

# USACE HONOLULU DISTRICT REGULATORY PROGRAM OVERVIEW

Joshua Moffi  
Regulatory Office  
Honolulu District, USACE  
Date: 13 November, 2024



US Army Corps  
of Engineers®





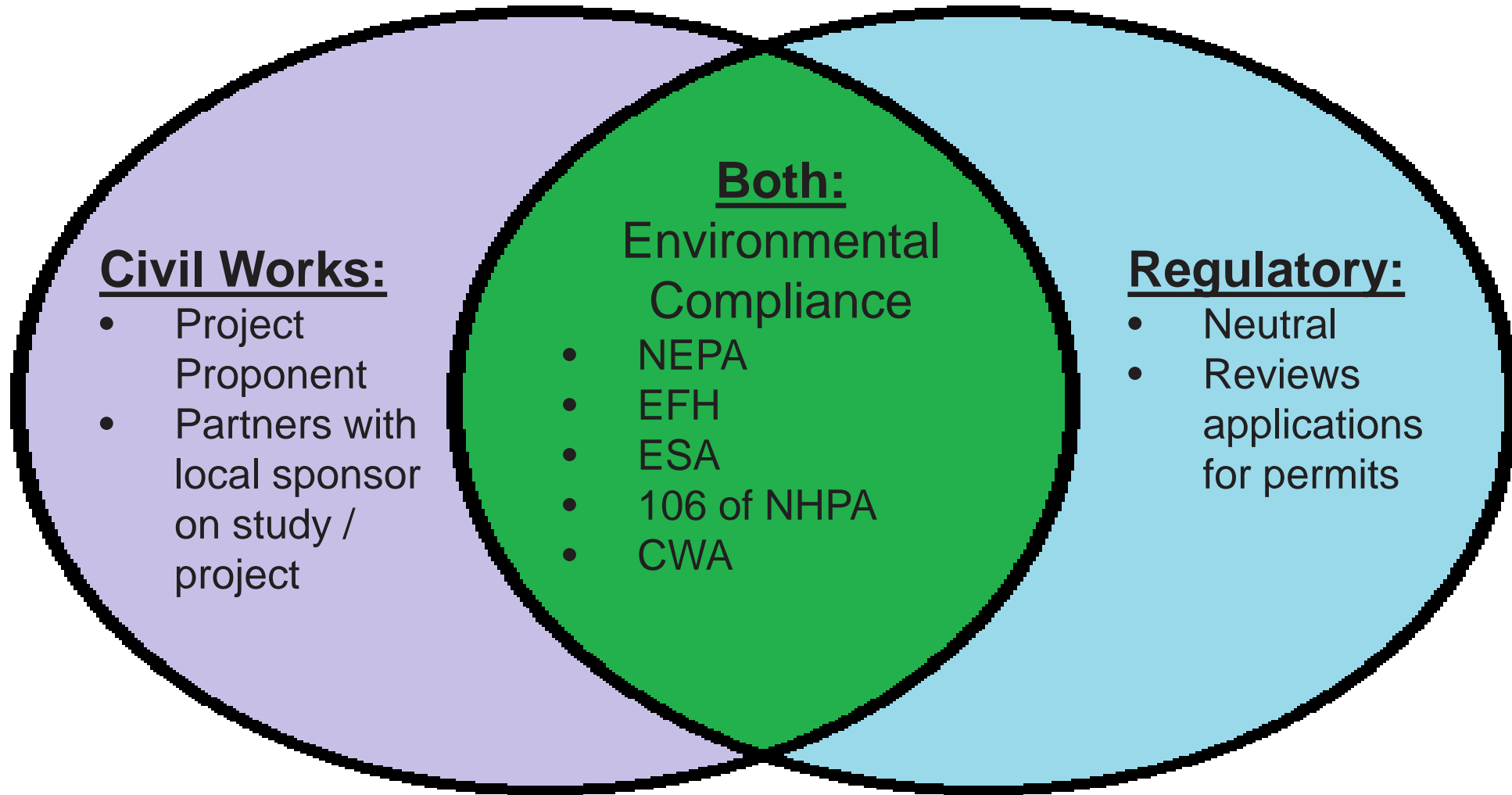
# OUTLINE

1. Corps regulatory scope, mission, authorities
2. Corps geographic jurisdiction
3. Permitting process and activities
4. Consultation, Compensatory Mitigation, Section 401 Cert.
5. Keys to a good application





