

Fish Passage Requirements of the Clean Water Act Section 404 Program

Fish Passage Meeting Juneau, Alaska

October 2015

U.S. Army Corps of Engineers,
Alaska District, Regulatory Program
U.S. Environmental Protection Agency,
Region X



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PRESENTATION OUTLINE

- **Intro to CWA**
- **Jurisdiction**
- **Regulated & exempt discharges**
- **Permit options**
- **Specific requirements**
- **Compliance**



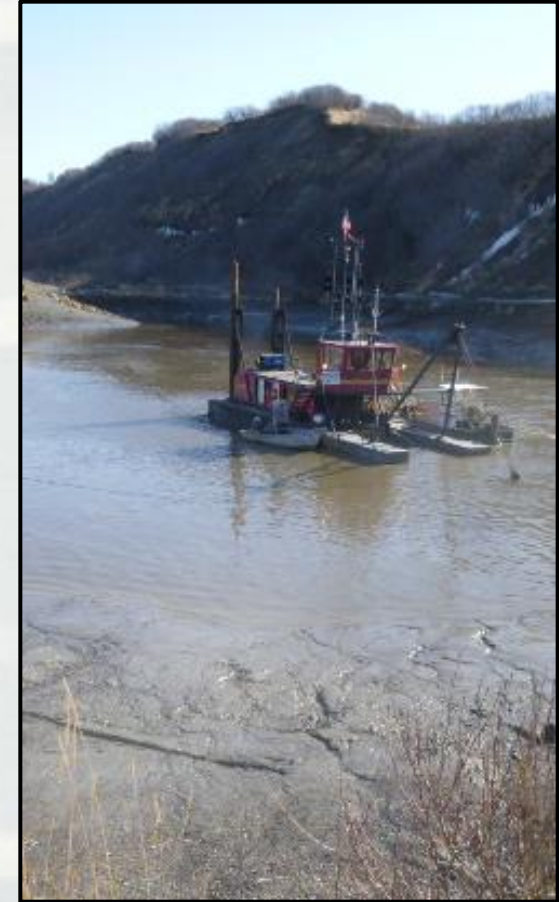
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AUTHORITY

CLEAN WATER ACT SECTION 404:

PRIMARY GOAL:

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



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404 Permit Review - CWA

- In most cases, a discharge is prohibited unless authorized by permit.
- The intent is to maintain the functional processes of the aquatic ecosystem.
- The scope is much broader than fish passage. Passage is required, but may not be sufficient.
- Discharges authorized under Section 404 must comply with the 404(b)(1) Guidelines.
- CWA, ESA, EFH, USFWS, NEPA & Section 106 impacts, are all evaluated.



CLEAN WATER ACT SECTION 404 WATERS OF THE UNITED STATES

Includes:

- All Section 10 waters
- Rivers, tributaries, lakes, bogs, marshes, most wetlands, etc.

References:

National Wetlands Inventory maps produced by the U.S. Fish & Wildlife Service are available at www.fws.gov/wetlands/

Soil surveys from the Natural Resources Conservation Service can be accessed at www.websoilsurvey.nrcs.usda.gov/app/

