download](#) | [Open File](#)
- 2006 ELI Mitigation Status Review.pdf | [Download](#) | [Open File](#)
- 2002 ELI Status of Banks & ILFs.pdf | [Download](#) | [Open File](#)
- 1994 Wetland Mitigation Banking.pdf | [Download](#) | [Open File](#)
- 1992 Wetland Mitigation Banking Concepts.pdf | [Download](#) | [Open File](#)
- 1995 Wetland Mitigation Credit Markets: Theory & Practice.pdf | [Download](#) | [Open File](#)
- 1995 Watershed-Based Wetland Planning.pdf | [Download](#) | [Open File](#)
- IWR Report on ILF programs (2000).pdf | [Download](#) | [Open File](#)
- ELI Report on ILF Programs (2006).pdf | [Download](#) | [Open File](#)
- 2010 Ecosystem Marketplace State of Biodiversity Markets Nationwide.pdf | [Download](#) | [Open File](#)
- 1995 Federal Guidance on Mitigation Banking.pdf | [Download](#) | [Open File](#)
- 2000 In-Lieu Fee Guidance.pdf | [Download](#) | [Open File](#)

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Galveston

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MITIGATION BANKING INSTRUMENT TEMPLATE

SWG IRT – Mitigation Banking Instrument Template

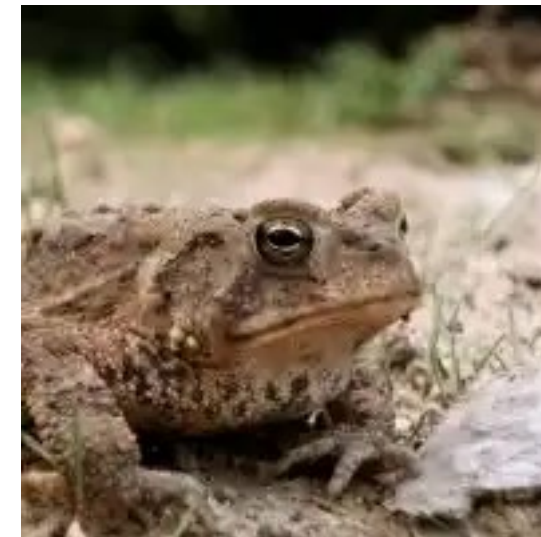
Rev. 20241212

INSTRUCTIONS: All mitigation banks require a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The purpose of the Mitigation Banking Instrument (MBI) is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the proposed mitigation bank. The proposed mitigation bank will be used for compensatory mitigation for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, provided such activities have met all applicable requirements and are authorized by the USACE. All mitigation banks must comply with 33CFR332.8 to be used to provide compensatory mitigation for a Department of the Army (DA) permits.

This template is provided to assist in the timely development and submittal of a draft MBI (DMBI) for a proposed mitigation bank. It represents a standard of the required content necessary for DMBI completeness pursuant to 33 CFR 332.8; and provides the document format, structure, information, and preferences expected by the Galveston District Corps of Engineers Regulatory Program (SWG) and the Interagency Review Team (IRT). As noted throughout the template, multiple sections require project-specific information to be incorporated in the text of the DMBI (and further supplemented in the Appendices), that will require further evaluation by the Corps and IRT. Submittals in accordance with this template will result in more timely review, and potential approval of the MBI.

- This template may be periodically revised by the Corps based on new information, scientific research or advances in the application of compensatory mitigation, and/or changes in the Regulatory Program. The most current version of this template will be posted on the SWG website, as well as the Regulatory In-lieu Fee and Bank Information Tracking System Website (RIBITS). All blue text is instruction/explanatory and should be removed from the submitted document.
- (Underlined) text and text within parentheses in this template may indicate information that should be replaced by bank-specific information in the draft MBI. For example, “(Permit Number)” in the template would be replaced with “SWG-2024-000##” in the DMBI document submitted. Project specific information should be included where indicated and in the corresponding Appendices.
- All blue text are instructions/explanatory/example and should be removed from the submitted document.
- **DO NOT MAKE CHANGES TO LANGUAGE OR FONT IN [DARK RED] TEXT.** These passages contain procedural information regarding the operation and management required for all Mitigation Banks within the Galveston District and should not be modified.

- Do not change or remove any parts of the template other than allowable language indicated. This may include version date, footers (except to add the Bank Name), table of contents or Appendix (list of required exhibits).
- All text insertions, deletions, or other revisions, including any alterations of standard language from the template, made by the Sponsor must be clearly indicated (e.g., Microsoft Word track changes) within the document and submitted to the USACE/IRT in electronic and hard copy (if requested) format (via RIBITS posting, with direct Corps email notification in subject line) in both Microsoft Word and editable reduced file size PDF document with bookmarks for the appendices. Word Compare Document will be utilized to streamline new proposals and resubmittals. If alterations are made to mandatory language that corrupts that review functionality, the document will be returned to the Sponsor without review as the discrepancy is identified by the Corps. The request may be administratively withdrawn (without prejudice) accordingly, as appropriate. |



SECTION I: INTRODUCTION

A. PURPOSE

This Mitigation Banking Instrument (MBI), authorized as a condition of the Department of the Army (DA) Permit (Permit Number), is the legal document for the establishment, use, operation, and maintenance of the (Bank Name) Mitigation Bank. The (Bank Name) will be used for compensatory mitigation for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act, provided such activities have met all applicable requirements and are authorized by the U.S. Army Corps of Engineers (USACE). All mitigation banks must comply with 33CFRPart 332 if they are to be used to provide compensatory mitigation for DA permits. The Sponsor is responsible for developing, operating, and maintaining the bank subject to the requirements of this MBI; and the Sponsor agrees to satisfy and assume the legal responsibility for the mitigation requirements assigned to a respective permit by USACE.

USACE approval of this Instrument constitutes the regulatory approval required for the (Bank Name) to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 CFR 332.8(a)(1). This Instrument is not a contract between the Sponsor or Property Owner and USACE or any other agency of the federal government. Any dispute arising under this Instrument will not give rise to any claim by the Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

The (Bank Name) Mitigation Bank is sited on (public or private) lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. Bank credits for DA permits may also be used to satisfy the requirements of other programs (e.g. tribal, state, or local wetlands regulatory programs, USACE civil works projects, and Department of Defense military construction projects, Endangered Species Act), consistent with the requirements of the programs, if the appropriate credits required by a DA permit is supplemental to such programs. Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity.

This MBI serves to ensure compliance with Section 404 of the Clean Water Act 33 USC 1344 et seq, Section 10 of the Rivers and Harbors Act 33 USC 401 et seq and the implementing regulations found at 33 CFR 320-332, which are controlling in any conflict between the MBI and those laws and regulations. The USACE role is regulatory only; the MBI should not be construed as a contract with the Government that is enforceable by law by the applicant or any third party. The sponsor agrees to the extent allowed by the laws of the State of Texas to defend, indemnify, and hold the United States harmless in any action where any party, including the sponsor, the beneficiary or any third party brings a claim, monetary or otherwise, against the United States that relates in any way to USACE execution of mitigation banking documents for the establishment of this mitigation bank.

B. LOCATION AND OWNERSHIP OF BANK PROPERTY

"The (Bank Name) MB project, encompassing *** acres, is located [Provide general information here to give geographic boundaries-EXAMPLE: north of U.S. Highway 90, west of Highway-146, south of Trinity River Wildlife Refuge, and contiguous with the southeastern shore Trinity River.] More specifically, the proposed project is located in [Section/s *, Township * south/north, Range * east/west, (repeat as appropriate)]; in **** County, near [city, town, municipality], Texas (LAT: *****, LONG: _****)."





C. GENERAL PROVISIONS

1. The Bank Sponsor is responsible for establishing, operating, and maintaining the Bank according to this MBI.
2. The goal of the Bank is to [delete as applicable] preserve, restore, re-establish, establish and/or enhance the functions of [identify credit type(s)] (e.g. forested wetland system). In circumstances deemed appropriate by USACE, credits from the Bank may be used as "In-kind" compensation for unavoidable wetland impacts authorized by DA permits.
3. Use of credits from the Bank to offset wetland impacts authorized by DA permits will be in compliance with the Clean Water Act and implementing regulations, including but not limited to the Clean Water Act Section 404(b)(1) Guidelines and all other applicable Federal and State laws, rules and regulations.
4. The Property Owner is the owner of real property containing approximately _____ acres (the "Property"), located at _____ [insert address and county], state of Texas, designated Assessor's Parcel No(s)_____. The Property is generally shown on the Bank Location Maps (Appendix B) and legally described in the Real Estate Records and Site Protection Instrument (Appendix F), attached to and made a part of this MBI.
5. Bank Sponsor and Property Owner desire(s) to create the Bank over [add if applicable: a ____-acre portion of] the Property (the "Bank Property"). The Bank Property is generally shown on the Bank Location Maps (Appendix C) and legally described in the Site Protection Instrument (Appendix F) attached to and made a part of this MBI. The Bank Property is to be conserved and managed in perpetuity.
6. The Interagency Review Team (IRT), established by the District Engineer (DE) pursuant to 33CFR332.8, is comprised of representatives from federal, tribal, state, and local regulatory and resource agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank or in-lieu fee program. The IRT is the interagency group which provides input

Notice of Availability of the Regional Streamflow Duration Assessment Methods of the Arid West, Western Mountains, and Great Plains

Why is this important:

- Hydrologic data is limited.
- Currently, USACE & EPA only recognizing non-relatively permanent waters vs relatively permanent waters. Entire Stream Reach is observed to make this determination.
- The methods are rapid assessment tools for distinguishing between ephemeral, intermittent, and perennial streamflow at the reach scale for the Arid West, Western Mountains and Great Plains regions.
- Can be applied whenever there is uncertainty regarding streamflow duration class and a rapid evaluation method is desired.

	Learn about SDAMs What is streamflow duration? What are SDAMs? What can they be used for? Learn about SDAMs	Web Application for Regional SDAMs Access the Web Application for Regional SDAMs to apply the Regional SDAMs for the Pacific Northwest, Arid West, Western Mountains, and Great Plains Regions. Web app for Regional SDAMs	
	Materials that support application of the Regional SDAMs Access field forms, user manuals, suggested equipment list, training materials, additional references, data, and more. Supporting Materials	Development of the Regional SDAMs Why Regional SDAMs were developed, Regional SDAM coverage and map, steps taken to develop them, and more. Development of the Regional SDAMs	

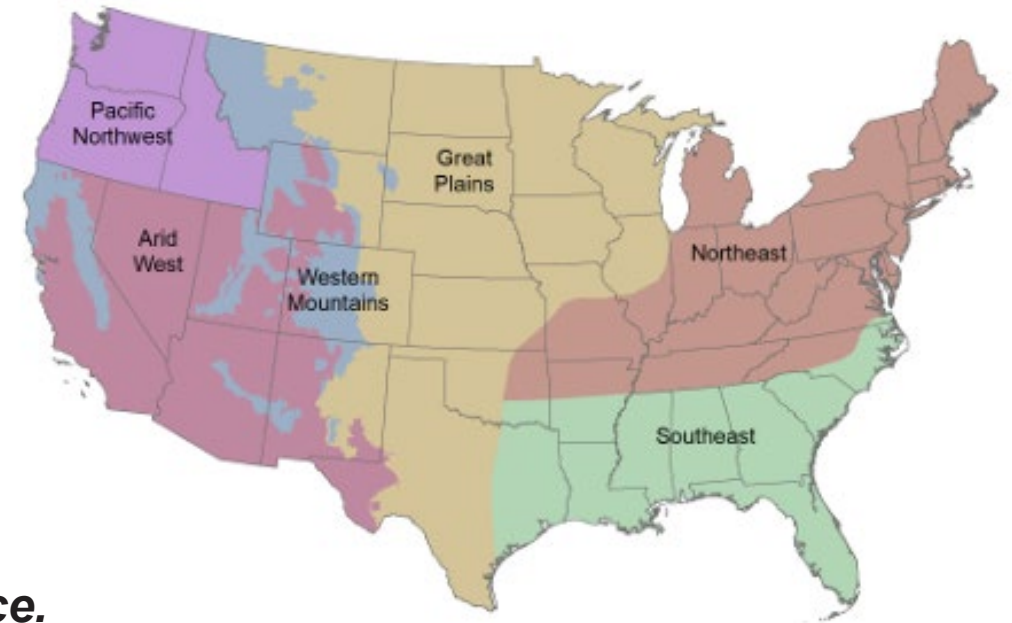
<https://www.epa.gov/streamflow-duration-assessment>

Notice of Availability of the Regional Streamflow Duration Assessment Methods of the Arid West, Western Mountains, and Great Plains

<https://www.swg.usace.army.mil/Media/Public-Notices/Article/3948353/joint-public-notice-notice-of-availability-of-the-regional-streamflow-duration/>

- SDAMs are rapid field assessment methods that use hydrological, geomorphological, and/or biological indicators, observable in a single site visit.
- Streamflow Duration Assessment Methods (SDAMs) provide a scientifically supported, rapid assessment framework to support best professional judgment in a consistent, robust, repeatable, and defensible way.

Figure 1. Boundaries of the Regional SDAMs in the United States.

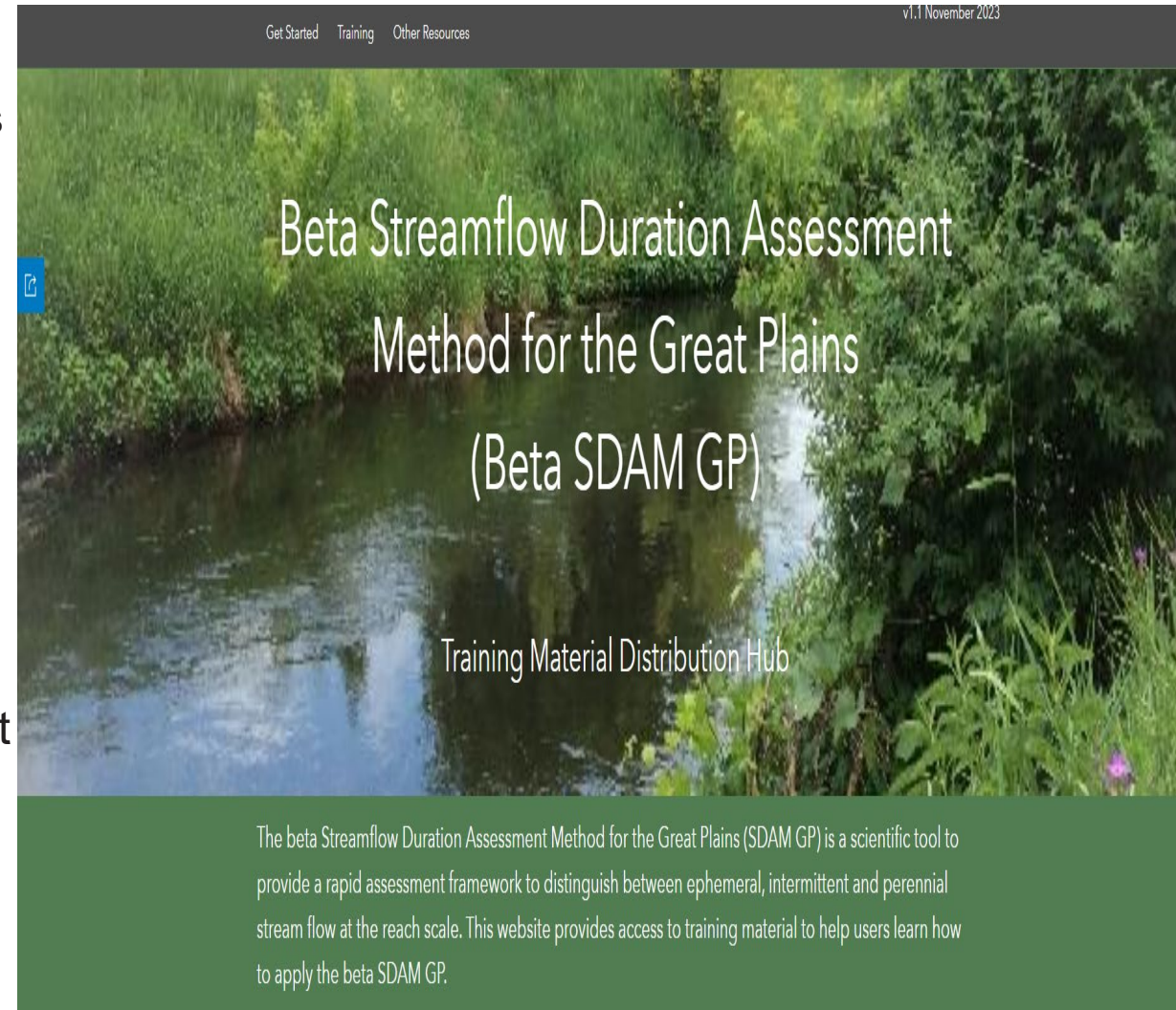


Non-Mandatory technical resource.

SDAMS – STREAMFLOW DURATION ASSESSMENT METHOD

These methods result from a literature review and multi-year field study conducted at nearly 700 stream reaches across the range of hydrologic landscapes of the Arid West, Western Mountains and Great Plains.

- Standardized process
- Uniform datasheet
- Unified field procedures
- This follows completion of a more than one year preliminary implementation and comment period on beta methods to inform development of the final Regional SDAMs.
- Galveston District has two SDAMs: Southeast & Great Plains: <https://sdam-for-great-plains-eprusa.hub.arcgis.com/>



User Manual, Data Management, and Reporting Support

ORDINARY HIGH WATER MARK (OWHM) MANUAL

<https://erdc-library.erdcren.mil/items/76c61f8f-6d75-4a35-aaf3-39aa64918afb>

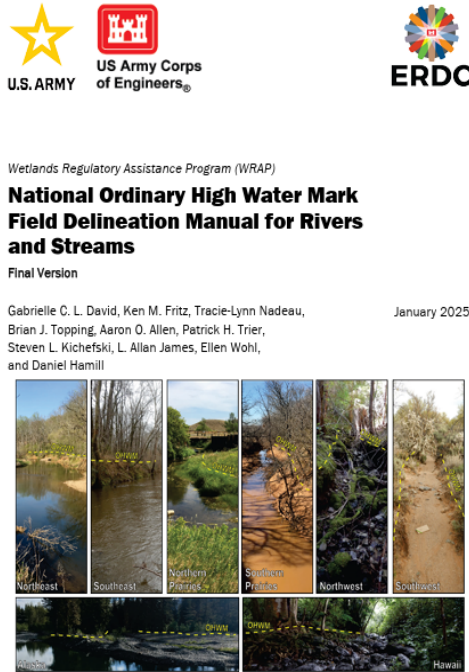
The OHWM defines the lateral extent of nontidal aquatic features in the absence of adjacent wetlands in the United States.

This is the first manual to present a methodology for nationwide identification and delineation of the OHWM.