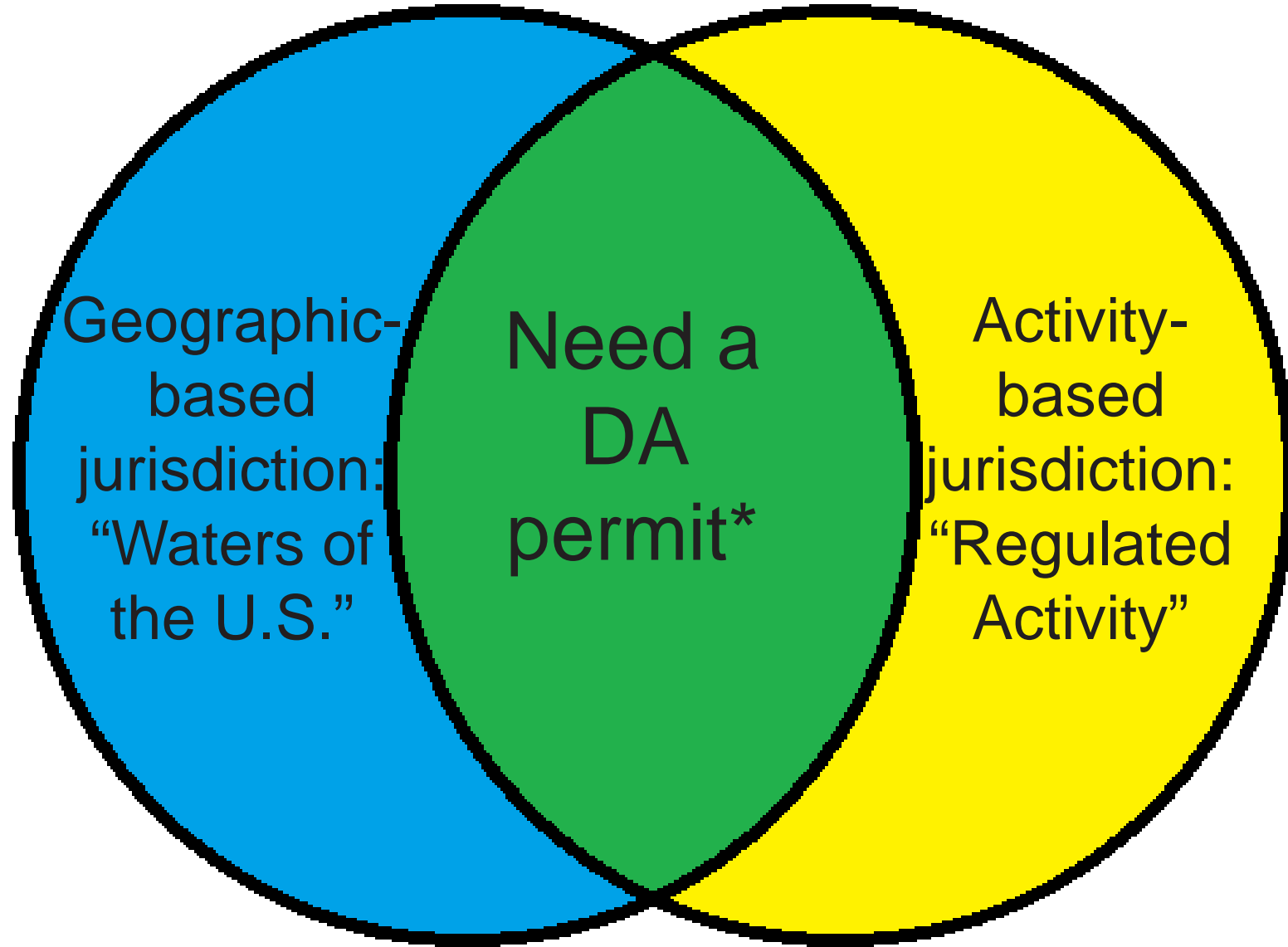
# REGULATORY COMPARED TO CIVIL & PUBLIC WORKS





# WHAT DO WE DO?

We review Department of the Army (DA) “Corps” permit applications for certain **activities** in **waters of the U.S.**



*\*unless an exemption applies*



# REGULATORY MISSION

To protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.





# MAIN CORPS AUTHORITIES (APPLICABLE LAW)



## Section 10 of the Rivers and Harbors Act (1899)

- **Structures** in and **work** in, over or under navigable waterway, i.e., **tidally-influenced**.
- Purpose - to maintain navigation

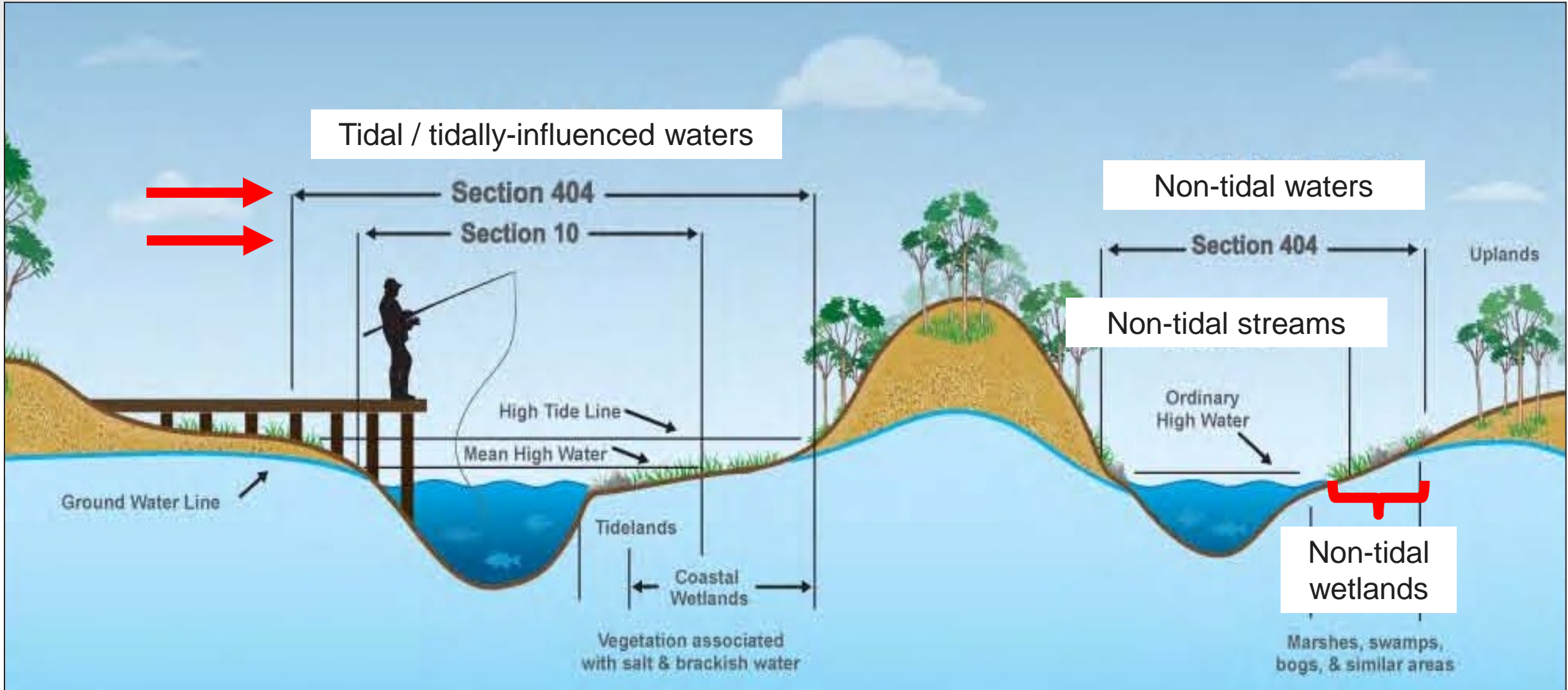
## Section 404 of the Clean Water Act (1972)

- Discharge of **dredged** and/or **fill material** into **all** waters of the United States, including wetlands.
- Purpose - to protect aquatic resources from mauka to makai.





# JURISDICTION: TIDAL VS NON-TIDAL





# NEW DEFINITION OF WATERS OF THE U.S.



In Honolulu District

- **Amended “January 2023 Rule”**
- Effective as of September 8, 2023
- Removal of the significant nexus standard
- Scalia plurality opinion from *Rapanos v. U.S.* (2006) on WOUS:
  - “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes”
  - Adjacent wetlands = “having a continuous surface connection to WOUS”



See <https://www.epa.gov/wotus> for additional information.  
Please contact [wotus-outreach@epa.gov](mailto:wotus-outreach@epa.gov) with any questions.





