

# Climate Adaptation Academy

## ROAD FLOODING: *Corps Regulatory Requirements & Environmental Aspects*

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25 January 2019

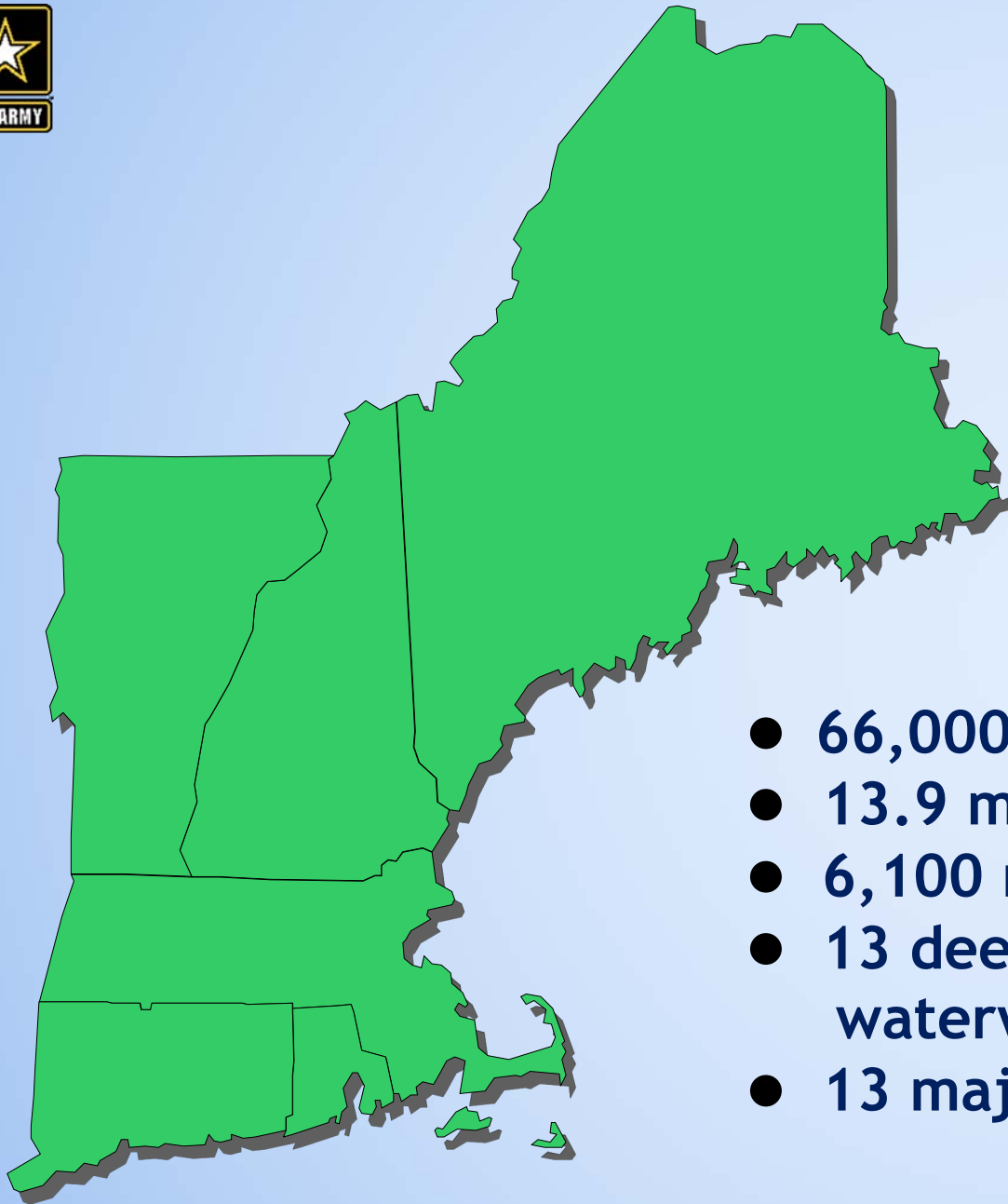


US Army Corps  
of Engineers®



# SCOPE OF PRESENTATION

- ▶ **Statutory Authority of the Corps**
- ▶ **Geographic Jurisdictional Limits**
- ▶ **Definitions, Activities**
- ▶ **Permitting under CT Programmatic General & Individual Permit Processes**
- ▶ **Regulatory Review Process**
- ▶ **Compensatory Mitigation**