- A two-page data sheet and field procedure outline a weight-of-evidence (WoE) methodology to organize and evaluate observations at stream sites.
- This manual presents a consistent, science-based method for delineating the OHWM in streams.
- It also describes regional differences and challenges in identifying the OHWM at sites disturbed by human-induced or natural changes and illustrates how to use remote data to structure field inquiries and interpret field evidence using the principles of fluvial science.
- The manual demonstrates that, in many landscape settings, the OHWM may be located near the bankfull elevation.

There is no conclusion on the datasheet.

Non-Mandatory technical resource.



ORDINARY HIGH WATER MARK (OHWM) MANUAL

- Includes Case Studies, Examples for difficult OHWM delineations.
- A virtual refresher training is being offered to USACE and the public through the Society of Wetland Scientists on 15 May 25.
- Future virtual training opportunities will be made available via the ERDC OHWM website found at the <https://www.erdc.usace.army.mil/ohwm>
- OHWM identification and/or delineation for official USACE Regulatory purposes will continue in accordance with the applicable OHWM definition in the Federal regulations, Regulatory Guidance Letter 05-05, and any applicable USACE district policies. However, the Final National OHWM Manual and the OHWM Data Sheet (ENG 6250) may be used as technical resources to assist with identifying and delineating the OHWM using a scientifically supported, rapid framework.

TOOLS AND TECHNICAL GUIDELINES FOR DELINEATING THE EXTENT OF TIDAL WATERS

<https://erdc-library.erdcdren.mil/server/api/core/bitstreams/71cecaeb-680b-459e-ace4-85e35ab764b5/content>

Why is this important?

- The delineation tidally influenced waters is often used to define the extent of federal or state jurisdictional boundaries, including USACE limits of jurisdiction under the Rivers and Harbors Act of 1899 (RHA) and Section 404 of the Clean Water Act.
- Federal jurisdiction of navigable waters also extends to all areas subject to the ebb and flow of the tide, including bays, estuaries, wetlands, rivers, creeks, canals, and other waterbodies subject to tidal action.
- This provides use of field observations and desktop-based data sets, tools, and techniques to identify and delineate the lateral and longitudinal extent of tidally influenced waters.
- Tidal waters, and thus federal jurisdiction under the RHA, “end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm.” (33 C.F.R. 328.3)
- Technical data, definitions, and data is lacking which breeds uncertainty, ambiguity, increasing risk of litigation and undermining the defensibility of USACE decisions.
- Not all JD’s mandate an on-site field investigation.



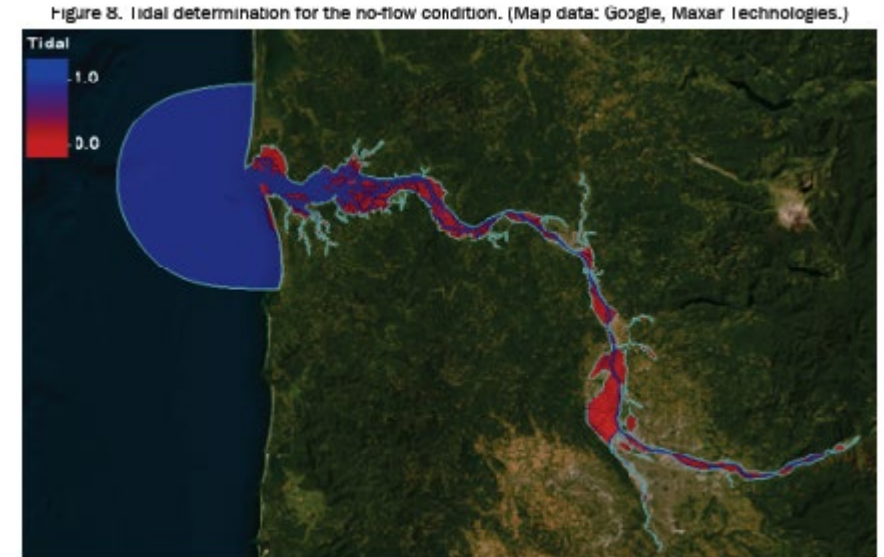
TOOLS AND TECHNICAL GUIDELINES FOR DELINEATING THE EXTENT OF TIDAL WATERS

<https://erdc-library.erdc.dren.mil/server/api/core/bitstreams/71cecaeb-680b-459e-ace4-85e35ab764b5/content>

The paper summarizes the outcomes of the kickoff workshop held with over 55 USACE Regulators, synthesizes the state-of-the-science for identifying and delineating the head of tide, and provides a proof-of-concept for tools to identify and delineate the head of tide and lateral extent of tidally influenced waters using existing gage data and hydrodynamic models.

Next Steps:

- Developing national technical guidance
- Geospatial data layers for the National Regulatory Viewer
- Web-based tools: 1) to map the plane of the mean high water line for estuaries using Adaptive Hydraulics (AdH) models and 2) to identify and delineate the head of tide using USGS gage data.



4.3 Head of Tide (HoT) Analysis



QUESTIONS

Kara Vick
Team Lead/Technical Expert
Compliance Branch, Regulatory Division
2000 Fort Point Road
Galveston, Texas 77550

Office: 409-766-6354
USACE cell: 409-926-1090
Email: Kara.d.Vick@usace.army.mil



REGULATORY OUTREACH JURISDICTION

John Davidson
Chief, Compliance Branch

Galveston District, Jadwin Building
February 5, 2025



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OUTLINE



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- Map of Current Definition of Waters of the United States
- Pre-2015 Regime Post Sackett Definition of Waters of the United States
 - (a)(1) Traditional Navigable Waters
 - (a)(2) Interstate Waters
 - (a)(3) Other Waters
 - (a)(4) Impoundments
 - (a)(5) Tributaries
 - (a)(6) The Territorial Seas
 - (a)(7) Adjacent Wetlands
- Non-Jurisdictional Waters
- Generally Non-Jurisdictional Features
- Approved Jurisdictional Determination Coordination Process with the EPA
- EPA HQ and OASACW Policy Guidance Memorandums on Approved Jurisdictional Determinations
- Continuous Surface Connection and Relatively Permanent Flow Data to Collect in the Field
- Aquatic Resource Delineation Reports



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BACKGROUND

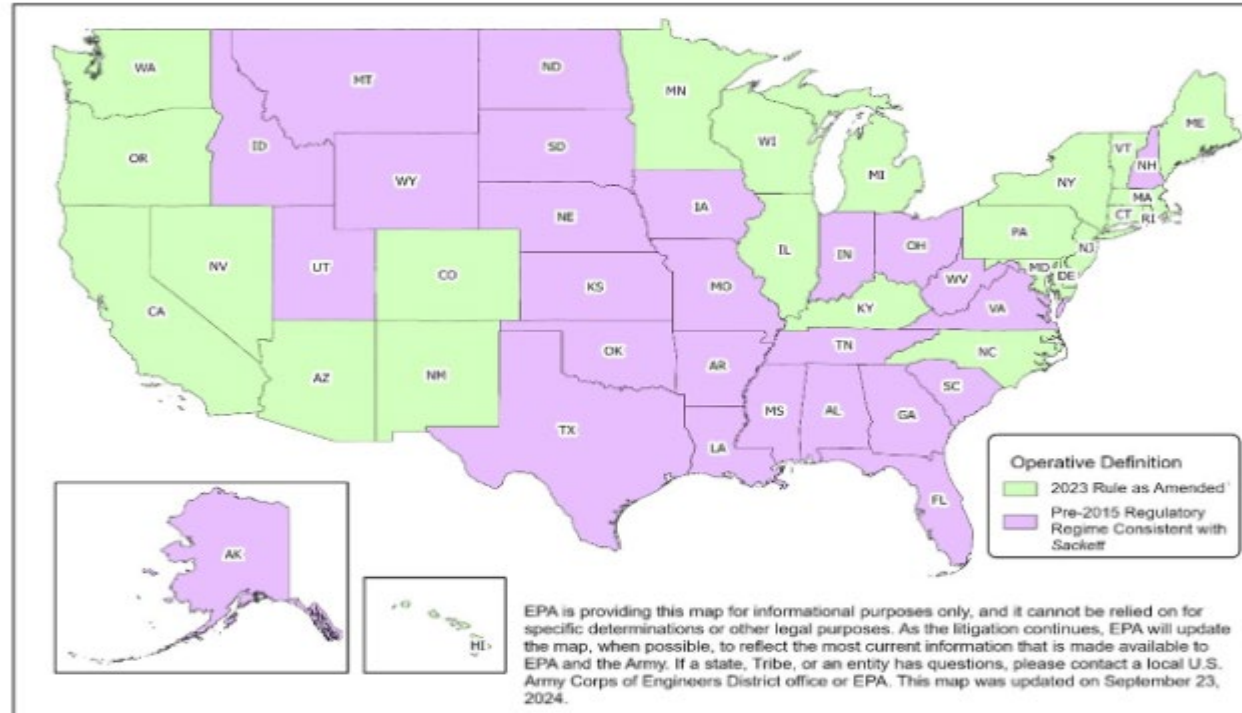
[HTTPS://WWW.EPA.GOV/WOTUS/DEFINITION-WATERS-UNITED-STATES-RULE-STATUS-AND-LITIGATION-UPDATE](https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update)



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3

Operative Definition of "Waters of the United States"



¹ Also operative in the U.S. Territories and the District of Columbia

*NOTE: For efficiency, this slide's list and 40 CFR 230.3(s) (2014).

. See, e.g., 33 CFR 328.3 (2014)

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https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf



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Pre-2015 Regulatory Regime: Terminology

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.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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Pre-2015 Regulatory Regime: Framework

Categories of Jurisdictional Waters*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



Categories of Non-Jurisdictional Waters*

Waste treatment systems and prior converted cropland

***NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, **the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.**”
- “Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies:
 - will not assert jurisdiction based on the significant nexus standard,
 - will not assert jurisdiction over interstate wetlands solely because they are interstate,
 - will interpret “adjacent” to mean “having a continuous surface connection,” and
 - will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.”

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Pre-2015 Regulatory Regime: Joint Coordination Memo

- “Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD.”
 - “With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.”

https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf

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Pre-2015 Regulatory Regime: (a)(1) – Traditional Navigable Waters

- Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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Pre-2015 Regulatory Regime: (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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Pre-2015 Regulatory Regime: (a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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Pre-2015 Regulatory Regime: (a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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Pre-2015 Regulatory Regime: (a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
 - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
 - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).



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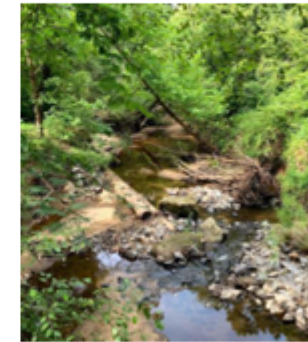
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Pre-2015 Regulatory Regime: (a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
 - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
 - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



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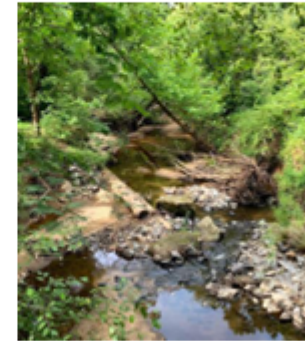
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Pre-2015 Regulatory Regime: (a)(5) – Tributaries

Relatively Permanent

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
 - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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Pre-2015 Regulatory Regime: (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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Pre-2015 Regulatory Regime: (a)(7) Adjacent Wetlands

- **Wetlands** means 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. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
 - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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Pre-2015 Regulatory Regime: (a)(7) Adjacent Wetlands

Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
- Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
 - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
 - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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Pre-2015 Regulatory Regime: Exclusion: Waste Treatment Systems

- The regulations exclude waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- All waters that are upstream and downstream of the waste treatment system that were jurisdictional prior to the authorized activities and qualify as jurisdictional WOTUS under the pre-2015 regulatory regime, are still WOTUS and subject to the CWA.

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Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The regulatory exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

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Pre-2015 Regulatory Regime: Exclusion: Prior Converted Cropland

- The Corps and EPA will continue to generally rely on valid prior-converted cropland (PCC) designations made by USDA-NRCS for making determinations of the applicability of the PCC exclusion, provided that the PCC has not been abandoned. However, the final authority regarding Clean Water Act (CWA) jurisdiction remains with EPA.
- Preamble to the 1993 WOTUS Regulations (58 FR, 45034): *“PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.”*

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Pre-2015 Regulatory Regime: Generally Non-Jurisdictional Features

- Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:
 - Artificially irrigated areas which would revert to upland if the irrigation ceased;
 - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
 - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
 - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and
 - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

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Tools and Resources

Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- [USACE Antecedent Precipitation Tool \(APT\)](#)
- [USGS Topographic Maps](#)
- [Regionalized streamflow duration assessment methods \(SDAMs\)](#)
- Aerial and satellite imagery
- [USGS National Hydrography Dataset \(NHD\)](#)
- Stream Gage data, including from [USGS](#)
- Regional regression analysis
- Hydrologic modeling tools such as [HEC-HMS](#)

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Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Direct observation
- Regional field observations
- USACE Antecedent Precipitation Tool (APT) <https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>
- USGS Topographic Maps <https://www.usgs.gov/programs/national-geospatial-program/topographic-maps>
- Regionalized streamflow duration assessment methods (SDAMs) <https://www.epa.gov/streamflow-duration-assessment>
- Aerial and satellite imagery
- USGS National Hydrography Dataset (NHD) <https://www.usgs.gov/national-hydrography/national-hydrography-dataset>
- Stream Gage data, including from USGS <https://waterdata.usgs.gov/nwis/rt>
- Regional regression analysis
- Hydrologic modeling tools such as HEC-HMS <https://www.hec.usace.army.mil/software/hec-hms/>



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TOOLS AND RESOURCES



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Examples of tools to determine whether tributaries or lakes and ponds are relatively permanent include:

- Elevation data and models, including LIDAR (for example, from the USGS)

<https://www.usgs.gov/faqs/what-lidar-data-and-where-can-i-download-it>

- State, tribal, and local data and maps

- USGS StreamStats <https://www.usgs.gov/streamstats>

- Probability of Streamflow Permanence (PROSPER) by the USGS (including for the Pacific Northwest)

<https://www.usgs.gov/centers/wyoming-montana-water-science-center/science/probability-streamflow-permanence-prosper>

- NRCS hydrologic tools and soil maps <https://websoilsurvey.nrcs.usda.gov/app/>

- NOAA national snow analyses maps

- NRCS snow sources

- USEPA WATERS GeoViewer <https://www.epa.gov/waterdata/waters-geoviewer> and How's My Waterway

<https://www.epa.gov/waterdata/how-s-my-waterway>

- USGS National Map Viewer <https://apps.nationalmap.gov/viewer/>



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Tools and Resources

Examples of tools to determine whether an adjacent wetland has a continuous surface connection to a jurisdictional water include:

- Direct observation
- Regional field observations
- [USGS Topographic Maps](#)
- Aerial and satellite imagery
- [USGS NHD](#)
- [USFWS National Wetlands Inventory \(NWI\)](#)
- Elevation data such as [LIDAR](#)-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and [soil maps](#)
- [FEMA flood zone](#) or other floodplain maps

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Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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USACE Approved Jurisdictional Determination Coordination with the EPA

Aquatic Resources Required to be Coordinated with the EPA under the pre-2015 regime post-Sackett

- All draft Approved Jurisdictional Determinations (AJDs) assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations. Such draft AJDs shall be coordinated if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.
- Corps districts may choose to coordinate with EPA regions on draft AJDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance draft AJDs at any time.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process: (local-level coordination)

- All aquatic resources go on one AJD Memorandum for the Record
- Corps submits email with draft AJD and exhibits (delineation map, topo map, LiDAR Digital Elevation Model, flowpath from the aquatic resources to the TNW, photos, etc.) to EPA Region
- If the EPA Region has comments, it must provide those comments to the Corps district within 10 business days.
- If the EPA region does not have comments, the EPA region may still choose to elevate the draft AJD within the 10-business day coordination period.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (local-level coordination)

- If the EPA region does not provide comments and does not elevate the draft AJD within 10 business days, or if the region notifies the district that it has no comments and does not intend to elevate the draft AJD, local-level coordination is complete, and the Corps may finalize the AJD.
- If the EPA region provides comments within 10 business days, the agencies must coordinate on matters of fact at the local level and make every attempt to resolve any issues. If the EPA region requests a meeting, it must be held within the 10-business day coordination period.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (local-level coordination)

- Prior to the end of the 10-business day local-level coordination period, or within 3 business days of the transmittal of comments from the EPA region or the meeting, whichever is later, the Corps district may notify the EPA region that it plans to reconsider the draft AJD and is therefore withdrawing it from local-level coordination.
- Unless the Corps district notifies the EPA region of its intent to reconsider the draft AJD as specified above, the Corps district must transmit a revised draft AJD to the EPA region within 3 business days of the transmittal of the EPA region's comments or meeting, whichever is later or notify EPA that it does not intend to revise the draft AJD.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (local-level coordination)

- Within 3 business days of transmittal of a revised draft AJD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed, and local-level coordination is complete. The Corps district may finalize the AJD.
- Within 3 business days of transmittal of a revised draft AJD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft AJD to the HQ level.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (local-level coordination)

- If the EPA region does not provide any notification to the Corps as specified in the previous two bullets within 3 business days of transmittal of a revised draft AJD or notification by the Corps district that it does not intend to revise the draft AJD, the local-level coordination for the draft AJD is complete and the Corps may finalize the AJD.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (Headquarters-Level Joint Review)

- Once transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate. At any point during those 10 business days, EPA HQ and/or Corps HQ may request the draft AJD also be coordinated with the Office of the Assistant Secretary of the Army for Civil Works (OASACW). The requesting agency will notify and transmit the information to the OASACW, who will then coordinate with EPA HQ on the draft AJD, and the time for additional HQ-level will be 5 business days from notification by the requesting agency.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (Headquarters-Level Joint Review)

- If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual agreement between EPA HQ and OASACW is reached, EPA HQ and OASACW may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the AJD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, OASACW a final draft AJD and a memorandum describing how the



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (Headquarters-Level Joint Review)

- direction or guidance provided was applied to the final draft AJD.
- If a mutual decision between EPA HQ and Corps HQ or OASACW is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the AJD should determine what revisions are necessary to transmit to EPA HQ, Corps HQ and, if engaged OASACW a final draft AJD and memorandum describing how guidance provided was applied to the final draft AJD.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd: (Headquarters-Level Joint Review)

- EPA HQ and CORPS HQ or OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps may finalize the draft AJD. EPA HQ and Corps HQ or OASACW may provide AJDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor Corps HQ or OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified (10 business days or agreed upon timeframe), the Corps district may finalize the draft AJD.