# TYPES OF PERMITS

## General Permits

- Nationwide Permits
- ENG Form 6082
- Corps processing time is ~60 days

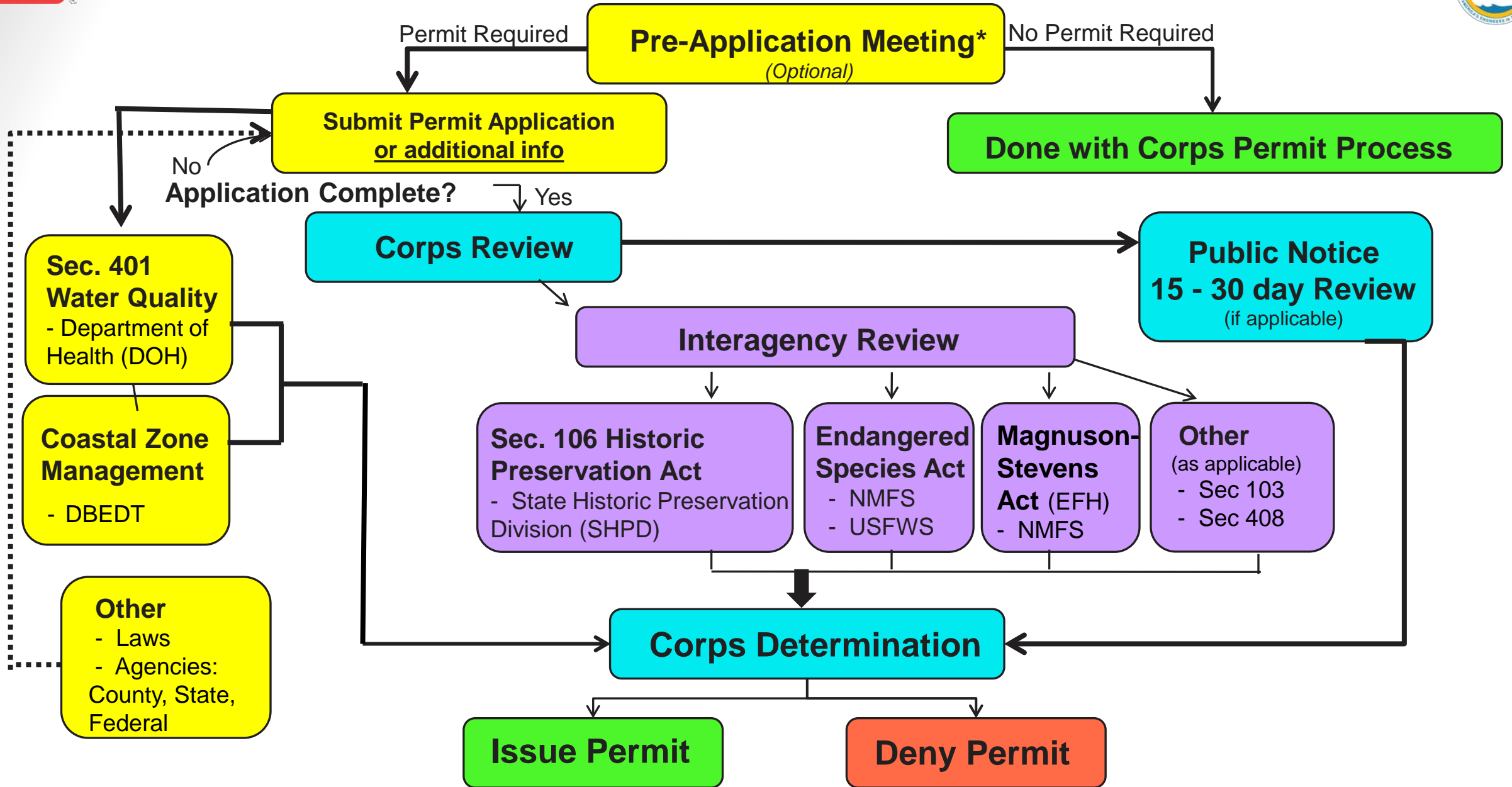
## Individual Permits

- Standard Permits or Letters of Permission
- ENG Form 4345
- Corps processing time is ~120 days
- Adjacent property owner names and mailing addresses
- Alternatives analysis





# CORPS REVIEW PROCESS





# EXAMPLE ACTIVITIES – SECTION 10

Structures or work in  
Section 10 waters  
(tidally-influenced)

- Dredging
- Dock / pier installation / repair
- Temporary structural construction BMP
- Utility line installation repair over or under Sec 10 water





# EXAMPLE ACTIVITIES – SECTION 404

- Discharge of fill (all WOUS)
  - Grading/ grubbing, including temporary, e.g., access roads, machine removal of mangrove roots, fill BMPs
  - Expand fishpond makaha / walls beyond approximate original design
  - Erosion protection along shoreline (e.g., revetment) or stream banks
  - Ecosystem restoration
  - Residential / industrial development
  - Open trench utility line installation/ repair
  - Road / bridge repair