## New England Region

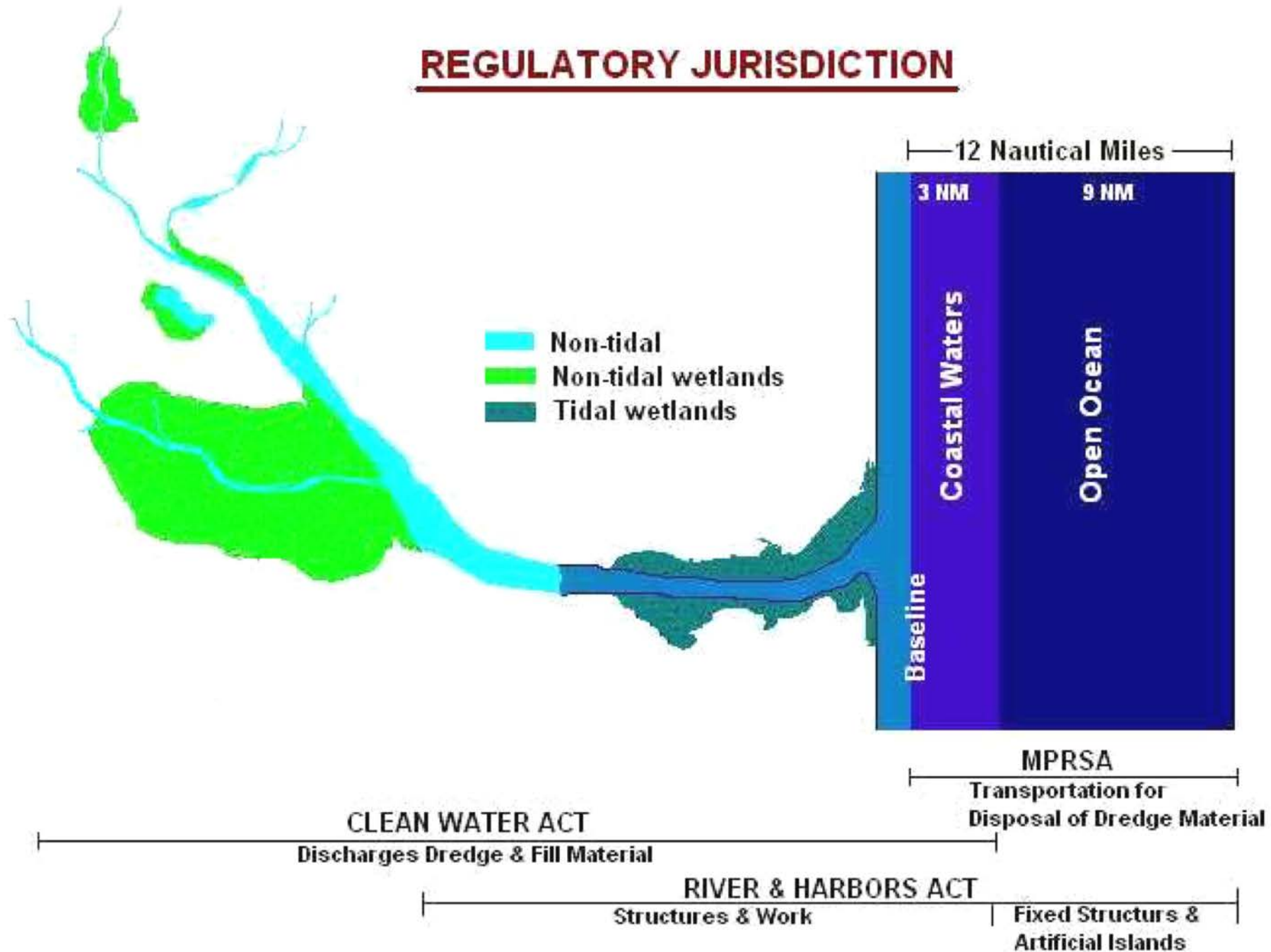
- 66,000 square miles
- 13.9 million people
- 6,100 miles of coastline
- 13 deep draft commercial waterways
- 13 major river basins