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd:

- EPA retains the ultimate administrative authority to construe geographic jurisdiction, and EPA HQ may notify Corps HQ or OASACW that it plans to make a project-specific jurisdictional decision covered by the draft AJD, and consistent with 33 CFR 325.9(b). As soon as possible and no later than 10 business days of notice of a revised draft AJD, EPA HQ shall notify Corps HQ or OASACW and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by the EPA pursuant to this section will be binding on the federal



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USACE Approved Jurisdictional Determination Coordination with the EPA

Coordination Process Cont'd:

- government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business days of notice of a revised draft AJD, the coordination for the draft AJD will be considered complete and the Corps district may proceed with finalizing the AJD.



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June 25, 2024

EXTENSION OF JOINT COORDINATION MEMORANDA TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Subject: Extension of U.S. Department of the Army, U.S. Army Corps of Engineers and U.S. Environmental Protection Agency Coordination of draft approved jurisdictional determinations under the “Revised Definition of ‘Waters of the United States,’” as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (the 2023 rule, as amended, 33 CFR §328.3; 40 CFR §120.2) and the pre-2015 regulatory regime.

I. Purpose. The purpose of this memorandum is to extend the coordination processes by which the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, hereafter “the agencies,” are coordinating on *Clean Water Act* geographic jurisdictional matters to ensure accurate and consistent implementation of the 2023 rule, as amended, and of the pre-2015 regulatory regime,¹ where that regulatory regime is operative.²

II. Background. For both regulatory regimes (the 2023 Rule, as amended, and the pre-2015 regulatory regime) under which the U.S. Army Corps of Engineers is issuing approved jurisdictional determinations, the agencies entered into joint coordination memoranda to establish a process by which the agencies would coordinate on *Clean Water Act* geographic jurisdictional matters to ensure accurate and consistent implementation of the regimes where each regulatory regime is operative.³ These coordination memoranda were signed on September 27, 2023 to be in effect for nine months

¹ 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. The pre-2015 definition of “waters of the United States,” is also referred to as “the 1986 regulations,” inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. See 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

² For more information about the operative definition of “waters of the United States” for specific geographic areas and parties in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

³ The coordination memorandum for the 2023 rule, as amended, is available at https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf. The coordination memorandum for the pre-2015 regulatory regime is available at https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-pre-2015-regulatory-regime_508c.pdf.



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after signature, or until June 27, 2024. Consistent with section V of the 2023 coordination memoranda, the U.S. Environmental Protection Agency and the U.S. Department of the Army initiated a joint Headquarters-level review no later than 30 calendar days prior to their termination date and concluded that an extension of the coordination memoranda was warranted.

III. Extension of Coordination Processes. In accordance with section V of the 2023 coordination memoranda, the agencies have mutually agreed to extend both coordination memoranda and their outlined expectations for an additional nine months from the original termination date of June 27, 2024.

IV. Termination Date and Review. The 2023 coordination memoranda for both the 2023 rule, as amended, and the pre-2015 regulatory regime will now remain in effect until March 27, 2025. No later than 30 calendar days prior to the termination date of those memoranda, the agencies shall initiate a joint Headquarters-level review to reevaluate various requirements in the memoranda, assess implementation effectiveness, and consider the need for further coordination. This joint Headquarters-level review shall be completed prior to the extended termination date. The coordination memoranda and their outlined expectations may only be modified or extended by written agreement of both signatory agencies.

Michael L. Connor
Assistant Secretary of the Army
(Civil Works)

Bruno Pigott
Acting Assistant Administrator
Office of Water



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- To date, there have been 14 Memorandums from the Environmental Protection Agency Headquarters and the Office of the Assistant Secretary of the Army for Civil Works – 7 Pre-2015 Regime and 7 amended 2023 Rule
- All are case-specific but the guidance from the memorandums can be applied to both definitions of Waters of the United States in most cases
- Intent of the Memorandums is to provide guidance to the EPA Regional Offices and Corps Districts to produce consistent Approved Jurisdictional Determinations nationally.



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19DEC2023 – NWO-2003-60436 (pre-2015)
One Wetland

A single wetland may be divided, for example, by ditches, berms, and road crossings. It is necessary to utilize multiple pieces of evidence to assess if the divided wetland are separate, distinct wetlands or are functioning as one wetland. Indicators that a divided wetland is functioning as one wetland include, but are not limited to, a hydrologic connection, including discrete features like pipes or culverts or through a shallow subsurface connection, similarities in plant communities between the divided portions of the wetland, slope and topography, soils, and hydrologic indicators.



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7FEB2024 – LRL-2023-00466 (pre-2015)

Pond that does not meet 1986 preamble waters or meet the criteria to be evaluated under another jurisdictional category should be evaluated under an (a)(3) “other water”

The EPA and Corps generally do not consider “waters of the U.S.” to include “waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation is abandoned and the resulting body of water meets the definition of ‘waters of the U.S.’”



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16FEB2024 – SAS-2001-13740 (pre-2015)

Waste Treatment System Exclusion

Under pre-2015, waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are not waters of the U.S. The pre-2015 regulations do not include an exclusion specifically for stormwater features. To be covered by the exclusion, a waste treatment system must be designed to meet the requirements of the CWA where, for example, it is constructed pursuant to CWA section 404 permit or where it is incorporated in an NPDES permit as part of a treatment system. Waters that are part of an approved NPDES permit for stormwater are not automatically covered by the exclusion. The waters must function as a waste treatment system and must serve a treatment purpose.



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16FEB2024 – MVS-2023-00288 (amended 2023)
RPW Flow Determinations

The flow characteristics at the farthest downstream limit of the stream were determined to meet the RPW standard, however, these characteristics were not representative throughout the tributary reach. The majority of the tributary reach had non-RPW flow and the minority of the tributary reach, largely within the review area, had characteristics of an RPW. Where data indicate the flow characteristics at the downstream limit are not representative of the entire tributary reach, the flow characteristics that best characterize the entire tributary will be used.



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16FEB2024 – LRB-2021-01386 (amended 2023)
One Wetland

While delineated as separate wetlands, the draft AJD notes that these wetlands are connected via culverts. Wetland 1 is separated from Wetland 2 by a previously permitted road crossing that does not include culverts. Under longstanding agency practice, a wetland is also delineated as a single wetland if human-made levee or similar artificial structure divides it, but a hydrologic connection is maintained between the divided wetlands. Evidence of a potential hydrologic connection via a shallow subsurface could be observed if the wetland continued to function similarly and retain similar species on either side of the human-made structure.



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19MAR2024 – NWP-2023-602 (amended 2023) Wetlands Connected Through a Storm Sewer System

Wetland is drained by a roadside ditch for approximately 50 feet which drains into a culvert that connects to a stormwater drain. Subsurface flow continues for approximately 0.21-mile before outflowing into a 100-foot swale that enters a separate wetland abutting an RPW. The stormwater system indicates that multiple stormwater laterals drain into the city's storm sewer system before it reaches the outfall. The EPA and OASACW determined that subsurface flow through the city's storm sewer system does not qualify as flow through a discrete feature that can serve as a continuous surface connection.



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25JUN2024 – NWK-2022-00809 (pre-2015)

2.1 Miles is Relatively Long

Wetlands were 2.68 and 2.1 miles from the downstream RPW. The flowpath is through roadway ditches, railroad ditches, farm ditches, and culverts and has weak indicators of flow frequency and duration. The 2.1-mile physical connection is relatively long. The draft AJD states that the long distance and chain of features between the wetlands and the RPW are too extended and tenuous to constitute a continuous surface connection. The agencies concur with the District.



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25JUN2024 – NAP-2023-01223 (amended 2023)
350 LF Meets the Continuous Surface Connection

Wetland 6 is connected to an RPW by a piped connection. The 70-foot length of the physical connection is relatively short. The agencies concur the pipe meets the continuous surface connection. Wetland 8 exhibits a continuous surface connection to Water 2, an RPW, via an approximate 350-foot long non-relatively permanent swale that conveys water from the surrounding uplands and Wetland 8 at low frequency and low volume. The 350-foot length of the physical connection is relatively short. The agencies concur that the 350-foot non-relatively swale meets the continuous surface connection requirement.



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25JUN2024 – SWG-2023-00284 (pre-2015)
115 LF is Relatively Short

The draft AJD concluded that Wetland 2 is adjacent to a TNW and is jurisdictional as an (a)(7) adjacent wetland. The continuous surface connection is through a drainage ditch that flows for approximately 115 linear feet, including through two culverts underneath driveways. The ditch is a non-RPW that appears to carry only ephemeral flow after precipitation events and to be developing bed and bank characteristics. More than one such feature can serve as part of a continuous surface connection. The 115-foot length of physical connection is relatively short. The agencies concur that Wetland 2 has a continuous surface connection to a TNW.



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3SEP2024 – LRB-2023-00451 (pre-2015)
195 LF Through a Wetland Abutting RPW or TNW

Wetland 17 was observed to have a continuous surface connection to Stream1, via the 95 LF of Stream 3 (non-RPW) which flows into Wetlands 16 which abuts Stream 1, the jurisdictional tributary. The total length of the physical connection between Wetland 17 and Stream 1 is 195 feet. Where there are physical indicators that a non-RPW or similar feature flows into and out of the flowpath wetland or when the flowpath wetland abuts a requisite water, it is reasonable to conclude the flowpath continues through the flowpath wetland. The agencies concur that Wetland 17 is adjacent to Stream 1.



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20NOV2024 – POH-2023-00187 (amended 2023)
490 LF With Evidence of Flow

The San Roque Wetland exhibits a continuous surface connection to a TNW via a discrete, man-made ditch approximately 490 feet long. The AJD notes that maintained ditch passes through a boxed culvert under a driveway and there is also a ditch gate or other structure approximately 98 feet from the outlet to the TNW, but the structure does not impede flow based on observation of sediment plumes extending from the outlet of the ditch to the TNW. This information provides evidence of an unimpaired, continuous surface connection, including during not only storm events, but also during bank full periods, and/or ordinary high flows. The agencies concur that the ditch and culvert provide a CSC.



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21NOV2024 – NWK-2024-00392 (amended 2023)
725 LF is Not Physically Close Enough

Wetland A is located 725 feet upstream of the RPW. Water flows from the wetland through a 45-foot well-defined drainage swale that connects to Stream 1, a non-RPW, that flows for 680 feet to an RPW. The draft AJD concluded that Wetland A is jurisdictional as an (a)(7) adjacent wetland based on a continuous surface connection. As the length of the connection increases, even with stronger indicators of flow, the length of the connection can become no longer physically close, such that the discrete features are no longer providing a continuous surface connection. The 725-foot length of connection between the wetland and the requisite water is not physically close enough to meet the CSC.



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18DEC2024 – NWS-2023-923 (amended 2023)

Waste Treatment System Exclusion

According to the draft AJD, Ditch 3 and the storm water pond were determined to be excluded under paragraph (b)(1) of the amended 2023 rule as waste treatment systems and are within the area covered by a NPDES permit. Under the amended 2023 rule, waste treatment systems, including treatment ponds or lagoons, designed to meet the requirement of the CWA are not WOTUS. A waste treatment system may be designed to meet the requirements of the CWA where, for example, it is constructed pursuant to a CWA section 404 permit or where it is incorporated into a NPDES as part of a treatment system. In promulgating the waste treatment system exclusion, EPA did not exclude storm water features.



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20DEC2024 – MVR-2023-0828 (amended 2023) Wetlands and Pond Close to a TNW

The draft AJD concluded that two wetlands are adjacent to a TNW and are jurisdictional as an (a)(4) water and that the pond is a RPW and has a continuous surface connection to a TNW and is jurisdictional as an (a)(5) water. All features are approximately 30-feet laterally from the TNW river. Under high water events the wetlands and pond are likely inundated by flooding based on evidence of sediment deposition patterns, lack of emergent vegetation, presence of wrack lines, and visible water-staining on trees. Certain natural banks are indicators of a direct hydrologic surface connection as they are formed through repeated hydrologic events.



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CSC AND RPF FIELD DATA



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Data to Collect in the Field to Assist the Corps in Determining a Continuous Surface Connection and Relatively Permanent Flow

- Data Points showing an upland between a wetland and a swale, ditch, tributary, culvert, etc.
- Photos of a continuous surface connection or lack thereof (GPS location and direction of photo) and APT for field date
- Photos of all tributaries, ditches, swales, and culverts showing presence or absence of water and indicators of a bed and bank and/or an OHWM (GPS location and direction of photo) and APT for field date
- Assessment of wetlands that extend outside the project area (how far does it extend outside and does the extension connect to a possible continuous surface connection)



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DELINEATION REPORTS



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Requirements for the Galveston District to Accept a Delineation Report

- Transects on tracts greater than 5 acres
- Data sheets along the transect and others necessary - please use the automated data sheet https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/
- Atypical data sheets if warranted (Appendix B of 1987 Manual)
- All aquatic features identified (wetlands, ponds, swales, ditches, tributaries, culverts, etc.)
- Aerials and Topos
- LiDAR Digital Elevation Model
- GPS data
- Supplement recommends soil profiles to be 20 inches (A12)



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DELINEATION REPORTS



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Headquarters Initiatives

- Corps HQ is developing a “Minimum Standards for Aquatic Resource Delineation Reports” document
- Corps HQ is also developing a GPS Standard for Data Collection



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SUMMARY



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- Galveston District is currently determining jurisdiction under the pre-2015 regime post Sackett which could change
- Approved Jurisdictional Determinations are case-specific
- The Corps currently coordinates draft AJDs with adjacent wetlands and/or other waters with the EPA (March 27, 2025)
- EPA HQ and OASACW Memorandums are guidance for the nation
- Galveston District does not accept aquatic resource delineation reports that lack the required information



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QUESTIONS



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REGULATORY REQUEST SYSTEM (RRS)

Sean Dillard

Sean.M.Dillard@usace.army.mil
Regulatory Project Manager
5 February 2025



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OUTLINE OF TOPICS

Overview of the Regulatory Request System (<https://rrs.usace.army.mil/rrs>)

Most common uses of the RRS

Additional data to include in your RRS submissions

What to do if having issues with RRS submittals

Status of RRS submittals across the country



RRS OVERVIEW

RRS is a web-based platform that enables users to submit pre-application meeting requests, jurisdictional determination requests, application submittals, view/comment on public notices, and report potential violations. This new system aims to modernize our permit application process nationally and improve efficiency.

Went live in early 2024 and has been continuously updated to include new features.

Managed through USACE Regulatory Headquarters in Washington D.C.

All future submittals to the Galveston Regulatory office should utilize the RRS online platform.





RRS HOMEPAGE

Welcome to the Regulatory Request System

Apply Online • Learn about the Regulatory Program • Track Request Status

[Get Started](#)



Regulatory Program Information

Learn the basics about the Regulatory Program, including recent announcements.



Jurisdiction

Does the property in question contain wetlands/waters? If so, does the USACE have jurisdiction?



Permitting

Do you need a permit? Need to schedule a pre-application meeting?



Mitigation

Discover how we help avoid and minimize impacts to aquatic resources.



Report Violations

Submit a report of unauthorized activity or permit non-compliance.



RRS Support

Get general system support, district contact information, submit feedback, and login.gov help.



Public Notices

Search, Review, and Comment on USACE Regulatory Public Notices



Apply for a Permit



If you're ready to apply for a permit, click here to login or start a new request




RRS UTILIZES LOGIN.GOV

To create a profile and sign-in to the RRS, users will have to do so via Login.Gov.

Login.gov is federal government owned and operated.





Civil Works Business Intelligence
is using Login.gov to allow you to
sign in to your account safely and
securely.

[Sign in](#) [Create an account](#)

Sign in for existing users

Email address

Password

☐ Show password

[Sign in](#)



RRS MOST COMMON USES FOR THE PUBLIC



Apply for a Permit

If you're ready to apply for a permit, click here to login or start a new request



Public Notices

Search, Review, and Comment on USACE Regulatory Public Notices



Permitting

Do you need a permit? Need to schedule a pre-application meeting?



Jurisdiction

Does the property in question contain wetlands/waters? If so, does the USACE have jurisdiction?



JURISDICTION



RRS will allow users to request jurisdictional determinations for their project area and/or property boundaries.

This is useful for investigating and determining the potentially regulated aquatic resources that could be present on the subject property.

Helps to ensure applicants don't accidentally fill and/or eliminate aquatic resources, resulting in potential Corps enforcement actions.

Not to be used for permit applications or preapplication consultation requests.



PREAPPLICATION CONSULTATION



Applicants can request a preapplication consultation meeting through the RRS.

The preapp will be assigned to a project manager who will reach out to have the requested meeting scheduled.

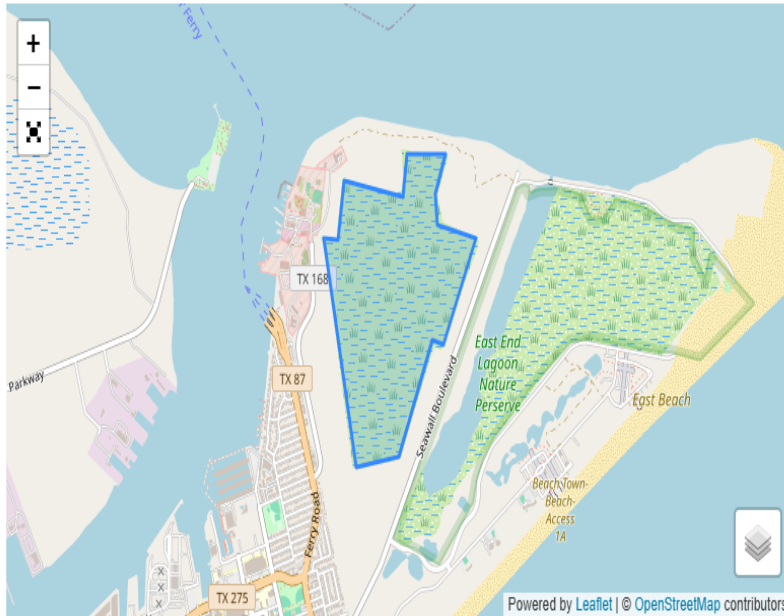
Useful for applicants who aren't familiar with the Corps Regulatory review process, types of applicable permits, and/or for large complex projects.

Applicants should provide meaningful project info, location maps, anticipated aquatic resource impacts, mitigation plans, etc.



APPLY FOR A PERMIT

Start a New Request



Latitude: 29.3277947 **Latitude:** -94.7624660
Address: ---
Address Line 2: ---
City: Galveston
State: Texas
Zip Code: 77550
County: Galveston County
District: Galveston District
Country: United States of America
Field Office Code: ---
Project Area: 317.609373 Acres
Parcel Number: ---
PLSS Section: --- **PLSS Township:** --- **PLSS Range:** ---
Nearest Waterbody: ---
Directions to Project Location: ---

Please review the following:

- Selected Request: **Nationwide Permit (ENG 6082)**
- Confirm that the Project Location information above is correct. The project's location determines the range of available requests within that specific geographical area. This information cannot be modified using the RRS once a request has been created.
- Please be advised that a Nationwide Permit verification relies on a delineation of Aquatic Resources within the project boundary to note where impacts may be occurring. Failure to provide this information may add additional time to the review of your request.