# TRIGGERS FOR CORPS PERMIT



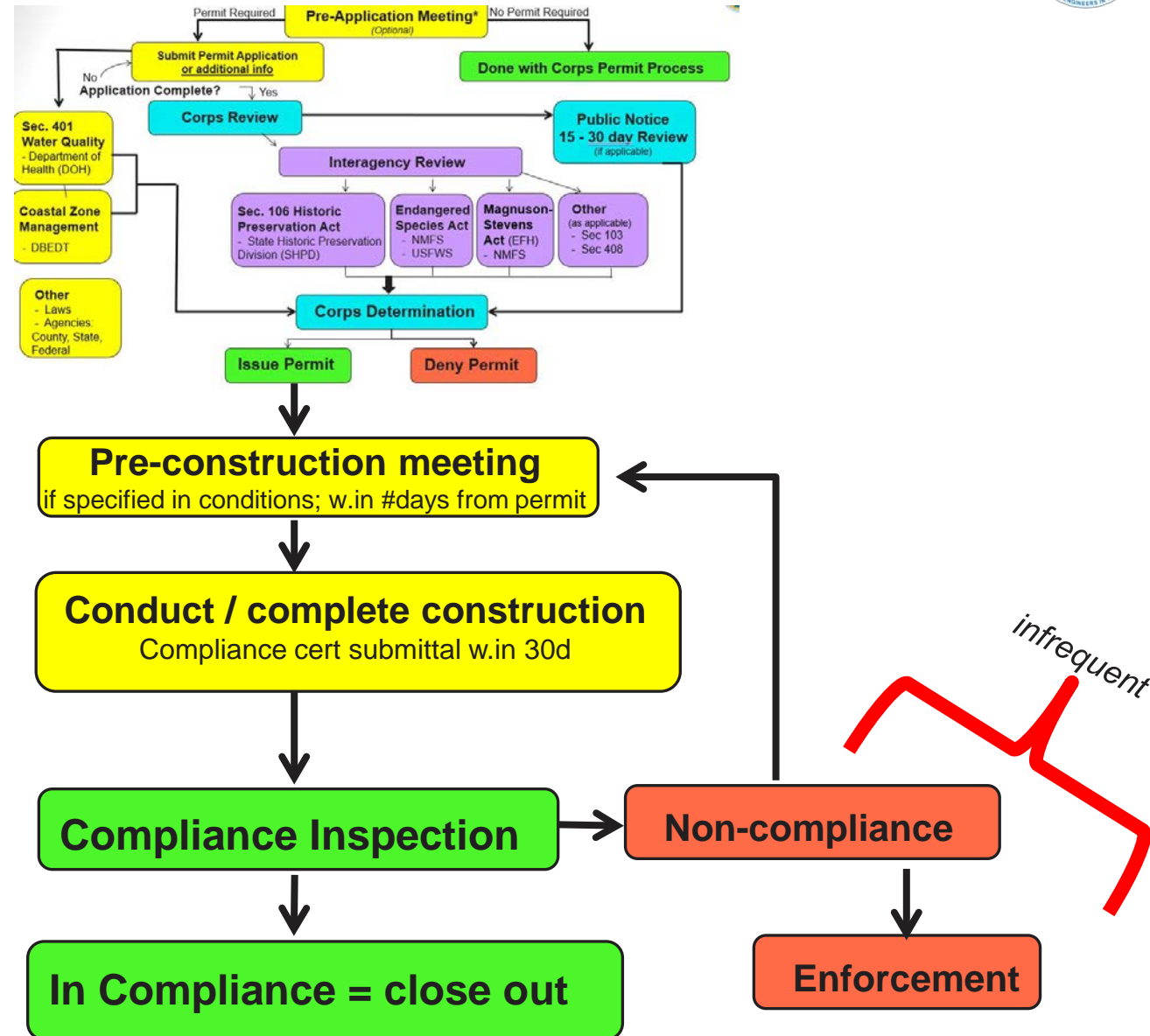
- Definition of fill: rock (gravel, riprap), sand, concrete, soil  
(33 CFR 323.2(e)(2))
- Fill has the effect of replacing WOTUS with dry land and/or changing the bottom elevation of a WOTUS
- Examples of discharge of fill in regs (33 CFR 323.2(f))
- Not rubbish or other pollutants → EPA / DOH
- No minimum impact size / volume





# AFTER RECEIVING CORPUS PERMIT

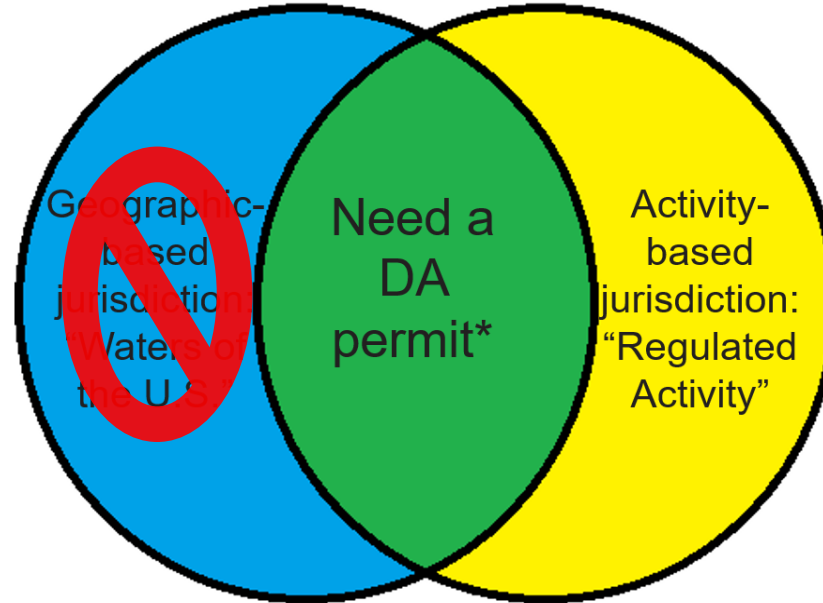
- Pre-construction meeting
  - review terms and conditions of permit (e.g., ESA AMMs, BMPs), ID any permit mods needed
- Compliance inspection
  - typically done when construction complete, but sometimes while construction ongoing to review BMP compliance