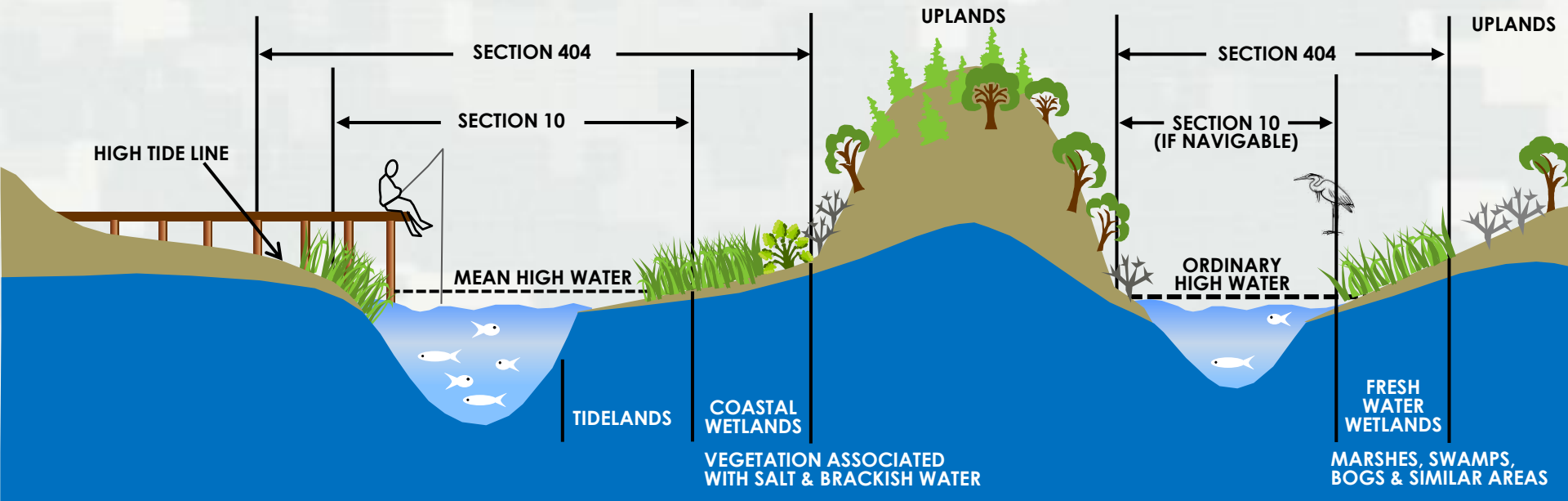


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CLEAN WATER ACT SECTION 404 RIVERS & HARBOR ACT OF 1899 SECTION 10

JURISDICTIONAL AREAS

REGULATORY PROGRAM JURISDICTION



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CLEAN WATER ACT SECTION 404

REGULATED ACTIVITIES

- Discharge/placement of dredged or fill material into waters of the U.S.
- Includes mechanized land clearing/leveling
- Congress exempted discharges from certain agricultural, logging, forest road, ranching activities – 404(f) exemptions



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Exempt Discharges under 404(f)

- **323.4(a)(6): Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized.**



Exempt Discharges Under 404(f)

15 BMPs required under 323.4(a)(6)(i-xv).

- *(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;*
- *(vii): The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;*
- *(x): Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practicable alternatives exist;*

Failure to meet the BMPs results in “recapture” of the road; i.e., the fill discharge is no longer exempt and requires a permit.



TYPES OF PERMITS

Nationwide/ Regional General Permits

- Issued by USACE Headquarters/districts for activities with minimal adverse effects to the aquatic environment
- Established through public notice and comment
- Valid for 5-year period – current NWP expire in 2017
- Shorter processing time than Individual Permits (45-60 days)

Standard Individual Permits

- Public notice on specific project; 120+ day processing times
- Activities with potentially more than minimal impact (outside general permit thresholds)

Other Permit Types

- Letter of Permission: In Alaska, an expedited review
For certain activities not involving fill in navigable waters (Section 10)



Nationwide Permit Conditions

- **31 - General Conditions: Adopted by Corps HQ**
- **2. Aquatic Life Movements.** *No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.*
- **3. Spawning Areas.** *Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.*
- **9. Management of Water Flows.** *To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).*



Nationwide Permit Conditions

- **13 - Regional Conditions: Adopted by Alaska District**
- **REGIONAL CONDITION I - Relocation of Stream Beds**
- *Relocated stream channels shall approximate the length, meander pattern, gradient, channel cross-section, substrate and flow velocity of the original stream channel. Relocated stream channels shall be designed and constructed to avoid excessive loss of flow through the bed and dewatering of the stream channel. The relocation of stream channels shall include establishment of an associated floodplain. The floodplain shall be of similar dimension and form as the original, or sized to convey the 100-year flood while retaining the channel, substrate, and floodplain characteristics without significant down- or head-cutting.*
- **REGIONAL CONDITION J - Culvert Installation**
- *Culverts in fish bearing waters must be installed in accordance with a valid Alaska Department of Fish and Game, Fish Habitat Permit.*
- **Special Conditions: May be added to any permit type**
 - ▶ E.g., Timing window



MITIGATION SEQUENCING

40 CFR 230.10(d): *no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.*

Subpart H identifies steps to avoid, minimize, and compensate for potential adverse impacts. These steps are taken in sequence.