Press the **Continue** button below to begin to your request.

If changes are required, press the **Previous** button to return to the Project Location tab.

Permit applications can be filled out and submitted within the RRS.

Applicants will include their project info, highlight the project area, input aquatic resources, list potential impacts, and request a specific permit type (GP or SP).

Will allow applicants to track the status of their submittal.

Extensions of time and existing permit modifications should be requested as new permit applications.





The public can view and comment on any active Corps Regulatory Public Notice across the country.

Public Notices are active and expire during the established 30-day period.

Gives overview of the project and provides a hyperlink to the full public notice on the District webpage.

Comments submitted are automatically migrated to the Corps Regulatory database for review by the Project Manager.

Does not require Login.gov account.

PUBLIC NOTICES

Public Notice: SWG-2008-00486



Details

[Submit Comments](#)

DA Number:

SWG-2008-00486

Date of Public Notice:

01/16/2025

Project Name:

Port of Corpus Christi/IP/Corpus Christi Ship Channel/Nueces Co.

Comment Period Ends:

02/16/2025

Action Type:

PERMITMOD

Keyword(s):

SWG-2008-00486, Port of Corpus Christi Authority, boat ramp

Description:

The applicant proposes to modify Department of the Army (DA) permit SWG-2008-00486 by excavating 166 cubic yards (CY) of material below the mean high-water (MHW) line and discharge 214 CY of fill material below the high tide line associated with the construction of an emergency response boat ramp armored by two riprap structures.

Applicant

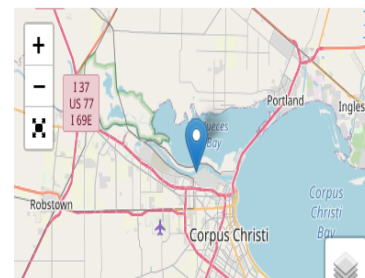
Applicant Name:

-

Applicant Company:

Port of Corpus Christi Authority

Location



District:

Galveston

Hydrologic Unit Code:

12110202

State:

Texas

Latitude:

27.81744

County:

Nueces County

Longitude:

-97.45349

Zip Code:

78409





ADDITIONAL ITEMS TO INCLUDE IN RRS SUBMISSIONS

To further expedite the review process, applicants should include the below if applicable:

- Project history/background
- Existing Corps subject # (SWG-2024-XXXX)
- Correct project mapping and location data
- Complete and accurate delineations
- Complete and correct aquatic resources and impacts





RRS SUBMITTAL PROBLEMS



RRS Support

Get general system support, district contact information, submit feedback, and login.gov help.

RRS is a complex network of many codes detailing the entire country.

RRS problems and submittal issues are inevitable and will be addressed over time as they occur.

RRS is run nationally from Corps Regulatory HQ in Washington D.C. Galveston District has no control over the content, coding, or errors that occur within the RRS.

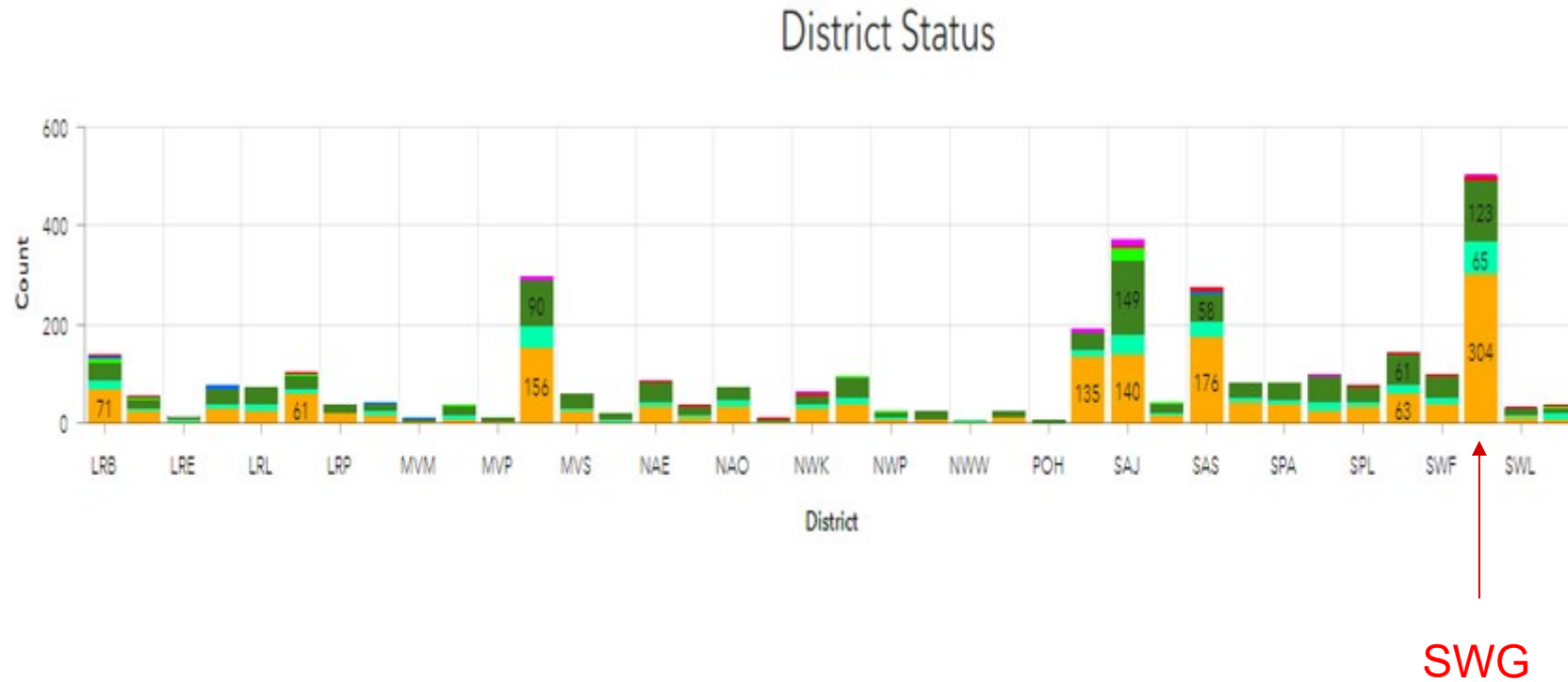
If/when these occur, please click on the RRS Support tab located on the RRS homepage. Follow the instructions and submit your problem to HQ for their review and resolution.

If left unresolved, then contact SWG directly and we may accept the submittal via email directly.



REGULATORY REQUEST SYSTEM PROJECT TRACKER

(SWG LEADS THE NATION IN RRS SUBMITTALS AS OF 09/2024)





QUESTIONS

<http://www.swg.usace.army.mil/>



ENDANGERED SPECIES ACT: NATIONWIDE PERMITS AND GENERAL CONDITION 18

Kristie A. Wood, Supervisor
Corpus Christi Field Office
Regulatory Division
Galveston District

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



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slender rush-pea – endangered



Houston Toad



Kemp's Ridley sea turtle - endangered



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OUTLINE

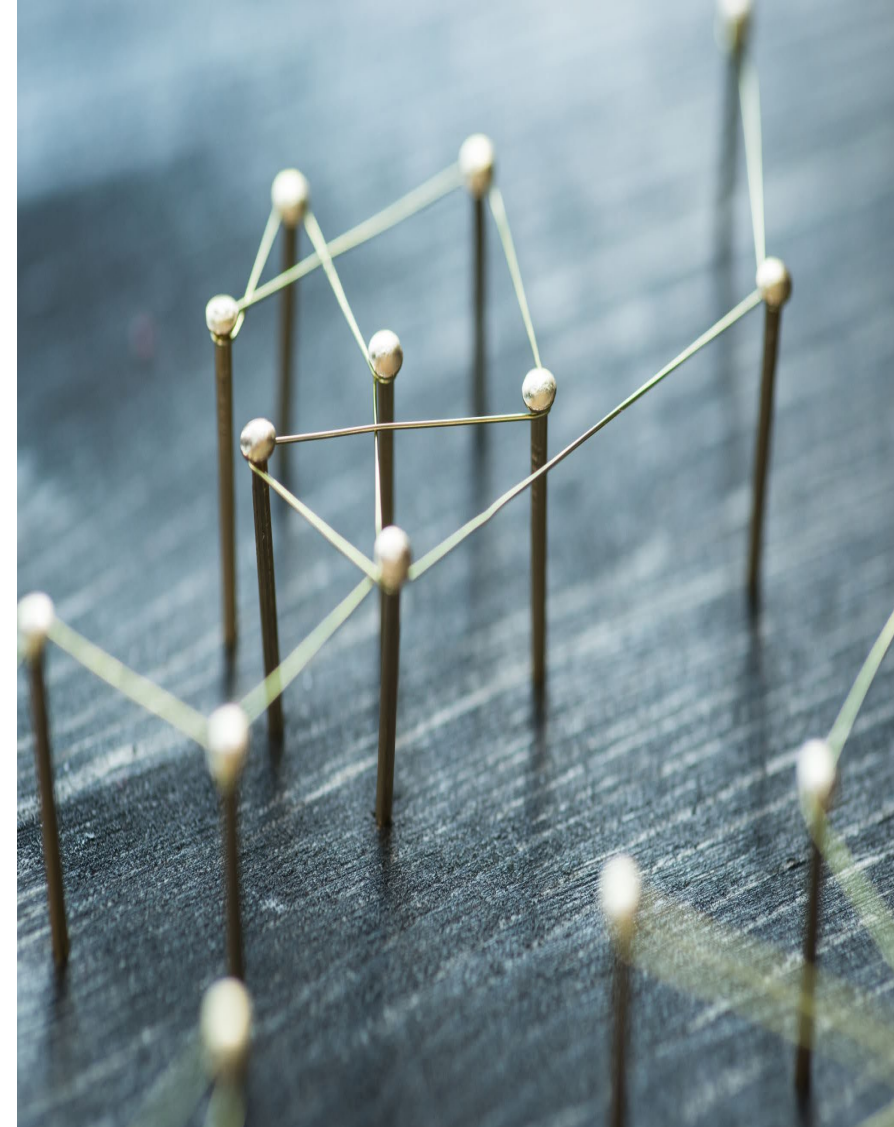


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- Endangered Species Act (ESA)
- Corps Regulations
- Nationwide Permits (NWP): Pre-construction Notification (PCN) Requirements
- Federally Complete Application: Eng Form 6082
- NWPs: General Condition (GC) 18
- GC 18 – What triggers a PCN?
- Pre-application Preparation
 - US Fish and Wildlife Service Species (USFWS) and Critical Habitat List
 - NOAA Fisheries/National Marine Fisheries Service (NMFS) Species and Critical Habitat List
 - Technical Assistance
- Additional Resources
 - USFWS Guidance on Species Habitat
 - Southeast Regional Office (SERO) Consultation Frameworks
 - NMFS's Environmental Consultation Organizer (ECO)
- Other Important Information to Consider
 - Existing Conditions
 - Potential Stressors
 - Exposure/Response Analysis
 - Additional Information Requests
 - Avoidance/Minimization Measures
 - Misconceptions





ENDANGERED SPECIES ACT OF 1973



Purpose: Program for the conservation of Federally listed threatened and endangered plants and animals and the habitats in which they are found.

Section 7(a)(2) requires: Federal action agencies to ensure that actions they authorize, fund, or carry out are not likely to **jeopardize the continued existence** of any Federally listed species or **result in the destruction or adverse modification of designated critical habitat** of such species.

Federal agencies responsible for administering the ESA:

- U.S. Fish and Wildlife Service (FWS)
- National Marine Fisheries Service (NMFS)

“The Services”

USFWS	NMFS
ESA	ESA
<ul style="list-style-type: none">• Terrestrial T&E species• Manatee• Critical habitat for above• Sea turtles on the beach (nesting)	<ul style="list-style-type: none">• Marine aquatic T&E species• Anadromous fishes (in marine <u>and</u> freshwater habitats)• Critical habitat for above• Sea turtles in the water



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CORPS REGULATIONS: ESA REQUIREMENTS



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33 CFR 325 Processing of Department of the Army (DA) Permits

- 325.2 Processing of applications
 - 325.2(b)(5) Endangered Species
 - ✓ **Applications will be reviewed** for the **potential impact** on threatened or endangered species pursuant to section 7 of the ESA as amended. [NOTE: This means **ALL** applications.]
 - 325.4 Conditioning of permits
 - ✓ DEs will add **special conditions** to DA permits when such conditions are necessary to satisfy legal requirements, such as compliance with the ESA.

Note: USACE Regulations can be accessed at
<https://rrs.usace.army.mil/rrs/home/regulatory-program>

CODE OF FEDERAL REGULATIONS



CFR

Revised as of January 1, 2024

OFFICE OF THE FEDERAL REGISTER



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NATIONWIDE PERMITS: GENERAL CONDITION (GC) 32. PCN REQUIREMENTS



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- a) **Timing.** If the prospective permittee does not provide all of the requested information, then the PCN is **incomplete**, and the review process will not commence until all of the requested information has been received.
- 2) If the permittee was required to notify the Corps pursuant to GC18, the permittee **cannot begin the activity** until receiving written notification from the Corps that there is “no effect” on listed species or that any consultation required under Section 7 of the ESA has been completed.

b) **Contents of Pre-Construction Notification:**

- 7) For **non-federal permittees**, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) **might be affected or is in the vicinity of the activity**, or **if the activity is located in designated critical habitat** (or critical habitat proposed for such designation), the PCN **must** include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity.



Note: References truncated for presentation purposes.
For full text, refer to the *2021 Nationwide Permits, General Conditions and Definitions* document at
<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>



FEDERALLY COMPLETE APPLICATION: ENG FORM 6082 (V. NOV 2024)



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U.S. Army Corps of Engineers (USACE)
NATIONWIDE PERMIT PRE-CONSTRUCTION NOTIFICATION (PCN)

For use of this form, see 33 CFR 330; the proponent agency is CECW-COR.

Form Approved -
OMB No. 0710-0003
Expires: 2027-10-31

26. List the name(s) of any species listed as endangered or threatened under the Endangered Species Act that might be affected by the proposed NWP activity or utilize the designated critical habitat that might be affected by the proposed NWP activity. (*see instructions*)

Instructions:

Block 26. List the Name(s) of Any Species Listed As Endangered or Threatened under the Endangered Species Act that Might be Affected by the Nationwide Permit Activity. If you are not a federal agency, and if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat, list the name(s) of those endangered or threatened species that might be affected by the proposed NWP activity or utilize the designated critical habitat that might be affected by the proposed NWP activity. If you are a Federal agency, and the proposed NWP activity requires a PCN, you must provide documentation demonstrating compliance with Section 7 of the Endangered Species Act.



Note: Eng Form 6082 can be downloaded at
<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>

Note: Additionally, NWP applications may be submitted using online forms, which are available at <https://rrs.usace.army.mil/rrs>





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GENERAL CONDITION (GC) 18. ENDANGERED SPECIES.

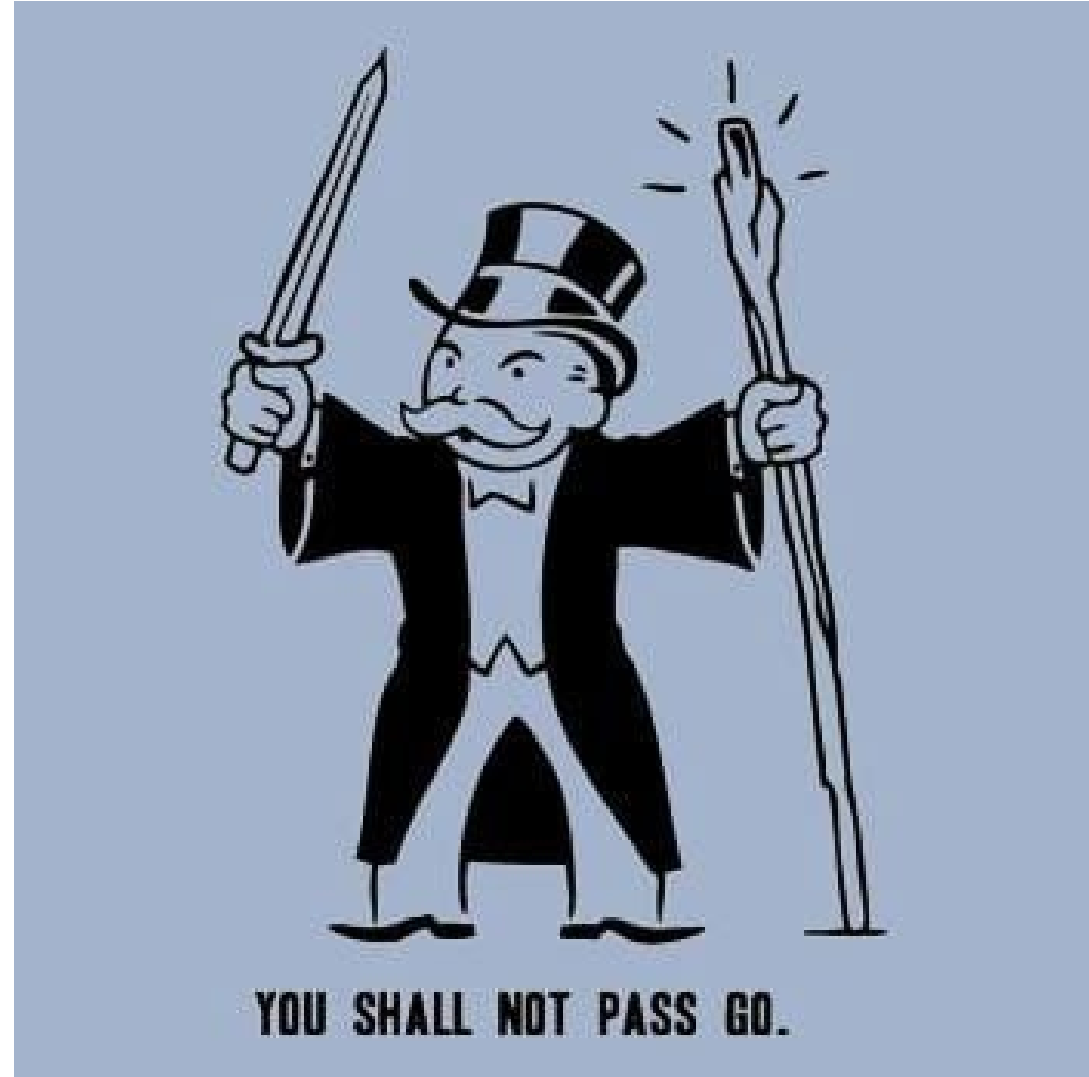


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(a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the ESA, or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. **No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed.**

Note: For full text, refer to the *2021 Nationwide Permits, General Conditions and Definitions* document at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>





GC 18. ENDANGERED SPECIES, CONT.