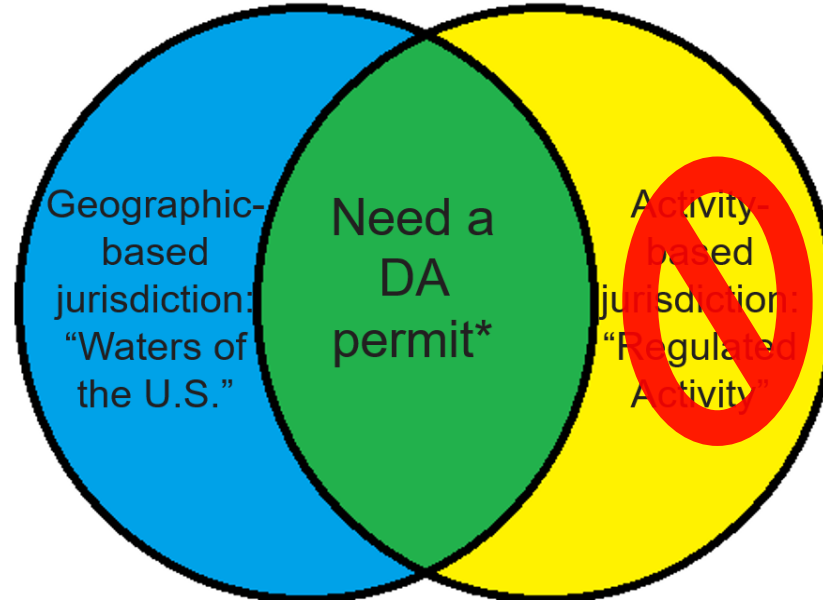


# NO PERMIT REQUIRED

1. Activities in uplands



2. Non-regulated Activities



3. Exemptions





# NON-REGULATED ACTIVITIES

## Structures in Non-tidal WOUS

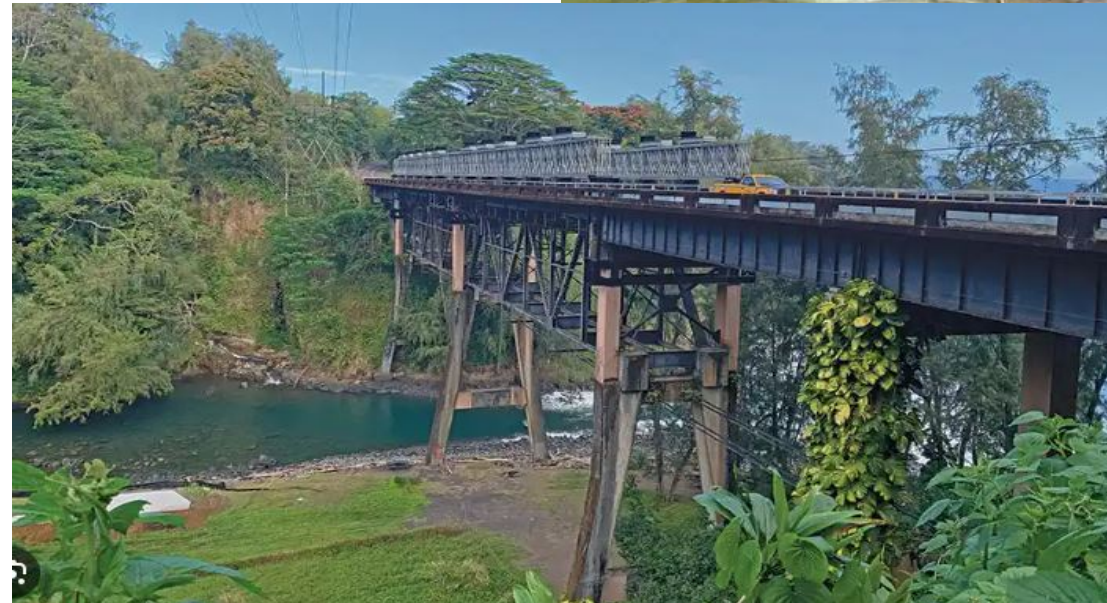
(Section 404 = *ONLY* discharge of fill regulated)

- No permit required for **most** pipes, loggers, scaffolding, or some weirs (unless cast-in-place concrete)



## Bridges and scaffolding construction / maintenance

- not regulated, except discharge of fill, in any WOTUS (either structure in non-tidal WOTUS or MOA with USCG in tidal WOTUS)







# NON-REGULATED ACTIVITIES

## Work in non-tidal WOUS:

- One-step excavation with upland disposal if there is more than incidental fall back, i.e., removal of accumulated sediment a single scoop at a time

## Clearing vegetation, green waste, or debris

- (not grubbing or root removal, which is a discharge of fill)





# NON-REGULATED ACTIVITIES IN SEC. 10 WOUS

- Activities that do not alter the course, condition, or capacity of a “navigable” water
  - However, the activity may be considered **work**, so always best to check and get an No Permit Required letter.





# EXAMPLES OF SECTION 10 - NO PERMIT REQUIRED

- Vessels
  - Independently mobile, prefabricated = vessel (typically)
  - Mooring duration, location, intent, and impacts
- Operations
  - Vessel anchoring, cleaning, or vessel or structure-based activities





# SECTION 404(F) CWA PERMIT EXEMPTIONS

- Maintenance for currently serviceable project

- IF: no change to **character, size, or scope** of original fill design
- Examples: Repairing spalls or dislodged concrete panel from a concrete low water ford crossing to restore to previous design → No Permit Required
- Character = permeability, i.e., changing riprap to grouted riprap is NOT the same character and is NOT exempt
- Other exemptions: normal silviculture and farming; temporary farm/forestry/mining roads; construction of farm and stock ponds

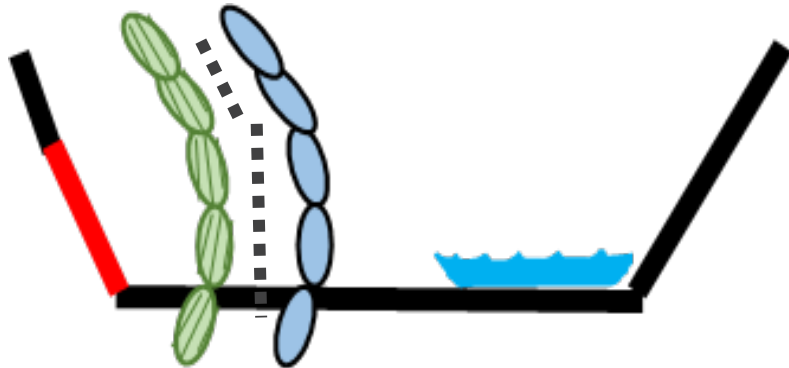




# CAVEATS TO CWA PERMIT EXEMPTIONS

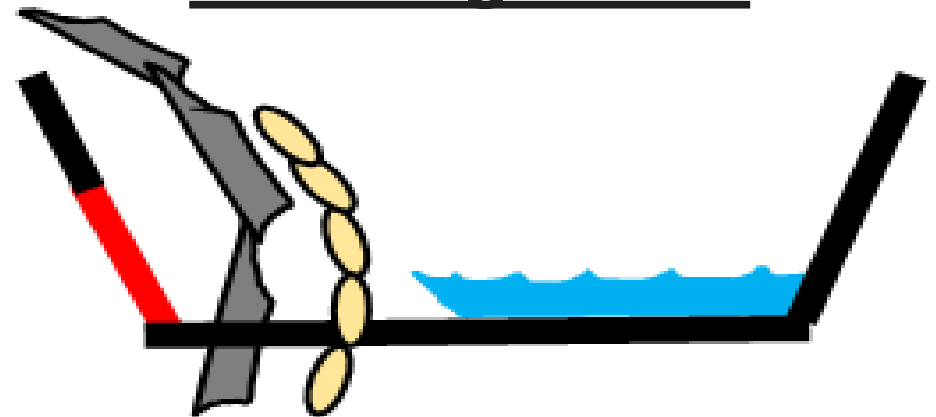
- Does not apply to Section 10 waters
- Exemption does NOT include fill for BMPs which requires a Corps permit (e.g., sandbag berm)

## Structure



Helical or sheet piles, or water-filled forms: needs permit **ONLY** in tidal WOUS

## Discharge of fill



Gravel bags or sand bags: needs permit in **ALL** WOUS



# ENDANGERED SPECIES & ESSENTIAL FISH HABITAT

- Lead federal agency consults with U.S. Fish and Wildlife Service and National Marine Fisheries Service
- Consultation timelines 60-135 days.
- Current information including surveys of benthos to cover comprehensive footprint
- Cannot authorize permit until complete





# NATIONAL HISTORIC PRESERVATION ACT – SEC. 106

- Lead federal agency considers effects to historic properties, cultural resources and consults with State Historic Preservation Division (SHPD - DLNR), NHOs
- Option for lead federal agency to designate 3<sup>rd</sup> party to complete Sec 106 with Corps' oversight; efficiency to complete 106 simultaneously with the state 6E-8 process





# FEDERALLY-FUNDED PROJECTS

- Funding federal agency is the lead federal agency
- Lead federal agency considers effects to relevant resource (ESA species and critical habitats, EFH, historic properties / cultural resources) and consults with relevant agency (USFWS, NMFS, SHPD / NHOs)
- When another lead federal agency is conducting consultation, the Corps cannot authorize permit until consultation is complete and sufficient for our review:
  - Documentation of consultation initiated with attachments provided to Services (e.g., action area)
  - Documentation of Service's conclusion of consultation (e.g., ESA LoC)