1. **Avoidance** - avoid impacts to Waters of the United States, including wetlands, to the maximum extent practicable
2. **Minimization** - minimize impacts that can't be avoided
3. **Compensation** - compensate for impacts that remain after avoidance and minimization



ENFORCEMENT & COMPLIANCE

Unauthorized Activity

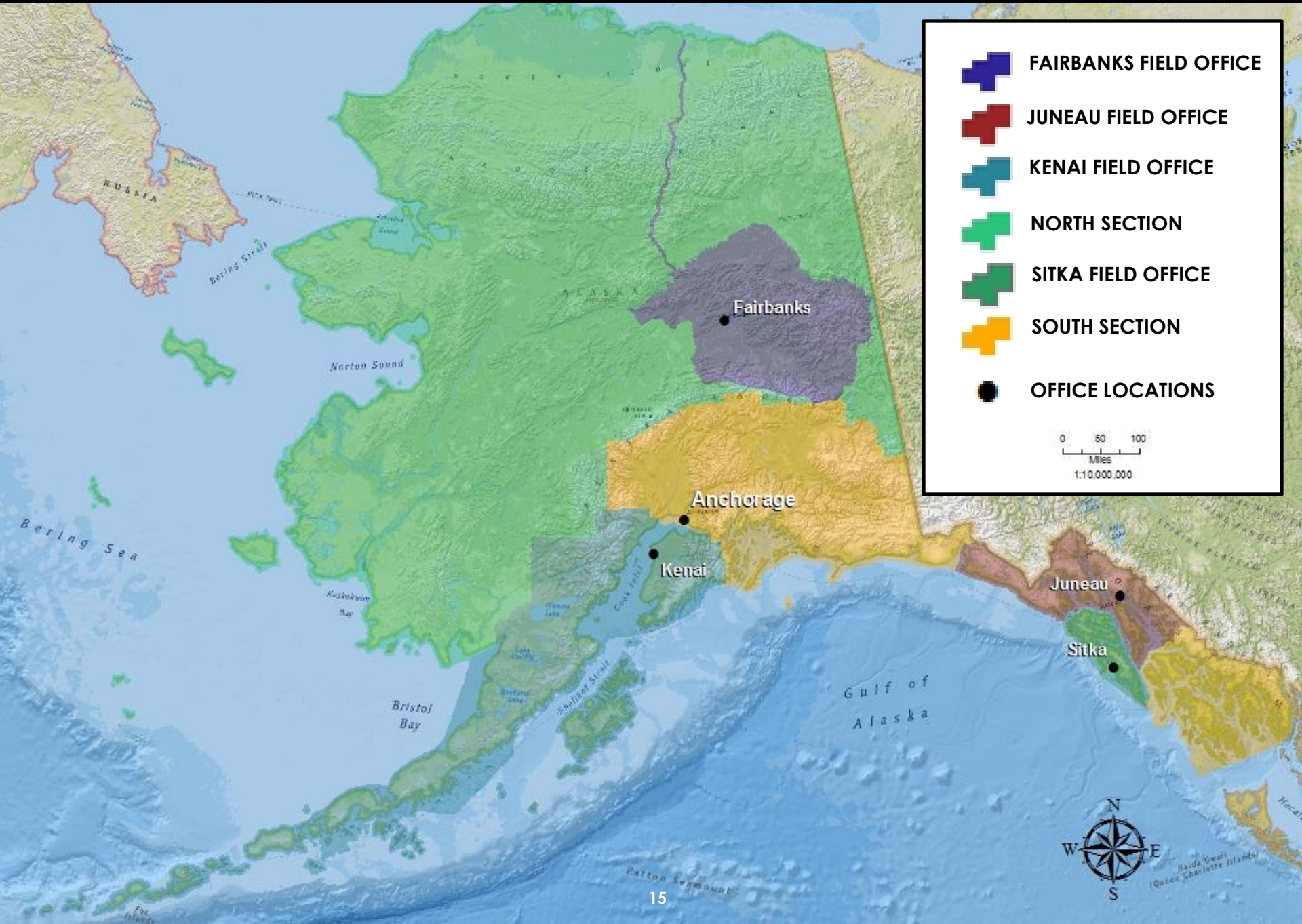
- After-The-Fact Permit
- Voluntary restoration
- Compliance Order
- Refer to the U.S. EPA
- Administrative penalties
- Legal action

Permitted Activities

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



ALASKA DISTRICT REGULATORY OFFICE BOUNDRIES



THANK YOU

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