(c) Non-federal permittees

- Must submit a PCN if any listed species (or species proposed for listing) OR designated critical habitat (or critical habitat proposed such designation) **might be affected** OR **is in the vicinity of the activity**, OR if the activity is **located in** designated critical habitat or critical habitat proposed for such designation.
- The applicant **shall not begin work until** the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed.
- The Corps will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within **45 days** of receipt of a **complete PCN**.
- If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant **must still wait** for notification from the Corps.



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GC 18 PCN TRIGGERS



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Do any of the following apply?

1. Listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) **might** be affected by the proposed activity.
2. The proposed activity is in the **vicinity** of listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation).
3. The activity is **located in** designated critical habitat (or critical habitat proposed such designation).

If you answered **YES** to any of these statements, then a PCN is **required**.

PRE-APPLICATION PREPARATION



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US FISH AND WILDLIFE SERVICE (USFWS)

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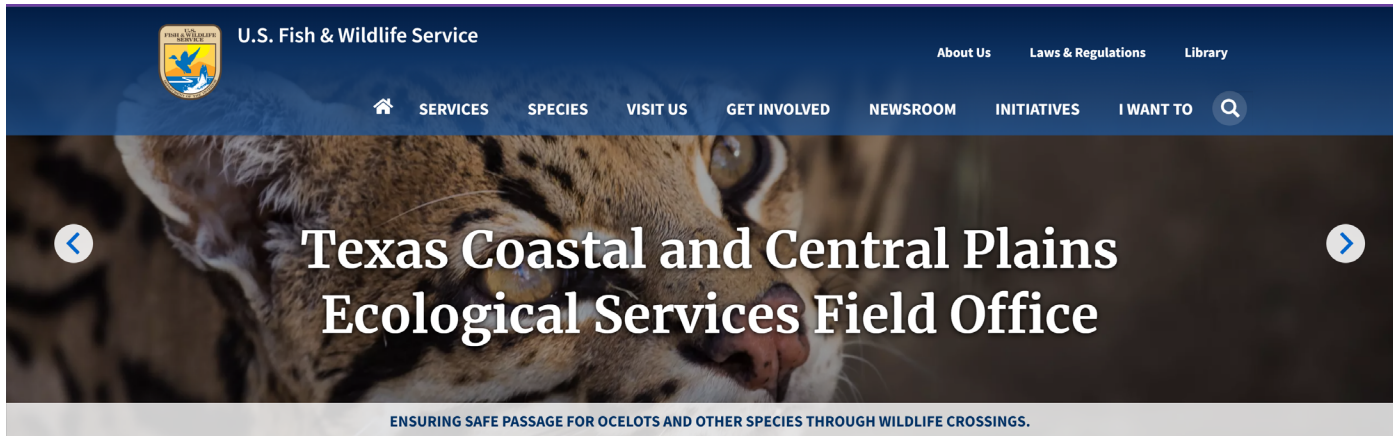
Texas Coastal and Central Plains Ecological Services Field Office

- ❖ Fort Worth
- ❖ Clear Lake*
- ❖ Corpus Christi*
- ❖ Alamo (sub-office to CC)*



More info at:

<https://www.fws.gov/office/texas-coastal-and-central-plains-ecological-services>



[Image Details](#)



Texas Coastal
and Central
Plains
Ecological
Services Field
Office

[About Us](#)

About Us

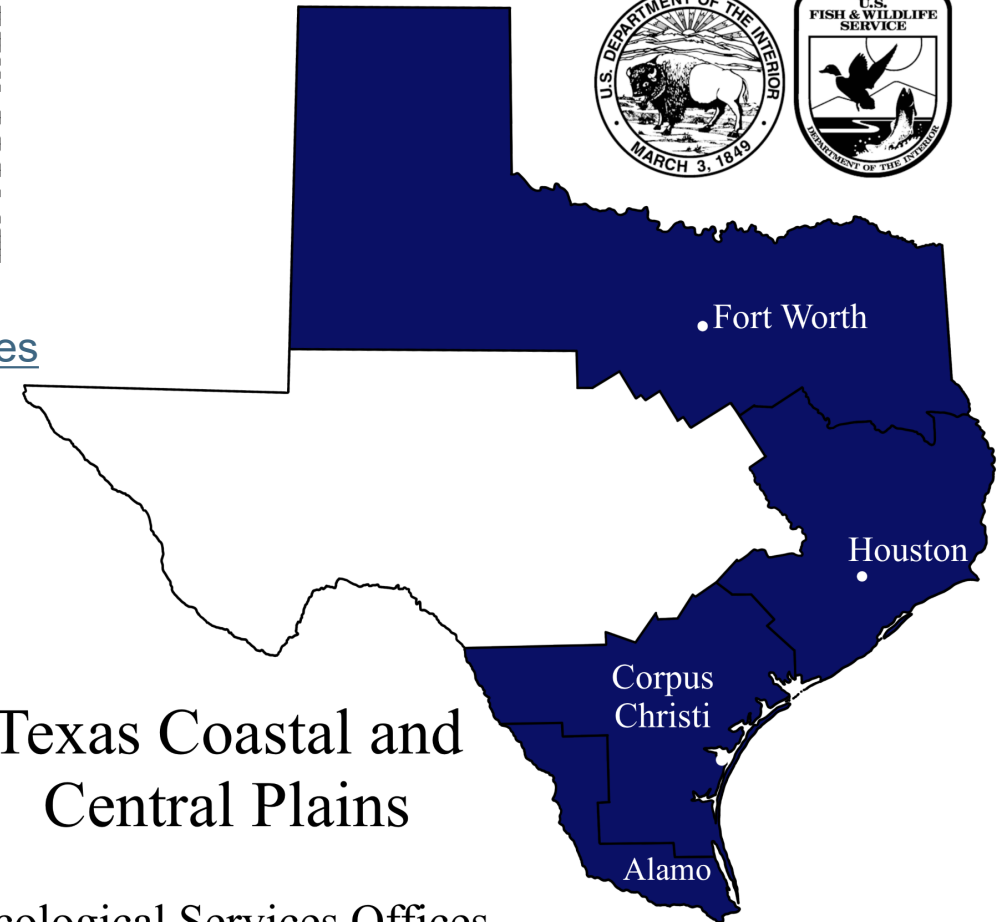
The Texas Coastal Ecological Services Field Office includes field offices in Clear Lake and Corpus Christi with a sub-office in Alamo, Texas. The Field Office covers 68 counties that include the Texas coast; parts of eastern and central Texas; and South Texas. The Texas Coastal Ecological Services Field Office strives to conserve and protect federally listed threatened and endangered species as well as federal trust resources such as wetlands, migratory birds, pollinators, and interjurisdictional fish within diverse and wide-ranging ecosystems. Partnerships with state and federal agencies, local governments, private and public citizens, and non-governmental organizations make our work possible.

[Help improve this site](#)



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Texas Coastal and Central Plains

Ecological Services Offices

*Note: POCs for nearly all of Galveston District actions.



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USFWS – SPECIES AND CRITICAL HABITAT LIST



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Information for Planning and Consultation (IPaC):

- <https://ipac.ecosphere.fws.gov/>
 - Official species list request
 - Helpful instructional videos provided on main website.
 - Note: Only valid for 90 days.
 - Note: IPaC does NOT display listed species or critical habitat under the sole jurisdiction of NOAA Fisheries.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Texas Coastal Ecological Services Field Office
17629 El Camino Real, Suite 211
Houston, TX 77058-3051
Phone: (281) 286-8282 Fax: (281) 488-5882



In Reply Refer To:

Project Code: 2023-0000586

Project Name: SWG-2021-00287 Redfish Bay Terminal

February 13, 2023

Subject: List of threatened and endangered species that may occur in your proposed project location or may be affected by your proposed project

To Whom It May Concern:

The U.S. Fish and Wildlife Service (Service) field offices in Clear Lake, Corpus Christi, and Alamo, Texas, have combined administratively to form the Texas Coastal Ecological Services Field Office. All project related correspondence should be sent to the field office address listed below responsible for the county in which your project occurs:

Official Species List

This list is provided pursuant to Section 7 of the Endangered Species Act, and fulfills the requirement for Federal agencies to "request of the Secretary of the Interior information whether any species which is listed or proposed to be listed may be present in the area of a proposed action".

Please submit with your application!



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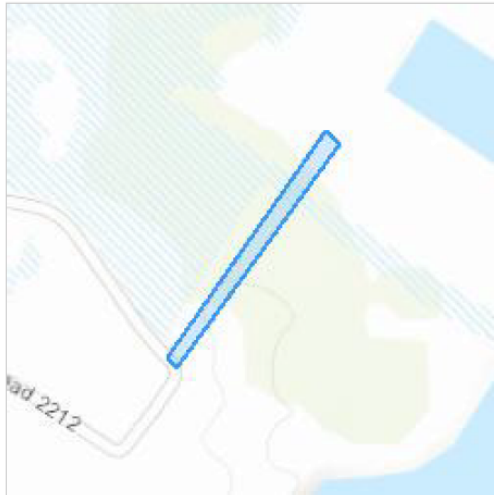
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Project Summary

Project Code: 2023-0000586
Project Name: SWG-2021-00287 Redfish Bay Terminal
Project Type: Road/Hwy - New Construction
Project Description: Culverted road crossing over tidal canal
Project Location:

Approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@27.8712492,-97.16293164511667,14z>



Counties: San Patricio County, Texas

Birds

NAME	STATUS
Eastern Black Rail <i>Laterallus jamaicensis ssp. jamaicensis</i> No critical habitat has been designated for this species. Species profile: https://ecos.fws.gov/ecp/species/10477 ←	Threatened
Piping Plover <i>Charadrius melodus</i> Population: [Atlantic Coast and Northern Great Plains populations] - Wherever found, except those areas where listed as endangered. There is final critical habitat for this species. Your location does not overlap the critical habitat. ← Species profile: https://ecos.fws.gov/ecp/species/6039	Threatened
Red Knot <i>Calidris canutus rufa</i> There is proposed critical habitat for this species. ← Species profile: https://ecos.fws.gov/ecp/species/1864	Threatened

Critical habitats

THERE ARE NO CRITICAL HABITATS WITHIN YOUR PROJECT AREA UNDER THIS OFFICE'S JURISDICTION. ←



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USFWS – CRITICAL HABITAT MAPPER



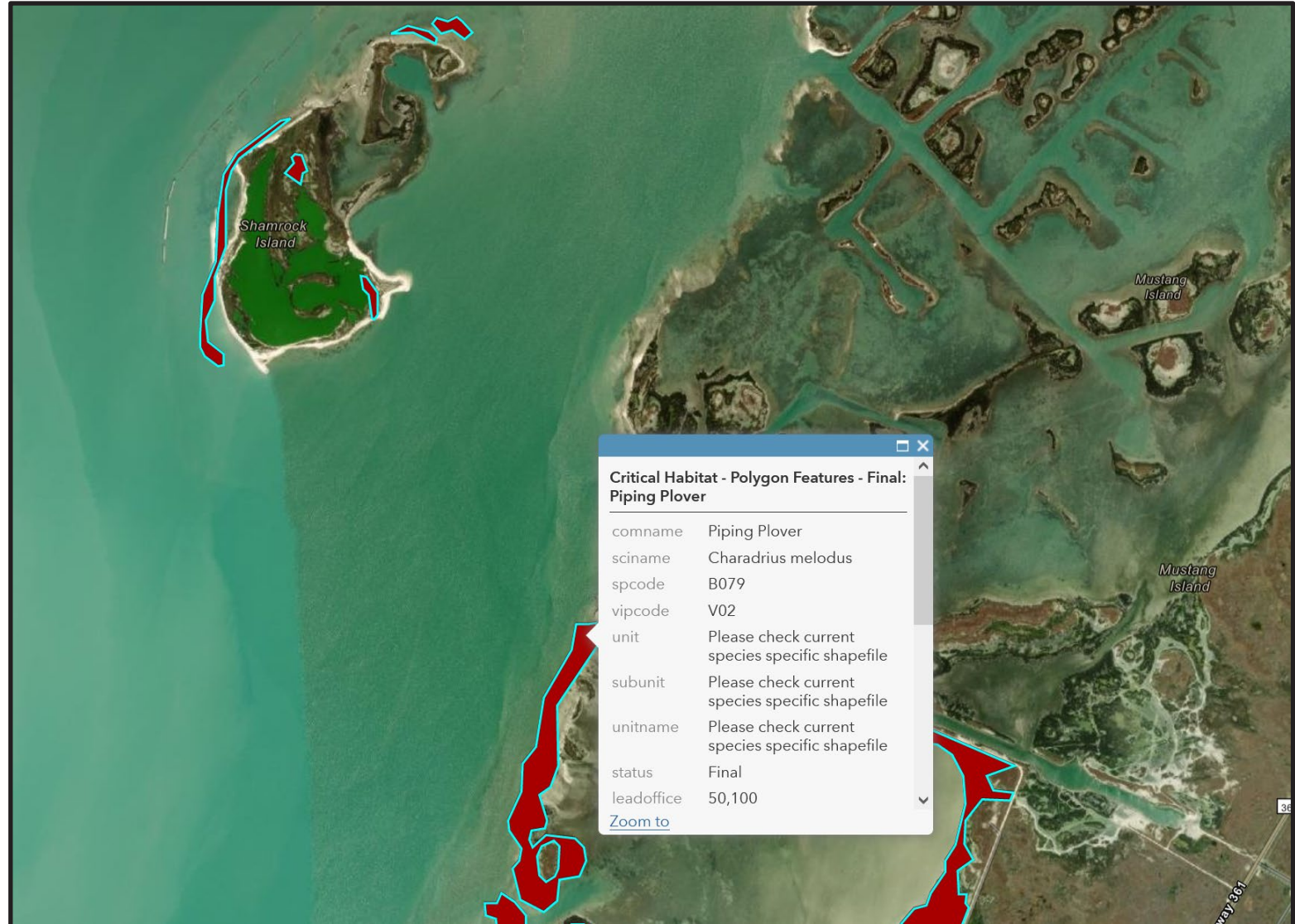
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Available at

<https://fws.maps.arcgis.com/apps/mapviewer/index.html?webmap=9d8de5e265ad4fe09893cf75b8dbfb77>

- Features may not be exact. When in doubt or unsure, request assistance from FWS and refer to the description provided in the Federal Register listing notice (which can be found by clicking on the species provide link in the IPaC report)
- It may take a while before designated or proposed critical habitat layers are uploaded into the mapper.





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NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) FISHERIES OR NATIONAL MARINE FISHERIES SERVICE (NMFS)



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Southeast Regional Office (SERO)

- Protected Resources Division is responsible for ESA consultation, coordinating office located in Florida.
- Habitat Conservation Division is responsible for Essential Fish Habitat consultation, coordinating office located in Galveston.

More info at:

<https://www.fisheries.noaa.gov/southeast/endangered-species-conservation/esa-section-7-interagency-consultation-southeast-united-states>





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SERO – SPECIES AND CRITICAL HABITAT LIST



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CONSULTATIONS

Threatened and Endangered Species List Texas

Threatened and Endangered Species and Critical Habitats Under NOAA Fisheries Jurisdiction

Southeast

Species	Listing Status	Recovery Plan	Critical Habitat
Green sea turtle	Threatened - North and South Atlantic Distinct Population Segment (81 FR 20057; April 6, 2016)	October 1991	63 FR 46693; September 2, 1998
Kemp's ridley sea turtle	Endangered (35 FR 18319; December 2, 1970)	September 2011	None
Leatherback sea turtle	Endangered (35 FR 8491; June 2, 1970)	April 1992	44 FR 17710; March 23, 1979
Loggerhead sea turtle	Threatened - Northwest Atlantic Ocean Distinct Population Segment (76 FR 58868; September 22, 2011)	December 2008	79 FR 39856; July 10, 2014
Hawksbill sea turtle	Endangered (35 FR 8491; June 2, 1970)	December 1993	63 FR 46693; September 2, 1998
Oceanic whitetip shark	Threatened (83 FR 4153; January 30, 2018)	2018 Recovery Outline	None
Giant manta ray	Threatened (83 FR 2916; January 22, 2018)	December 2019 Recovery Outline	None
Sperm whale	Endangered (35 FR 18319; December 2, 1970)	December 2010	None
Rice's whale	Endangered (84 FR 15446; April 15, 2019); Name Change (86 FR 47022; August 23, 2021)	September 2020 Recovery Outline	None

Last updated by [Southeast Regional Office](#) on July 21, 2022



<https://www.fisheries.noaa.gov/southeast/consultations/threatened-and-endangered-species-and-critical-habitats>

➤ Listed by State

PROTECTED RESOURCES REGULATIONS AND ACTIONS

Critical Habitat for Loggerhead Sea Turtle

[Final Rule](#) | [Southeast](#)

Overview

Authority
Endangered Species Act

Action Status
Final Rule

Effective
08/11/2014

Affected Species
[Loggerhead Turtle](#)

Summary

We, the NOAA Fisheries, issue a final rule to designate critical habitat for the Northwest Atlantic Ocean Distinct Population Segment (DPS) of the loggerhead sea turtle (*Caretta caretta*) within the Atlantic Ocean and the Gulf of Mexico pursuant to the Endangered Species Act of 1973, as amended (ESA). Specific areas for designation include 38 occupied marine areas within the range of the Northwest Atlantic Ocean DPS. These areas contain one or a combination of habitat types: Nearshore reproductive habitat, winter area, breeding areas, constricted migratory corridors, and/or *Sargassum* habitat. The U.S. Fish and Wildlife Service (USFWS) is issuing a final rule for loggerhead critical habitat for terrestrial areas (nesting beaches) in a separate document. No marine areas meeting the definition of critical habitat were identified within the jurisdiction of the United States for the North Pacific Ocean DPS, and therefore we are not designating critical habitat for that DPS.

Federal Register

- [Final Rule \(79 FR 39855\)](#)
- [Proposed Rule \(78 FR 43005\)](#)

Supporting Materials

- [Loggerhead turtle Northwest Atlantic Ocean DPS Critical Habitat Map](#)
- [Economic Analysis of Critical Habitat Designation of Marine Habitat for the Nor...](#)
- [Biological Report on the Designation of Marine Critical Habitat for the Loggerh...](#)

See next slide



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Courtesy Image

Young loggerhead seeks refuge in Sargassum seaweed off the Florida coast. (Photo by Jim Abernethy)



Loggerhead turtles were tagged and released from Florida's Atlantic coast, then followed for up to 220 days. (Jim Abernethy, NMFS)

RESOURCES

Loggerhead Turtle – Northwest Atlantic Ocean DPS Critical Habitat Map

Loggerhead sea turtle critical habitat map and associated data files for the Northwest Atlantic Ocean DPS.