# CONSULTATION EFFICIENCIES

## – EFH, ESA, WQC, CZM

- ESA with NMFS: Pac-SLOPES, updated 2021
- EFH Programmatic – 2023
- **Blanket WQC – 2021**
- CZM consistency determination for many NWP activities

Coming soon:

- USFWS PA
- FHWA's Section 106 PA





# COMPENSATORY MITIGATION

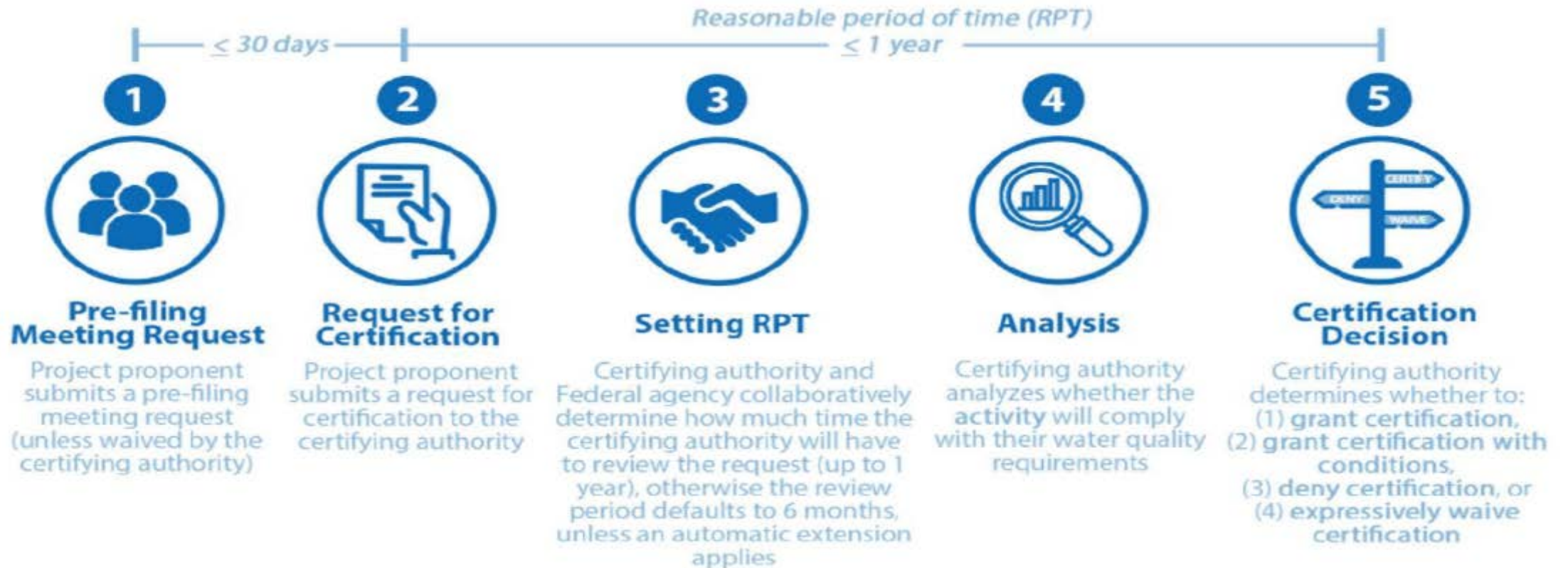
- Start with avoidance and minimization
- Permanent impacts to waters of the U.S., including loss (e.g., creation of a new land for a harbor pier out of open water) may require compensatory mitigation
- Mitigation type and amount depend on the functions provided by the water of the U.S. impacted/lost
- POH does not have approved mitigation ratios (beyond the 1:1 minimum) or functional assessments





# SECTION 401 – WATER QUALITY CERTIFICATION

- Blanket = Corps permit includes Section 401 WQC, no need to contact DOH directly
  - coverage for most NWP's and Letter of Permission, must meet terms and conditions
- 2023 CWA Rule for individual WQC:





# KEYS TO A GOOD APPLICATION

- Contents of complete PCN:  
NWP General Condition 32
- Contents of complete application (IPs):  
33 CFR 325.1d
- Complete work description (5w's)
  - Project footprint (square feet or acres)
  - Fill material(s) volumes (cubic yards)
  - Anticipated project start and duration
- Project plans with
  - Clear impact footprints in WOUS, show limits (e.g., OHWM), design % not important
- Other minimization efforts, project background info:e.g., Substrate composition, historic properties

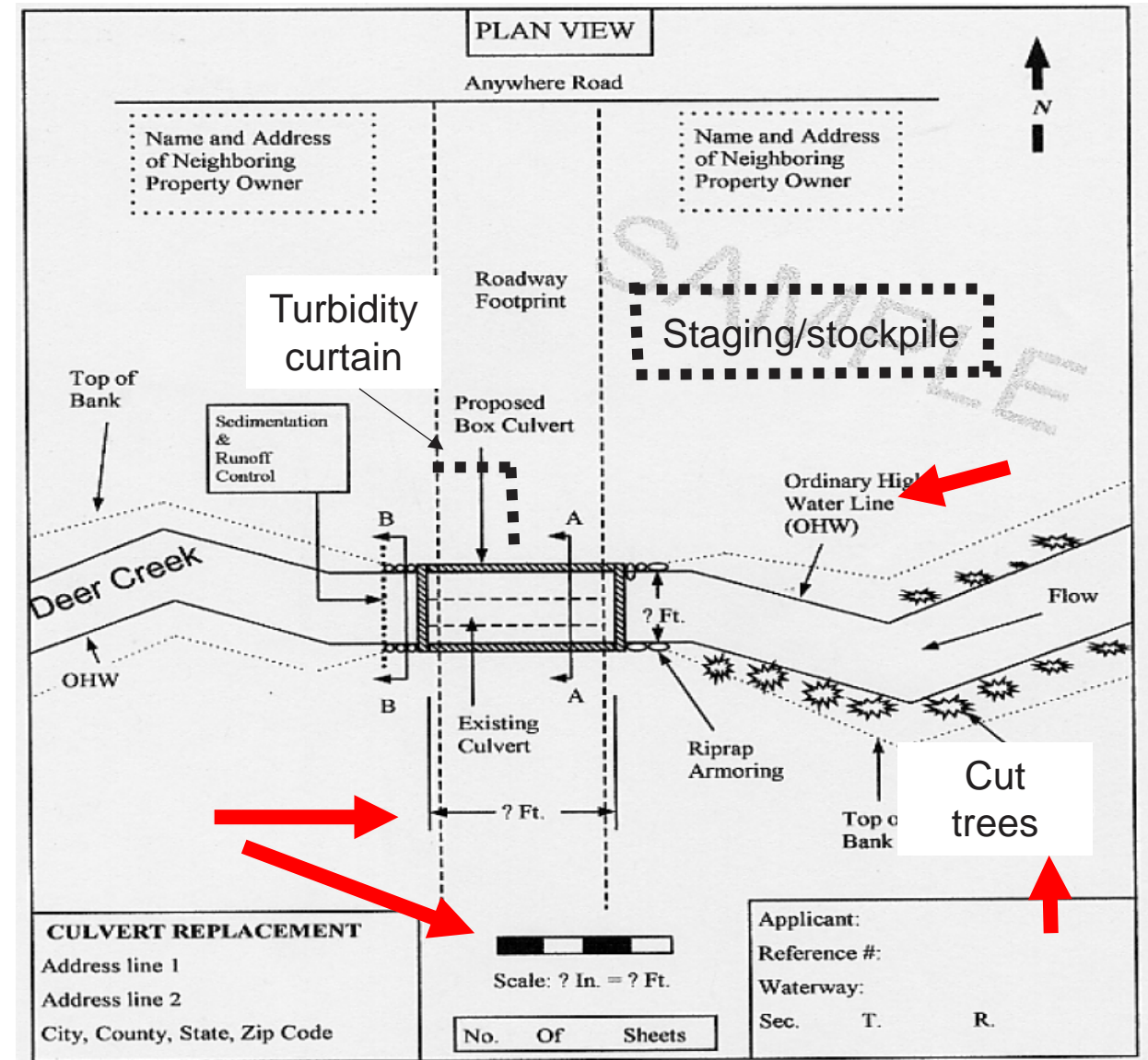




# KEYS TO A GOOD APPLICATION



- Construction method, equipment, phasing, detours, BMPs, and location of staging / stockpiling / access areas in uplands
- Even if no permit for the project work, BMPs may require a permit
- uplands info still needed for NHPA or ESA scope, e.g., tree clearing, night work / lights, noise
- Documentation of completed consultation for Federal applicant,
  - Including recent ESA and EFH consultations





# EMERGENCY PROJECTS

Even if State of Hawaii issues Declaration of Emergency, must still comply with Federal law.

## Corps permit and consultation

- Proceed with NWP if applicable
- Estimate conservative impacts
- Submit once you have description and plans (or scaled drawings with dimensions) for in-water work AND staging / stockpiling / access areas in uplands
- Working with HDOT-Highways Design Branch on Letter of Agreement to describe protocol for Corps permitting





# HOW TO APPLY FOR A PERMIT



NWP Application at:

<https://www.poh.usace.army.mil/Missions/Regulatory/Permits/Nationwide-Permits/>

Submit application or schedule a pre-application meeting:

[CEPOH-RO@usace.army.mil](mailto:CEPOH-RO@usace.army.mil)

Questions? Call: **808-835-4303**



# QUESTIONS?







©



Additional slides with more detail



# AMENDED 2023 RULE: FRAMEWORK



## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

*The information provided in this presentation is generally relevant to implementing either the 2023 rule, as amended, or the pre-2015 regulatory regime. Determinations of jurisdiction are case-specific determinations based on the record, and factual concerns or questions about the application of Sackett v. EPA may be raised in the context of a particular determination. In addition, the agencies may in the future provide revised or additional administrative guidance to address implementation of the 2023 Rule, as amended, or the pre-2015 regulatory regime, consistent with Sackett.*



# NOT CONSIDERED WATERS OF THE U.S.

## 33 CFR Part 328.3(b)

1. Waste treatment systems
2. Prior converted cropland
3. Certain ditches
4. Artificially irrigated areas
5. Certain artificial lakes/ponds
6. Pools/ornamental pools
7. Waterfilled depressions created in dry land
8. Swales and erosional features