PDF



Metadata

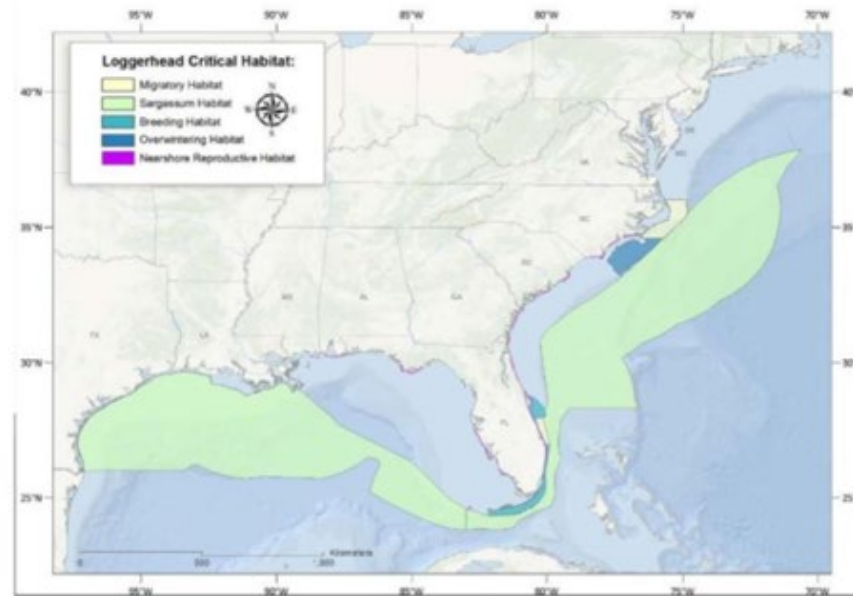
Shapefile



Web Service



Map | New England/Mid-Atlantic, Southeast



More Information

- > Loggerhead Sea Turtle Species Profile
- > Critical Habitat
- > Critical Habitat for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct



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SERO – ESA SECTION 7 MAPPER



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Draw Your Action Area

Your Action Area

Draw Shapefile Coordinates

Select draw mode

Buffer distance (optional)

Show results within

1 Miles

Preview Results Start Over

Area: 7.07 mi²

Corals (0)

Seagrass (0)

Sea Turtles (7)

Sharks, Rays, Sawfish (8)

Grouper and Sturgeon (0)

Whales (0)

In or Near Critical Habitat (0)

In or Near Seasonal Management Areas (0)

Miscellaneous (0)

creates CVS file

<https://www.fisheries.noaa.gov/resource/map/southeast-region-esa-section-7-mapper>

- Tool to aid in determine species that would be present in the project area.
- Provides information on species, life stages, and habitats that may be affected by proposed projects.
- Streamline incorporation of species and critical habitat information into action agency biological assessments.

OBJECTID	SPNAME	ESASTATUS	LIFESTAGE	BEHAVIOR
1074	Giant Manta Ray	Threatened	Adults	Migrating & Foraging
1075	Giant Manta Ray	Threatened	Adults	Migrating & Foraging
1192	Giant Manta Ray	Threatened	Adults	Mating
1194	Giant Manta Ray	Threatened	Adults	Mating
1311	Giant Manta Ray	Threatened	Juveniles	Migrating & Foraging
1313	Giant Manta Ray	Threatened	Juveniles	Migrating & Foraging
1431	Giant Manta Ray	Threatened	YOY	Migrating & Foraging
1432	Giant Manta Ray	Threatened	YOY	Migrating & Foraging



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TECHNICAL ASSISTANCE (PRE-CONSULTATION)

- useful pre-application meeting
 - Project description, mitigation measures, determine the action area, identifying ESA-listed species, identifying and evaluating stressors, etc.
- can be initiated with Services by applicant/agent
- optional, but recommended (particularly for large scale projects)
- process designed to identify and minimize potential conflicts between proposed actions and listed species and critical habitat
- requested when proposed project and location known, but typically before determining whether the project may affect listed species and critical habitat
- should include:
 - a written request for a list of listed or proposed to be listed species and designated or proposed critical habitat that may be present in the action area (or provide IPaC report);
 - description of proposed project;
 - project location; and,
 - description of the habitat that would be impacted.

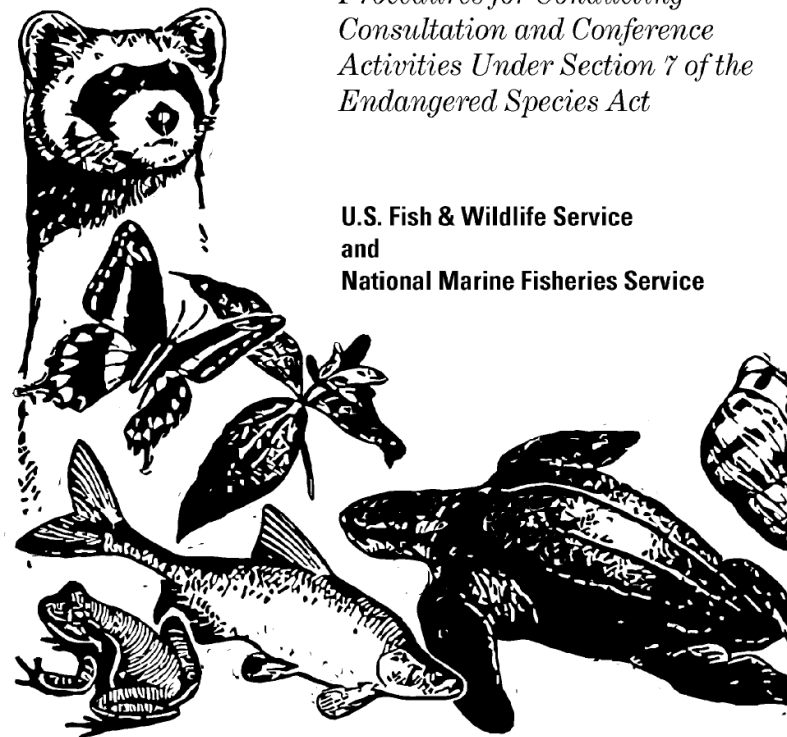
Endangered Species



Consultation Handbook

*Procedures for Conducting
Consultation and Conference
Activities Under Section 7 of the
Endangered Species Act*

U.S. Fish & Wildlife Service
and
National Marine Fisheries Service



March 1998
Final



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ADDITIONAL RESOURCES



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Note: This resource is being provided as a reference. This resource includes guidance specific to the USFWS's Midwest Region. Some of the guidance provide on this website may not be applicable in our USFWS region, the Southwest Region.



USFWS GENERAL GUIDANCE ON SPECIES HABITAT



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Table 1. General guidelines for evaluating whether species on the IPaC Endangered Species list may be present in an action area. If species-specific survey guidelines are available, follow those guidelines to carry out surveys and to interpret results, as appropriate.

Is the Species' Habitat Present in the Action Area?	Species Survey Result	Conclusion	Next Step	Comments
No	Survey not warranted	Species not present in action area	Consultation not required	Consider the potential for the species' habitat to become established in the action area before effects of the action have ended.
Yes	Survey(s) for species in the action area are negative	Species not present in action area ¹	Consultation not required	¹ Plan and implement surveys and interpret results in coordination with USFWS and/or in accordance with USFWS-recommended survey protocols.
Yes	Survey data unavailable or inconclusive for action area	Assume species is present in the action area.	Proceed to Step 3	¹ Plan and implement surveys and interpret results in coordination with USFWS and/or in accordance with USFWS-recommended survey protocols.
Yes	Survey(s) for species in the action area are positive	Species is present	Proceed to Step 3	¹ Plan and implement surveys and interpret results in coordination with USFWS and/or in accordance with USFWS-recommended survey protocols.

Source: <https://www.fws.gov/office/midwest-region-headquarters/midwest-section-7-technical-assistance>



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SERO CONSULTATION FRAMEWORKS



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- Summarize the best available information on species life history, behavior, and distribution.
- Identifies activities and potential routes of effect.
- Recommendations for integrating recovery considerations into Section 7 consultation practices.
- Recommendations on avoidance and minimization of effects to ESA-listed species and critical habitats.
- To be considered a consultation aid and used as general guidance.

Source:

<https://www.fisheries.noaa.gov/southeast/consultations/consultation-frameworks>

Consultation Frameworks

The Consultation Frameworks provide information needed to consult on federal actions that may affect some ESA-listed marine species and their designated critical habitat within the Southeast Region.

Southeast

The Consultation Frameworks summarize the best available information on species life history, behavior, and distribution; critical habitat; activities and potential routes of effect; and recommendations for integrating recovery considerations into section 7 consultation practices.

The Consultation Frameworks can be used by federal action agencies, or non-federal representatives to minimize effects to ESA-listed marine species and critical habitats and support recovery and conservation efforts. A large quantity of information was summarized in the production of these frameworks, and they should be considered a consultation aid and used as general guidance.

Consultation Frameworks

- [Sea turtle species](#) (PDF, 44 pages)
- [Sea turtle critical habitat](#) (PDF, 13 pages)
- [Coral species](#) (PDF, 39 pages)
- [Elkhorn and staghorn coral critical habitat](#) (PDF, 18 pages)
- [Queen conch](#) (PDF, 31 pages)
- [Atlantic sturgeon and critical habitat](#) (PDF, 35 pages)
- [Gulf sturgeon and critical habitat](#) (PDF, 18 pages)
- [Nassau grouper and critical habitat](#) (PDF, 24 pages)
- [Giant manta ray](#) (PDF, 21 pages)
- [Smalltooth sawfish and critical habitat](#) (PDF, 21 pages)



We are developing additional consultation frameworks for species and critical habitat under SERO's jurisdiction.

Return to the Southeast Region's ESA Section 7 Interagency Consultation main page [here](#).

Last updated by [Southeast Regional Office](#) on 10/17/2024



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Giant Manta Ray Consultation Framework NOAA Fisheries Southeast Region

March 2024



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May Affect Determination (Not Likely to Adversely Affect [NLAA] or Likely to Adversely Affect [LAA]) for the Species

For proposed actions that may affect giant manta rays, the biologist must carefully analyze the effects of the proposed action to confirm whether a NLAA or LAA determination is most applicable (Table 2). An activity that is typically NLAA for an activity could be LAA for a different consultation if circumstances are significantly different or best-management practices or project design criteria are not incorporated. The biologist must carefully analyze the effects of the proposed action to confirm whether NLAA or LAA is most applicable. An activity that is typically NLAA for an activity could be LAA for a different consultation if circumstances are significantly different or certain best-practices or project design criteria are not incorporated.

Best Management Practices for Reducing and Avoiding Effects to Giant Manta Ray

Consider the following when including giant manta rays in the consultation:

- Require the use of the [SERO Protected Species Construction Conditions](#) and other applicable PDCs.
- Require the use of the [SERO Vessel Strike Avoidance Measures](#).
- Report sightings by email to: manta.ray@noaa.gov. The applicant's agent will report during construction; the applicant will report post-construction.
- Ensuring projects prevent debris from entering the environment.

Additional considerations depending on the scope of the action could include the incorporation of environmental windows to minimize risk and probability of adverse effects. Action agencies should work with SERO to time activities when risk is minimized and enact conservation measures to reduce level and duration of exposure. This Species Distribution Model (Farmer et al. 2022) will help managers compute the likelihood of an interaction and recommend environmental windows to minimize risk.

- To identify environmental windows to time activities to minimize risk action agencies should consider the Species Distribution Models predictions that are detailed in [Farmer et al. \(2022\)](#)

Activity	Route of Effects	Potential Impact to Species	Considerations
Fishing Pier – (i.e., Beach side piers only and inlets. ICW pier interactions are extremely unlikely to occur).	<ul style="list-style-type: none"> • Interaction with recreational fishing gears and entanglement • Potential disturbance during construction 	<ul style="list-style-type: none"> • Injury, disfigurements, amputations resulting from foul hooking and/or entanglement (Pate et al. 2020) • Interactions with construction equipment are typically extremely unlikely to occur due to species' mobility • Noise associated with pile driving 	<ul style="list-style-type: none"> • Location (is the pier located in an area of high manta ray abundance)? • Artificial lighting can concentrate zooplankton that may attract manta rays to the project area • Require posting of educational signage, anglers outreach, and fishing line disposal receptacles • Construction conditions and noise abatement measures
Aquaculture	<ul style="list-style-type: none"> • Physical barrier • Poses an entanglement risk • Alter water quality and/or habitat • Vessel traffic 	<ul style="list-style-type: none"> • Physical barrier could block or impede movement in the area? • Injury or mortality resulting from entanglement in lines 	<ul style="list-style-type: none"> • Type of equipment and duration of in-water construction?
	<ul style="list-style-type: none"> • Construction activities • Attraction 	<ul style="list-style-type: none"> • Water quality/habitat degradation could reduce foraging habitat • Vessel strike could result in injury or mortality • Habitat degradation avoidance, and /or displacement from the area • Attraction to increased nutrients, altered movement patterns 	<ul style="list-style-type: none"> • Duration of the permit (i.e., how long will the project be in operation so we know how long any structures would be in the water)? • What is the configuration and design of the aquaculture equipment? • Avoidance of important habitats (Farmer et al. 2022) to reduce impact • What are the maintenance plans for the facility (e.g., how often will nets/lines be inspected) • What is the average speed of support vessels and how frequently they are deployed?
Dredging (e.g., Hopper, Clamshell, Cutter Head)	<ul style="list-style-type: none"> • Potential disturbance during construction • Short and/or long-term habitat alteration and avoidance • Vessel traffic • Relocation trawling (if there is relocation trawling prior to dredging) 	<ul style="list-style-type: none"> • Interaction with equipment is extremely unlikely to occur due to species' mobility • Vessel strike could result in injury or mortality (Pate and Marshall 2020; McGregor et al. 2019) • If relocation trawling is proposed, there is potential injury and mortality 	<ul style="list-style-type: none"> • What is the average speed of support vessels and how many vessels will be in the project area at a given time? • Type of equipment to be used and the duration of dredging? • Are there shutdown procedures in place if a listed species is observed? • Will there be tow time limits for relocation trawls? • Will observers be present? If so, ensure data collection, tissue sampling, and possible tagging
Marina, Dock, Ramp, & Slips	<ul style="list-style-type: none"> • Potential impacts during construction • Vessel traffic • Entanglement 	<ul style="list-style-type: none"> • Interaction with construction equipment is extremely unlikely to occur due to species' mobility • Noise associated with construction activities is typically NLAA if it is below 	<ul style="list-style-type: none"> • Type of equipment and duration of in-water construction? • Construction conditions and noise abatement measures • Number and vessel speed. Are speed



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SERO GUIDANCE: CONSTRUCTION CONDITIONS



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NOAA FISHERIES | Southeast Regional Office
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

PROTECTED SPECIES CONSTRUCTION CONDITIONS, NOAA FISHERIES SOUTHEAST REGIONAL OFFICE

The action agency and any permittee shall comply with the following construction conditions for protected species under the jurisdiction of NOAA Fisheries Southeast Regional Office (SERO) Protected Resources Division (PRD):¹

Protected Species Sightings—The action agency and any permittee shall ensure that all personnel associated with the project are instructed about the potential presence of species protected under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). All on-site project personnel are responsible for observing water-related activities for the presence of protected species. All personnel shall be advised that there are civil and criminal penalties for harming, harassing, or killing listed species and all marine mammals. To determine which protected species and critical habitat may be found in the transit area, please review the relevant [marine mammal](https://www.fisheries.noaa.gov/find-species) and [ESA-listed species](https://www.fisheries.noaa.gov/find-species) at Find A Species (<https://www.fisheries.noaa.gov/find-species>) and the consultation documents that have been completed for the project.

1. **Equipment**—Turbidity curtains, if used, shall be made of material in which protected species cannot become entangled and be regularly monitored to avoid protected species entrapment. All turbidity curtains and other in-water equipment shall be properly secured with materials that reduce the risk of protected species entanglement and entrapment.
 - a. In-water lines (rope, chain, and cable, including the lines to secure turbidity curtains) shall be stiff, taut, and non-looping. Examples of such lines are heavy metal chains or heavy cables that do not readily loop and tangle. Flexible in-water lines, such as nylon rope or any lines that could loop or tangle, shall be enclosed in a plastic or rubber sleeve/tube to add rigidity and prevent the line from looping and tangling. In all instances, no excess line shall be allowed in the water. All anchoring shall be in areas free from hardbottom and seagrass.
 - b. Turbidity curtains and other in-water equipment shall be placed in a manner that does not entrap protected species within the project area and minimizes the extent and duration of their exclusion from the project area.
 - c. Turbidity barriers shall be positioned in a way that minimizes the extent and duration of protected species exclusion from important habitat (e.g. critical habitat, hardbottom, seagrass) in the project area.
2. **Operations**—For construction work that is generally stationary (e.g., barge-mounted equipment dredging a berth or section of river, or shore-based equipment extending into the water):
 - a. Operations of moving equipment shall cease if a protected species is observed within 150 feet of operations.

¹ Manatees are managed under the jurisdiction of the U.S. Fish and Wildlife Service.



NOAA FISHERIES | Southeast Regional Office
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

VESSEL STRIKE AVOIDANCE MEASURES, NOAA FISHERIES SOUTHEAST REGIONAL OFFICE

Background

Vessel strikes can injure or kill species protected under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). NOAA Fisheries Southeast Regional Office (SERO) Protected Resources Division (PRD) recommends implementing the following identification and avoidance measures to reduce the risk of vessel strikes and disturbance from vessels to protected species under our jurisdiction.¹

Protected Species Sightings

All vessel operators and crews should be informed about the potential presence of species protected under the ESA and the MMPA and any critical habitat in a vessel transit area. All vessels should have personnel onboard responsible for observing for the presence of protected species. All personnel should be advised that there are civil and criminal penalties for harming, harassing, or killing listed species and all marine mammals. To determine which protected species and critical habitat may be found in the transit area, please review the relevant [marine mammal](https://www.fisheries.noaa.gov/find-species) and [ESA-listed species](https://www.fisheries.noaa.gov/find-species) at Find A Species (<https://www.fisheries.noaa.gov/find-species>) and any ESA Section 7 consultation documents if applicable.

Vessel Strike Avoidance

The following measures should be taken when they are consistent with safe navigation to avoid causing injury or death of a protected species:

1. Operate at the minimum safe speed when transiting and maintain a vigilant watch for protected species to avoid striking them. Even with a vigilant watch, most marine protected species are extremely difficult to see from a boat or ship, and you cannot rely on detecting them visually and then taking evasive action. The most effective way to avoid vessel strikes is to travel at a slow, safe speed. Whenever possible, assign a designated individual to observe for protected species and limit vessel operation to only daylight hours.
2. Follow deep-water routes (e.g., marked channels) whenever possible.
3. Operate at "Idle/No Wake" speeds in the following circumstances:
 - a. while in any project construction areas
 - b. while in water depths where the draft of the vessel provides less than four feet of clearance from the bottom, or
 - c. in all depths after a protected species has been observed in and has recently departed the area.

¹ Manatees are managed under the jurisdiction of the U.S. Fish and Wildlife Service.