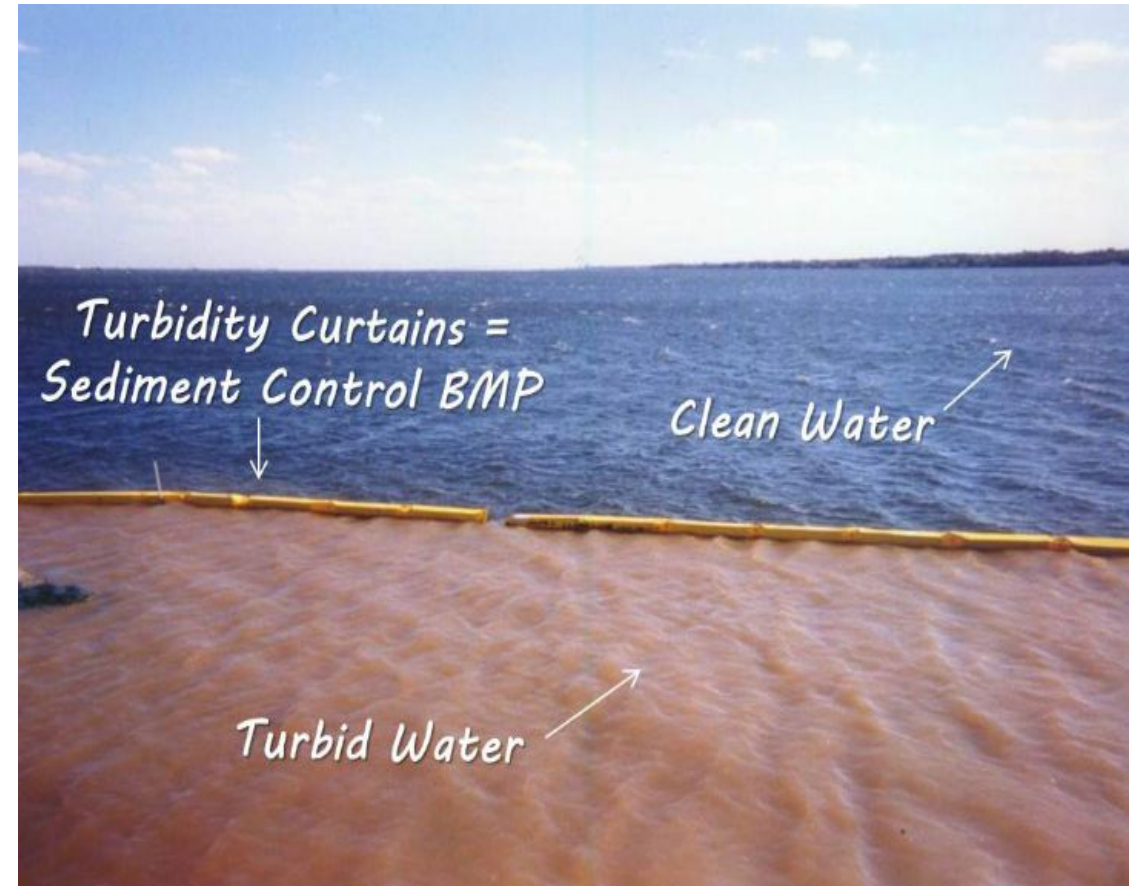




# CORPS PERMIT COMPLIANCE

## After a Corps permit is issued

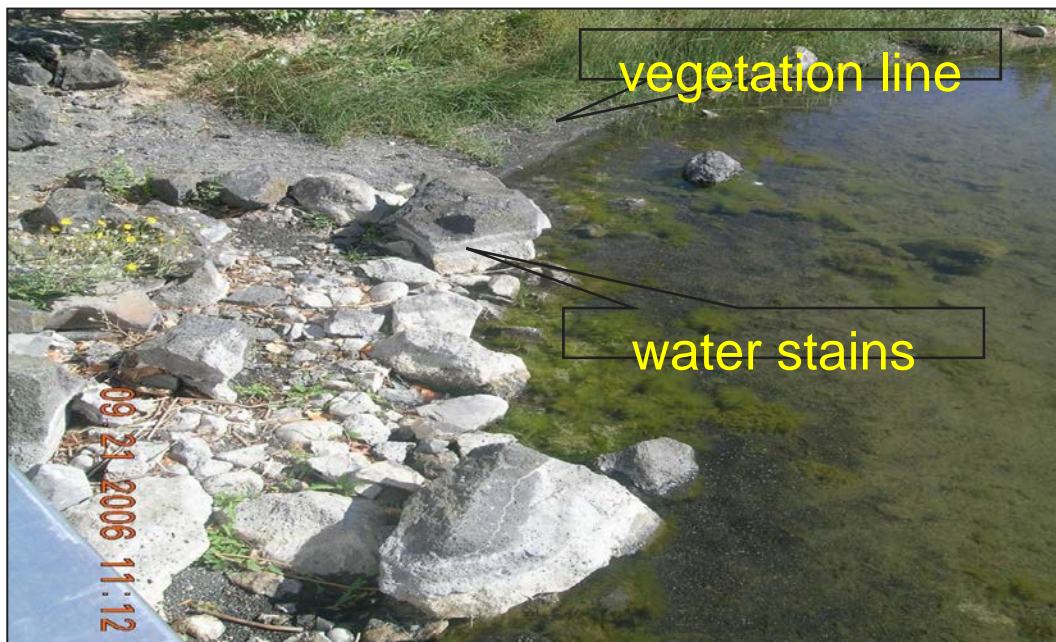
- Some permits include a special condition requiring a pre-construction meeting to review the authorized permit and conditions
- Most projects require the completion of a compliance certification – applicant signs, send to Corps
  - typically provided by Corps as part of permit documentation package
  - Compliance site visits happen for most terrestrial-based projects (i.e. mooring buoy less likely):
    - » typically after construction complete
    - » during construction for some projects after in-water work started to check BMPs
      - Pre-compliance site visits happen case by case: need to be balanced against rest of Corps workload





# AQUATIC RESOURCE DELINEATION REFERENCES

- For tidally-influenced, NOAA datum
- On-site observed characteristics indicating OHWM, HTL (e.g., rack lines, scour)
  - Characteristics listed in Rapanos wetland delineation data sheets





# JURISDICTION CLARIFICATION: HTL AND MS4

## High Tide Line

- The Mean Higher High Water (MHHW) mark or line is a frequently used proxy when on-site characteristics of the high tide line (e.g. rack line) are not available.

## MS4 Systems

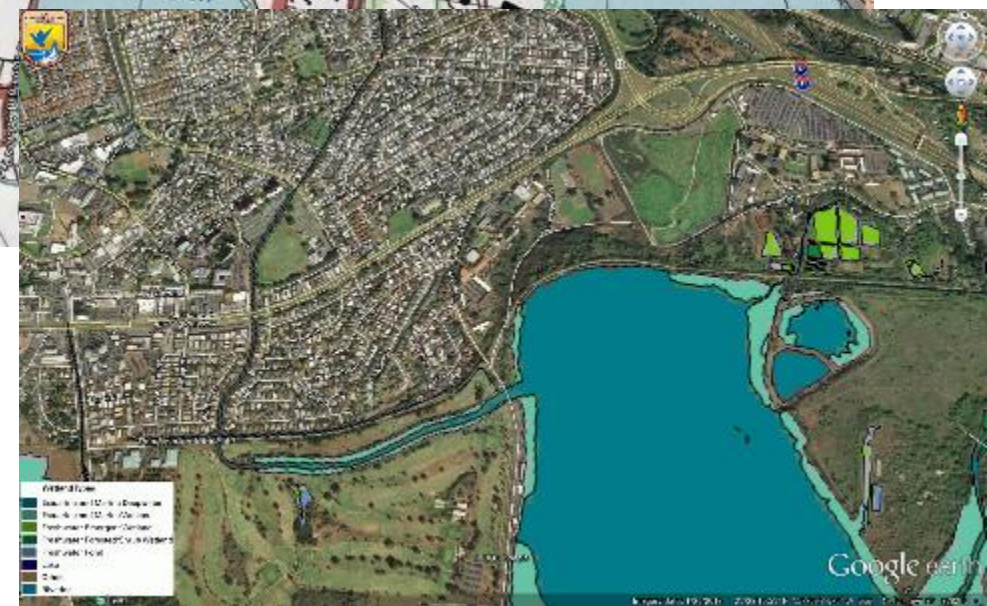
- Can included piped streams, which may be jurisdictional
- As-builts, USGS topo, historic aerial photographs may help ID a now piped stream





# AQUATIC RESOURCE DELINEATION REFERENCES

- USFWS NWI maps, Soils data (e.g. SSURGO data layer in Google Earth), USGS topo quad
- aerial photos, historic photos (if applicable),





# CONSULTATION EFFICIENCIES - SEC. 106

- Option for lead federal agency to designate 3<sup>rd</sup> party to complete Sec 106 with Corps' oversight; efficiency to complete 106 simultaneously with the state 6E-8 process and leverage other agencies' relationship with SHPD
- Benefit from FHWA's future PA with SHPD
- Monthly meetings with SHPD







# SECTION 103 MPRSA ACTIVITIES

- Corps authorizes transport to ODMDS, EPA authorizes use of / actual dumping at ODMDS
- EPA (Region 9) approval of Sampling and Analysis Plan
- Upland disposal: separate testing requirements from Hawaii DOH-CWB – consider conduct both types of testing simultaneously
- DQM system required during transport
- Approval for max 3 years