Protected Species Construction Conditions, Revised: May 2021

Vessel Strike Avoidance Measures, Revised: May 2021

<https://www.fisheries.noaa.gov/southeast/consultations/regulations-policies-and-guidance>





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NMFS'S ENVIRONMENTAL CONSULTATION ORGANIZER (ECO)



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HOME

SEARCH

ECO Public Portal



ECO Home Page

Welcome to National Marine Fisheries Service's Environmental Consultation Organizer!

ECO was created in 2019 to organize Endangered Species Act (ESA) section 7 and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat (EFH) consultations.

[ECO Public Portal FAQs](#)

ECO currently includes the following records:

- ESA, EFH, and Combined consultations completed from October 1, 2016 to present.
- ESA programmatic consultations that include NMFS review/approval of implementation actions and records for implemented actions.
- All open or ongoing ESA, EFH, or Combined consultations regardless of when they were requested or initiated.

Information on projects completed prior to October 1, 2016 can be requested via email: **NMFS.Historic.Consultations@noaa.gov**, please include "Consultation Information Request" in the subject line.

To search for a record go to the  **SEARCH** tab in the upper left corner and select parameters for your search.



Source: <https://appsportal.fisheries.noaa.gov/eco/page/home>



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HOME

SEARCH

ECO Public Portal

ECO Record Search Form

Statutory Authority

☒ ESA ☐ EFH ☐ Combined

ESA (Does not include combined)

Record ID

SERO-2024-XXXXX

Working Title

--- Type a Title ---

Agency Project Number

SWG-2024-XXXXX

Region

--- Select a value ---

Division

--- Select a value ---

Branch

--- Select a value ---

Action Agency ?

--- Start typing and select agency information ---

Activity

Construction

Sub-Activity

Beach Renourishment

+ SHOW ADDITIONAL FILTERS

RESET FORM

SEARCH



ECO Record Search Form

Statutory Authority

☒ ESA ☐ EFH ☐ Combined

ESA (Does not include combined)

Record ID

--- Type a Record Id ---

Working Title

--- Type a Title ---

Agency Project Number

--- Type a Project Number ---

Region

SERO

Division

--- Select a value ---

Branch

--- Select a value ---

Action Agency ?

--- Start typing and select agency information ---

Activity

Construction

Sub-Activity

Breakwater

+ SHOW ADDITIONAL FILTERS

RESET FORM

SEARCH

ECO Record Search Results

Record ID	Statutory Authority ?	Working Title	Region	Status
SERO-2024-01635	ESA - Informal	Tyndall AFB Coastal Resilience NBS Project	SERO	Complete
SERO-2024-01082	ESA - Informal	Jupiter Inlet Lighthouse	SERO	Complete
SERO-2024-00963	ESA - Informal	Port Lavaca Nautical Landings Boatramp Breakwater Repair	SERO	Complete
SERO-2024-00708	ESA - Informal	Benny's Shack Rookery Island	SERO	Complete
SERO-2024-00442	ESA - Informal	CBBEP Tern Rookery Island ECS	SERO	Complete
SERO-2024-00150	ESA - Informal	El Rincon Breakwater	SERO	Complete
SERO-2024-00128	ESA - Informal	Monroe County Canal #82, 83, 84	SERO	Complete

OTHER IMPORTANT INFORMATION TO CONSIDER



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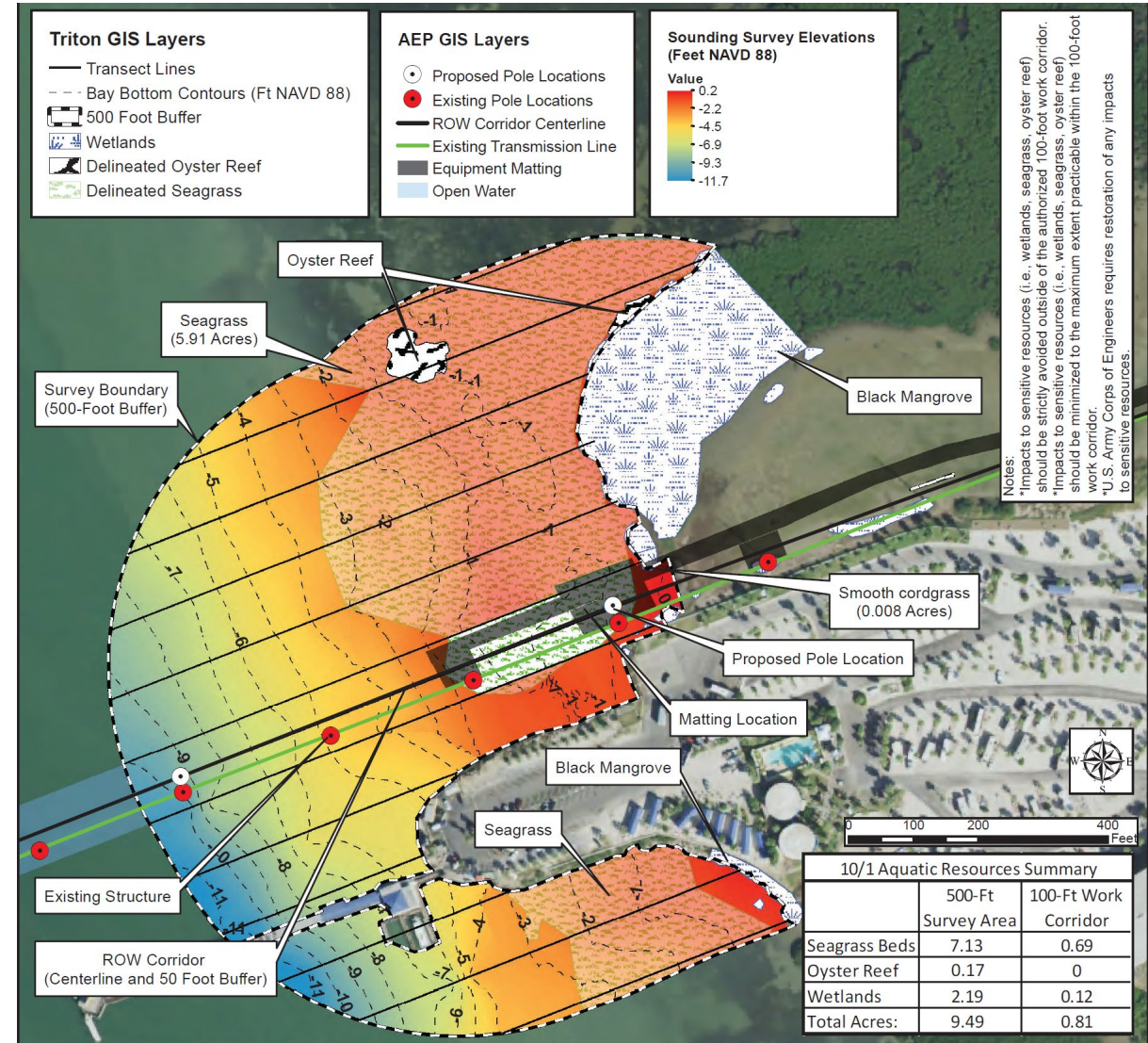
EXISTING CONDITIONS:

- Existing structures
- Existing habitat (e.g. seagrass, hard bottom, mangroves, etc.)
- Uses dominating the area
- Water depth
- Substrate type
- Water quality
- Project map with location of resources/habitat



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POTENTIAL STRESSORS :



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- Sound
- Modification of Habitat Structure and Disturbance
- Dredging
- Water Quality
- Modification of Prey Quantity/Quality
- Vessels
- In-water Structures





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EXPOSURE ANALYSIS – WHAT TO CONSIDER:

- Will there be exposure?
- **What** is the exposure?
- **Where** is the exposure?
- **When** is the exposure?
- What is the **frequency** of the exposure?
- What is the **intensity** of the exposure?
- What is the **proximity** of the action to species' locations and habitats?
- What **time of year** will the action occur related to critical periods (e.g. reproductions, wintering, etc.)?
- What **habitats** will be affected?
- What is the **species distribution** – where does it occur in your action area?
- What is the **duration** of the effects (direct and indirect) of the action on affected species (i.e. short-term, long-term, or permanent)?
- What is the **probability** of these effects occurring?



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Note: Include permanents/temporary access roads, temporary coffer dams, location of silt curtains, vessel access route, HDD laydown area, etc.

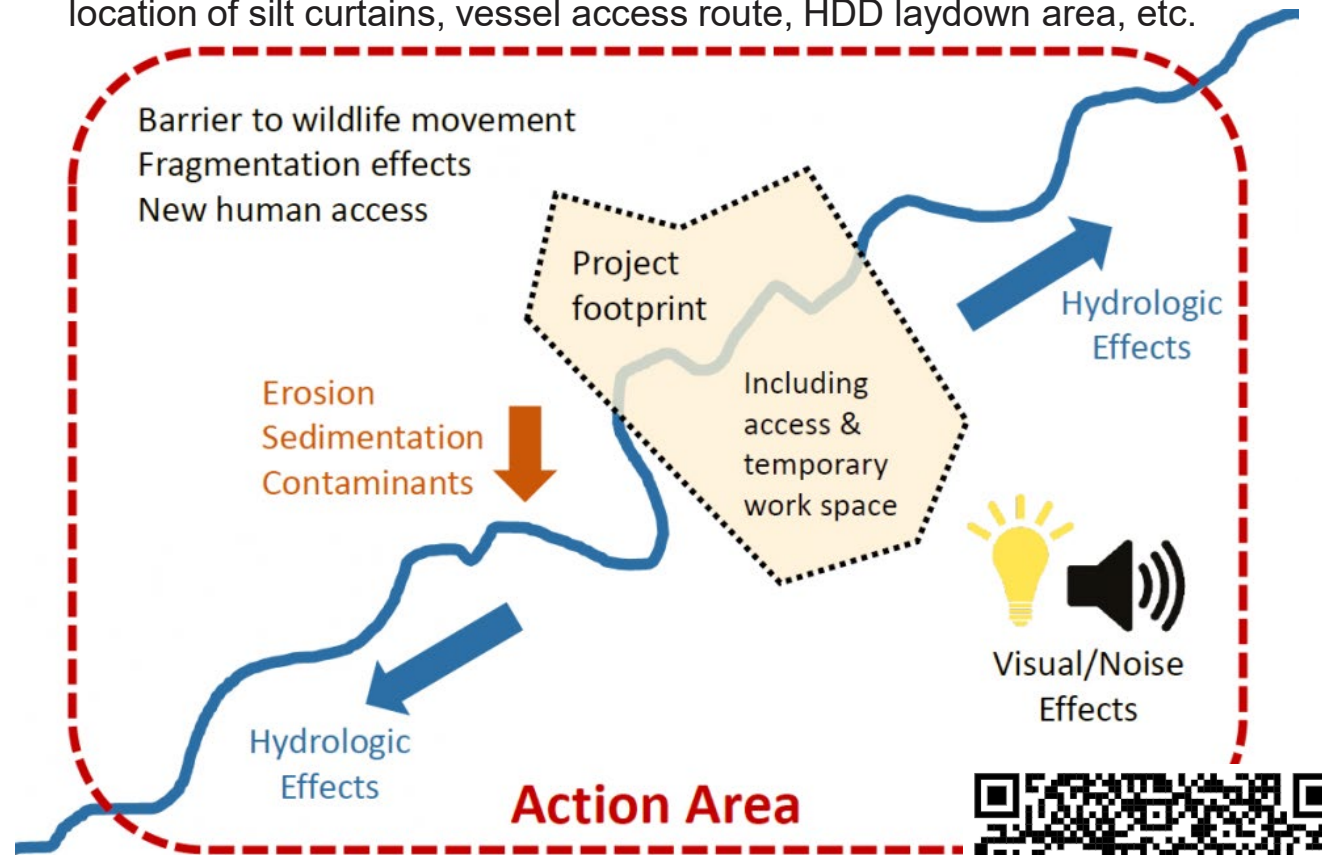


Figure source:

<https://www.fws.gov/office/maine-ecological-services/endangered-species-act-project-review-and-consultation>





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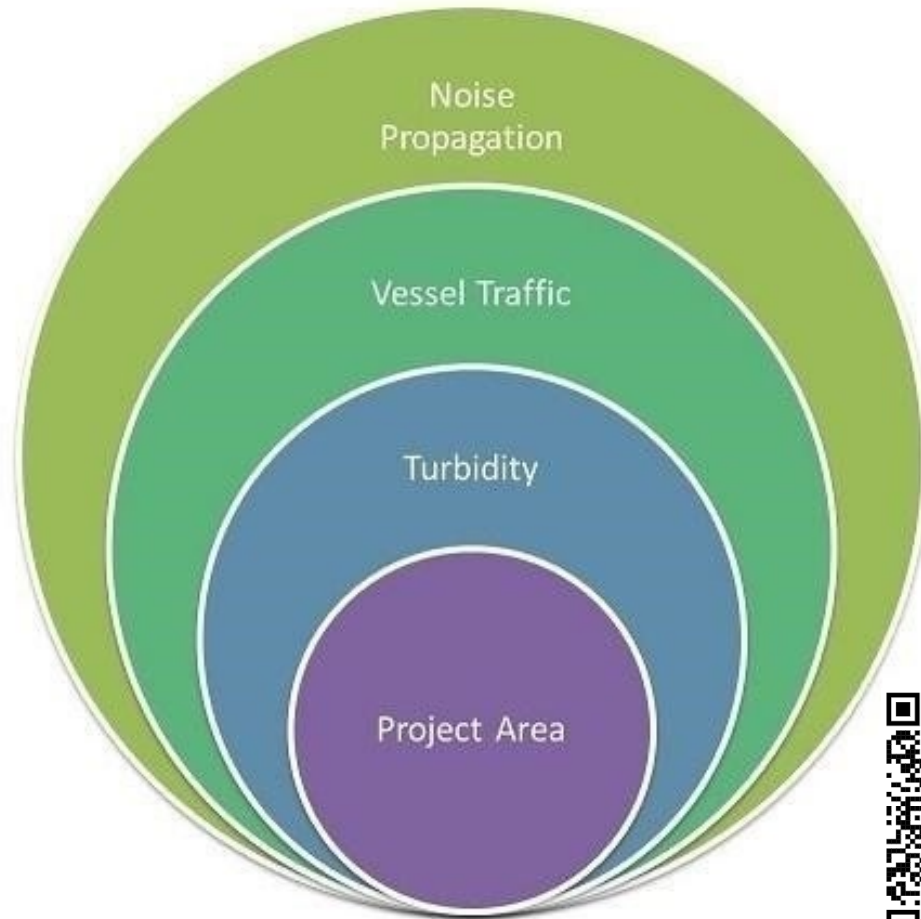
RESPONSE ANALYSIS – WHAT TO CONSIDER:



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Action Area



- What is the species **response** to these effects?
- What is the **likelihood** of a response to these stressors for any given species?
- Are the effects **short-term** (define time period), **long-term** (define time period), or both? What are they and how important is this?
- What is the disturbance **frequency** of the event or action (i.e., how often the effect will occur)?
- What is the disturbance **intensity** (i.e. how much of the habitat [by type] will be affected??
- What is the **severity** (i.e. how long will habitat take to recover)?
- What is the nature of the effects on the species' **lifecycles, population size, variability, or distribution**?
- What part of the population will be affected by this action?
- What is the relative importance of the action area to the species addressed?

Figure source: <https://www.fisheries.noaa.gov/southeast/consultations/section-7-consultation-guidance>



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ADDITIONAL INFORMATION REQUESTS



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Insufficient Project Component Descriptions:

➤ If using **turbidity/silt curtains or cofferdams** will be used, describe:

- installation method
- size of area within the curtain or cofferdam
- in-water duration of installed curtain or cofferdam

➤ If **dredging**, include the following information:

- dredge type (hopper, cutterhead, clamshell, etc.)
- identify whether the project is for maintenance dredging or new dredging
- area (acres/square feet) to be dredged
- volume of material (cubic yards) to be dredged
- type (sand, mud, rock, etc.) of material to be dredged
- for new projects, identify the existing and proposed depth to be dredged
- for maintenance projects, identify the currently authorized dimensions (area and depth) of channel and/or location to be dredged
- if sediment testing was conducted, disclose whether the material is contaminated and provide the report

- provide details regarding the dredge material disposal plan:
 - disposal location (e.g., upland contained Dredged Material Placement Area [DMPA], open water, beneficial use, etc.),
 - method of disposal,
 - estimate of number of trips (if applicable),
 - sediment type at disposal area, and
 - thickness of material placement
- if maintenance is included, indicate the frequency of recurring dredging and location of disposal
- time of year proposed (dredging start and stop dates)
- duration of work (total hours or days of dredging)





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ADDITIONAL INFORMATION REQUESTS CONT.



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Insufficient Project Component Descriptions:

➤ If there will be project **vessels**, provide:

- approximate size and type of vessel (i.e., deep draft, cargo, barge etc.)
- available information on speed
- travel routes (include figure)
- number of trips
- time window of operations
- amount of time each vessel will be underway
- presence of lookout

➤ If **in-water or over-water structures**, include the following information:

- type of structure(s) proposed (e.g. boat basin, riprap, seawall, pier)
- square and/or linear feet of the structure
- description of how the structure will be constructed, installed, or removed
- propose spacing between deck boards (if applicable)
- height of any structures above Mean High Water (MHW)
- state whether the structure would be new, replacing an existing structure, or removing an existing structure
- whether any listed or non-listed special resources (i.e.,

seagrass, mangroves, or corals) are in the footprint of the structure

- generally, (depending on location, listed species, critical habitat, etc.) repair and/or replacement of public fishing piers cannot be consulted on informally unless the project has an existing consultation that considers the potential of “take” due to recreational fishing

➤ If **aquaculture**, describe:

- species being grown/raised
- source of species (spat, stock, etc.)
- all proposed gear including vertical and ground lines, anchoring methods
- layout of gear (include figures wherever possible)
- markings and maintenance planned for gear
- size of area impacted/leased and portion of area where gear will be deployed



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ADDITIONAL INFORMATION REQUESTS CONT.



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Insufficient Project Component Descriptions:

➤ If rip-rap or other material being placed on shoreline or bottom, describe:

- type of material
- dimensions (water depth, linear feet, and area covered by riprap)
- placement method (e.g., small rocks by hand)
- material source location
- whether material will be placed below and/or above the waterline
- volume of material to be placed
- characteristics of substrate that will be covered or removed



➤ If pile driving:

- provide information on the specific construction methodology used to install the pilings and/or sheetpiles, if any (e.g., impact hammer, vibratory hammer, jetting, etc.)
- identify the type of material the piling (e.g., wood, steel, concrete, etc.) or sheetpile (e.g., steel, fiberglass, vinyl, etc.) is composed of
- identify the size of the pile and how many will be used
- describe any proposed noise abatement
- number of piles installed per day
- anticipated duration of pile driving activity (days)
- if using impact hammer, number of strikes per pile
- if using vibratory hammer, number of seconds of vibration per pile





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SERO – MULTI-SPECIES PILE DRIVING CALCULATOR



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- Only for use with NMFS listed species
- Excel spreadsheet and instructions available for download from SERO website at:

<https://www.fisheries.noaa.gov/southeast/consultations/section-7-consultation-guidance>



- Results from this calculator are used to determine action area in relation to noise impact caused by pile driving
- If submitting with application, please submit the spreadsheet for review.

IMPACT PILE DRIVING REPORT

VERSION 1.2-Multi-Species: 2022

Buckeye Terminal near Corpus Christi in Nueces Bay, narrow industrialized channel

PRINT IN LANDSCAPE TO CAPTURE ENTIRE SCREEN

(if OTHER INFO or NOTES get cut-off, please include information elsewhere)

PROJECT INFORMATION

	PEAK	SELss	RMS
Single strike level (dB)	197	166	182
Distance associated with single strike level (meters)	10	10	10
Transmission loss constant	15		
Number of piles per day	4		
Number of strikes per pile	350		
Number of strikes per day	1400		
Cumulative SEL at measured distance	197		

OTHER INFO 44 42" Steel Piles for Barge Dock

NOTES 0

Attenuation 0

RESULTANT ISOPLETHS

(Range to Effects)

FISHES

	ONSET OF	PHYSICAL INJURY		BEHAVIOR
	Peak	SEL _{cum} Isopleth		RMS
	Isopleth	Fish ≥ 2 g	Fish < 2 g	Isopleth
ISOPLETHS (meters)	2.5	49.8	92.1	1,359.4
Isopleth (feet)	8.2	163.5	302.0	4,459.8

Fishes present

SEA TURTLES

	PTS ONSET		BEHAVIOR
	Peak Isopleth	SEL _{cum} Isopleth	RMS Isopleth
ISOPLETHS (meters)	0.0	3.7	29.3
Isopleth (feet)	0.2	12.0	96.1

Sea Turtles present

MARINE MAMMALS

	LF Cetacean	MF Cetaceans	HF Cetaceans	PW Pinniped	OW Pinnipeds
PTS ONSET (Peak isopleth, meters)	0.3	0.1	4.6	0.4	0.0
PTS ONSET (Peak isopleth, feet)	1.1	0.2	15.2	1.3	0.2
PTS ONSET (SEL _{cum} isopleth, meters)	91.9	3.3	109.5	49.2	3.6
PTS ONSET (SEL _{cum} isopleth, feet)	301.6	10.7	359.3	161.4	11.8
	ALL MM	MF Cet. present	HF Cet. present	Phocids present	Otariids present
Behavior (RMS isopleth, meters)	292.9	LF Cet. present			
Behavior (RMS isopleth, feet)	960.8				



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AVOIDANCE/MINIMIZATION MEASURES:



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Measures proposed as part of the action to avoid, minimize, or offset the effects of the proposed action (e.g., special permit conditions, restrictions on equipment, time of year, daytime only construction, etc.).

Examples:

- *If maintenance dredging activities are scheduled for summer months (<provide specific timeframe>), a mechanical dredge will be used rather than a pipeline or hopper dredge to minimize impacts to listed species.*
- *The applicant has agreed to incorporate and adhere to the **Protected Species Construction Conditions (2021)***. NOTE: All of the conditions may not apply to the project or may not be able to be implemented. If this is the case, specify which conditions the applicant would incorporate into the project.*
- *The proposed project will be conducted within a timeframe <provide specifics> to avoid the time of year when the listed species is likely to be present.*
- *All work will occur during within daylight hours.*

- *Vibratory hammer will be utilized to the maximum extent practicable. NOTE: If the applicant is unsure whether they will use a vibratory hammer or an impact hammer, then you should disclose the possibility that either may be used and analyze the impacts and consider conservation measures for the “worst case scenario.”*
- *Pile driving activities will be limited to no more than 12 hours per day.*
- *The applicant has agreed to incorporate and adhere to **SERO's Vessel Strike Avoidance Measures (2021)***. NOTE: All of the measures may not apply to the project or may not be able to be implemented. If this is the case, specify which measures the applicant would incorporate into the project.*
- *Sediment disturbing activities will be carried out in a way <provide specifics> that will minimize the effects to benthic resources that serve as forage for the listed species.*
- *Turbidity control Best Management Practices (BMPs) will be implemented throughout the project timeframe and will include the following:*
 - *erosion and siltation barriers to prevent turbidity levels surrounding the project area from exceed background conditions.*
 - *turbidity curtains will be removed promptly when the water quality in the project area has returned to baseline conditions.*

* This would only apply to consultation conducted with NMFS.



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MISCONCEPTIONS

Project is net positive: A combination of beneficial and adverse effects is still “may affect”, even if the net effect after the project is completed is neutral or positive.

Not known to occur here: Unless adequate surveys have been conducted or adequate information sources have been referenced, this statement begs the questions “Have you looked?” and “How have you looked?”. If suitable habitat is present, and you have not conducted adequate surveys (using accepted protocols), then you must assume the species is present for your analysis.



eastern black rail - threatened



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MISCONCEPTIONS CONT.



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whooping crane - endangered



Displacement: The argument that removal of habitat or disturbance of individuals results in a “not likely to adversely affect” or a “no effect” determination because individuals can go elsewhere. Animals that must move, or “go elsewhere” during critical life stages can be stressed to the point of harm or harassment. Also, other suitable habitats may already be occupied by other individuals of that species.

We'll deal with it later or, if the Service will concur with a “no effect” or a “not likely to adversely affect” determination now, the federal agency will promise to coordinate if listed species are located and do whatever the Service wants to protect them later. This is not consistent with ESA regulations and consultation procedures, section 7 consultation must be complete before an action is permitted or authorized. If a listed species is found at a project site where no consultation has previously occurred, all work would have to cease until consultation could be completed, which can result in costly delays. During project planning, federal agencies should include adequate time to conduct surveys, gather information, complete analyses, and conduct interagency consultation.



CONSULTATION TIMEFRAMES



50 CFR 402.13 Informal Consultation

(c)(2) **60 days** to issues concurrence; may be extended, but shall not exceed 120 days total from the date of receipt of the Federal agency's written request

50 CFR 402.14 Formal Consultation

(e) *Duration and extension of formal consultation.* 90 days to conclude formal consultation; may be extended up to 60 days; 45 days to deliver biological opinion (approx. **135 days**, without extension)



Source: <https://www.ecfr.gov/current/title-50/chapter-IV/subchapter-A/part-402>

CRITICAL NOTE:

- The clock for completing consultation **begins** once the **Service determines** the consultation request package is **complete** - contains the information necessary to adequately evaluate the potential effects of the proposed action.

NOAA Fisheries/NMFS:

- Currently reporting a 4-6 week assignment delay.
- Delays due to incompatible workload and staffing levels.
- Consultation assigned in the order of receipt.
- Individual consultation completion times are impacted by the consultation type, complexity, completeness of information, and our consultation biologist's workload, and then further affected by the workload of the reviewers and other actions being handled in our office.
- Additional information requests provide 45 days to respond. Will withdraw if no response received.
- Consultations currently ranging between 2-5 months from initiation date.



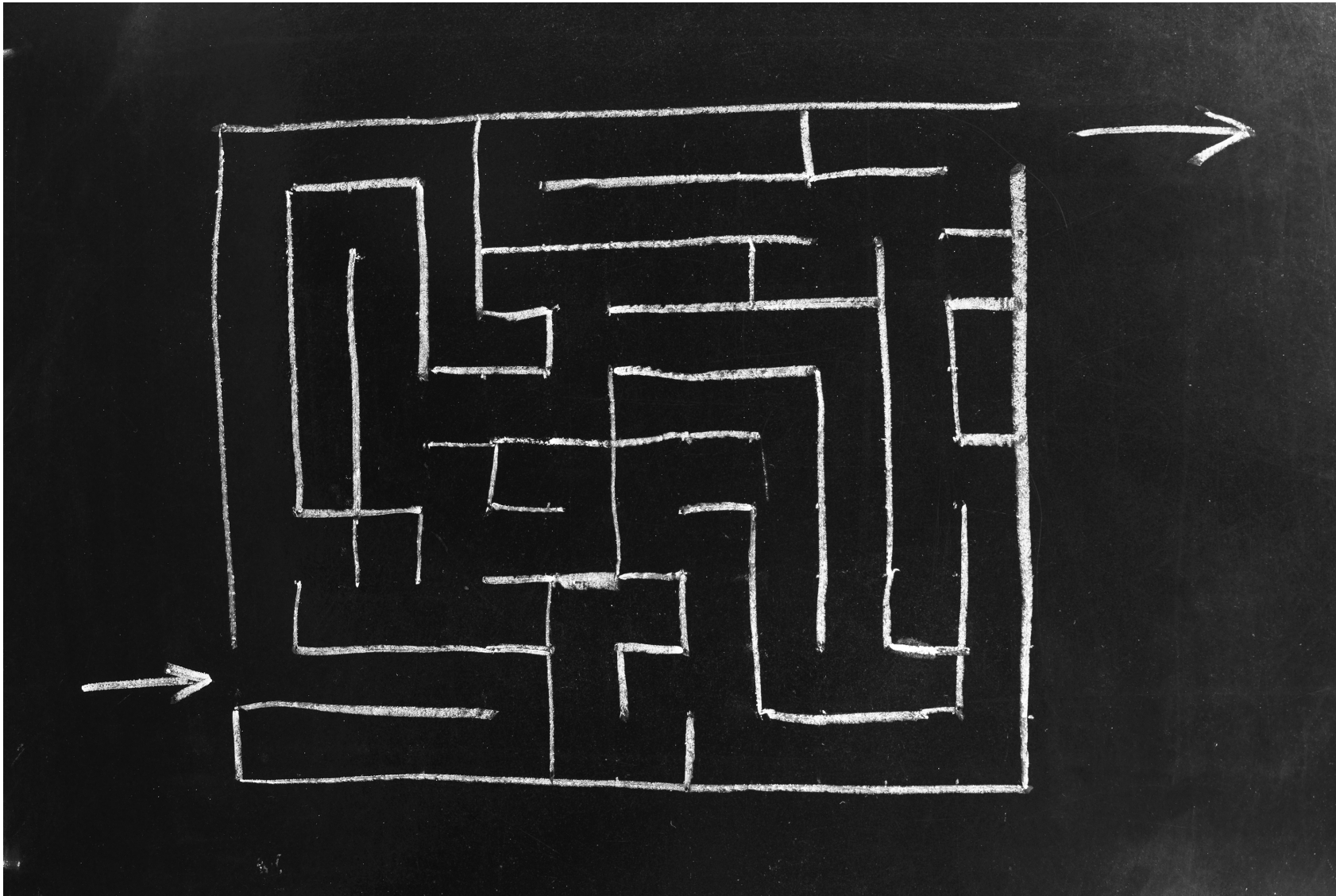
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Q&A



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33 USC 408

Galveston District Southwestern Division

Bonnie Jennings

Section 408 Program Manager

Headquarters

Charlene Harry

408 Coordinator, SWG Project Operations

Branch

Aron Edwards, Acting

Land Use Coordinator, SWG Navigation

Branch



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BUILDING STRONG®



Section 408

Civil Works Mission / Operations Division



Provide safe, reliable, efficient and environmentally sustainable waterborne transportation systems (channels, harbors, and waterways) for movement of commerce, national security needs, and recreation.



Reduce the risk of loss of life, reduce long-term economic damages to the public and private sector, and improve the natural environment. This includes the appropriate use and resiliency of structures such as levees and floodwalls



When does Section 408 apply?

- All Alterations to USACE Civil Works Projects within real estate interest, areas used by USACE project in Navigable Waters, and vicinity of Flood Risk Management USACE projects
- Actions that build upon, alter, improve, move, occupy or otherwise could affect the USACE project



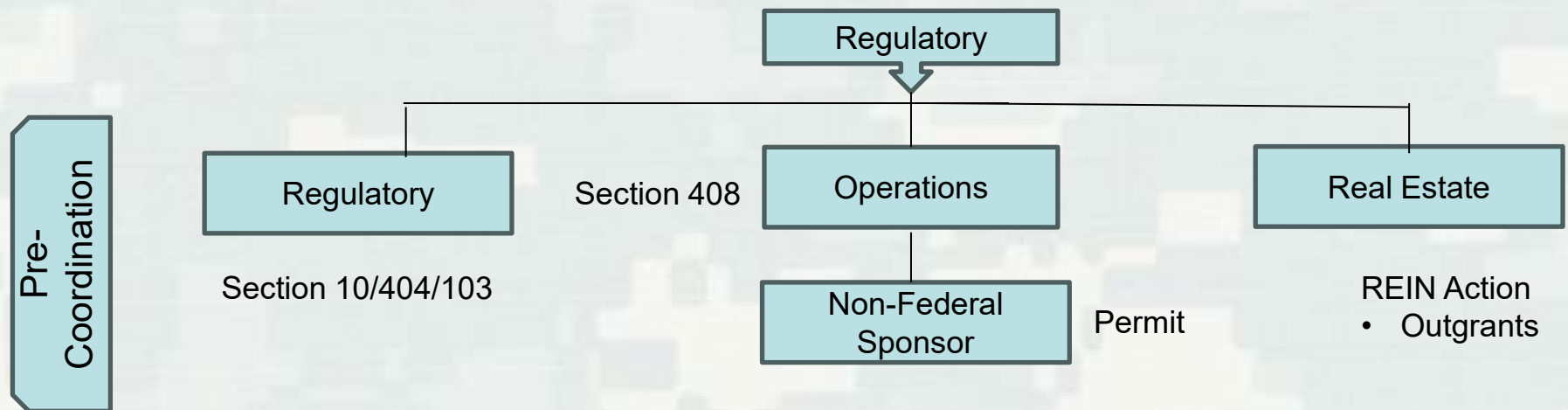
What is a Section 408?

- 33 USC 408 (Section 408) provides USACE authority to grant permission to alter a USACE civil works project if it
 1. Does not impair the usefulness of the project
 2. Will not be injurious to the public interest
- EC 1165-2-220 provided policy and procedural guidance for processing request to Alter a USACE Civil Works Project pursuant to 33 USC 408



USACE SWG

Section 408 Process



Regulatory – Internal Review

- No Federal Interest
- Adjacent Interest, May Affect, Info Needed
- Federal Interest, No Adverse Effect, Special Conditions
- Federal Interest, Will Effect, 408 Required



Real Estate Outgrant

- Real Estate tract impacted by proposed project
- Submittal of Real Estate application to RE Division required
- Operations review will be conducted under the Real Estate Outgrant review
- Regulatory permit must be authorized before RE Outgrant can be finalized.



Section 408 Permission Letter

- Federal project may be impacted by proposed project (No Real Estate tracts impacted)
- Submittal of Section 408 application to Operations Division required
- Non-Federal Sponsor coordination of Review and Letter of No Objection Required
- Section 408 Letter must be authorized before Regulatory permit can be finalized.



Funding Options

- Federal Appropriation
 - ▶ Fiscal Year Funding (HQ) is Limited
- Section 1156(a) (2)
 - ▶ Contributed Funds Agreement
 - ▶ Fee Letter
- Section 214
 - ▶ Non-Federal Sponsor



Section 408 FRM Review

Basic Requirements for complete request:

1. USACE Project and Alteration Description (408 Application)
2. Real Estate Requirements
3. Technical Analysis and Design (Geotech, D&L, H&H, Structural)
4. Environmental and Cultural Resources Compliance
5. Summary of Findings
6. Letter of No Objection if managed by our non-Federal Sponsor
7. O&M (Operation & Maintenance) Summary of changes

Additional Requirement when applicable:

1. RMC – Risk Management Center
2. EM – Emergency Management
3. HRRB – Historic Resource Review Board
4. SAR – Safety Assurance Review



Section 408 NAV Review

Basic Requirements for complete request:

1. USACE Project and Alteration Description (408 Application)
2. Scope of Work/ Work Plan
3. Project Plans (MLLW)
4. Environmental and Cultural Resources Compliance
5. Letter of No Objection from non-Federal Sponsor
6. Summary of Findings

Additional Requirement when applicable:

1. Geotechnical analysis
2. Structural analysis
3. Hydraulic analysis
4. Tidal analysis
5. Ship simulation
6. USCG and local Pilot coordination



Examples of 408 projects:

- NAV
 - ▶ Pipeline removal/installation under Federal channel
 - ▶ New work dredging
 - ▶ Bulkheads/docks adjacent to Federal channel
 - ▶ Pipeline adjacent to Placement Area

- FRM
 - ▶ Pipeline adjacent to FRM levee
 - ▶ Construction on Galveston Seawall
 - ▶ Hike and Bike Trails in Harris County
 - ▶ Construction within or adjacent to FRM project- May not require a Regulatory Permit



Phases of a Section 408 Review



- Pre-Coordination
 - Pre-application
 - Awaiting Application
 - Awaiting Drawings
 - Awaiting Funds
- USACE Comments
 - Applicant Response
 - Updated Drawings
 - NEPA Compliance
 - NFS LONO
 - Summary of Findings
 - Permission Letter with Special Conditions
- Construction Oversight Details
 - Pre-Construction Meeting
 - Final Construction
 - As Built
 - Project Closeout



SWG/ Mission/ Operations/ Land Use

🏠 / Missions / Operations Division / Land Use



Land Use

The U.S. Army Corps of Engineers Galveston District has real estate interests over lands for various purposes, including operations and maintenance of its navigation and flood risk management projects. These interests include fee ownership, perpetual easements, navigational servitude, rights-of-way, etc.

Non-federal entities often wish to gain access to these lands for various purposes. Some examples of these non-federal uses include: installation of temporary structures, staging areas for non-federal projects, installation of pipelines, disposal of dredged material, agricultural and recreational uses, etc.

Coordination with the Galveston District is required in order to use these lands. Depending on the scope and location of the non-federal project, coordination with one, or all, of the following Galveston District offices may be required: **Regulatory Division** (Department of the Army Permits), **Real Estate Division** (Outgrants) and/or **Operations Division** (Section 408 Reviews).

SWG Land Use Web GIS
Viewer

For more information on the Regulatory and Real Estate Divisions, scroll to the bottom of the page.

Resources

- [408 Application](#)
- [Real Estate Application](#)
- [Regulatory Permit Process](#)
- [Section 401\(C\)](#)
- [Frequently Asked Questions \(FAQ\)](#)
- [USACE Permit Finder](#)
- [Section 408 Pre-App Meeting Guide](#)
- [Section 408 Overview](#)
- [Section 408 Common Questions](#)
- [Section 408 Process Guide](#)

Guidance

- [Disposal Dredge Material](#)
- [Sampling and Analysis Plan Protocol](#)
- [Example Sediment Testing Report](#)
- [Procedural Review Plan](#)
- [EC 1165-2-220](#)



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Key Points

- Process is District Led
- Pre-application Meeting are encouraged
- Coordination throughout the Process with all Stakeholders is most effective