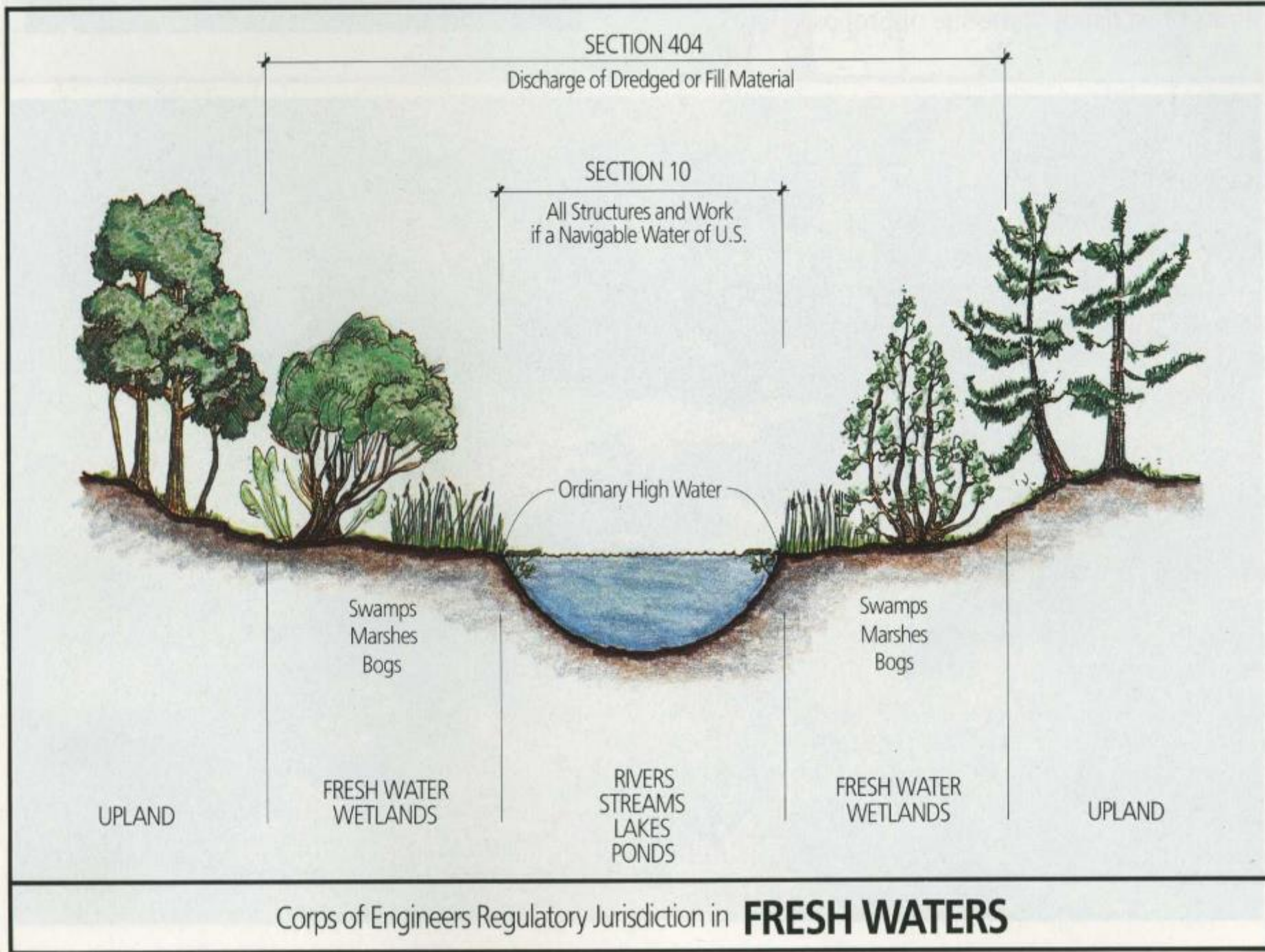


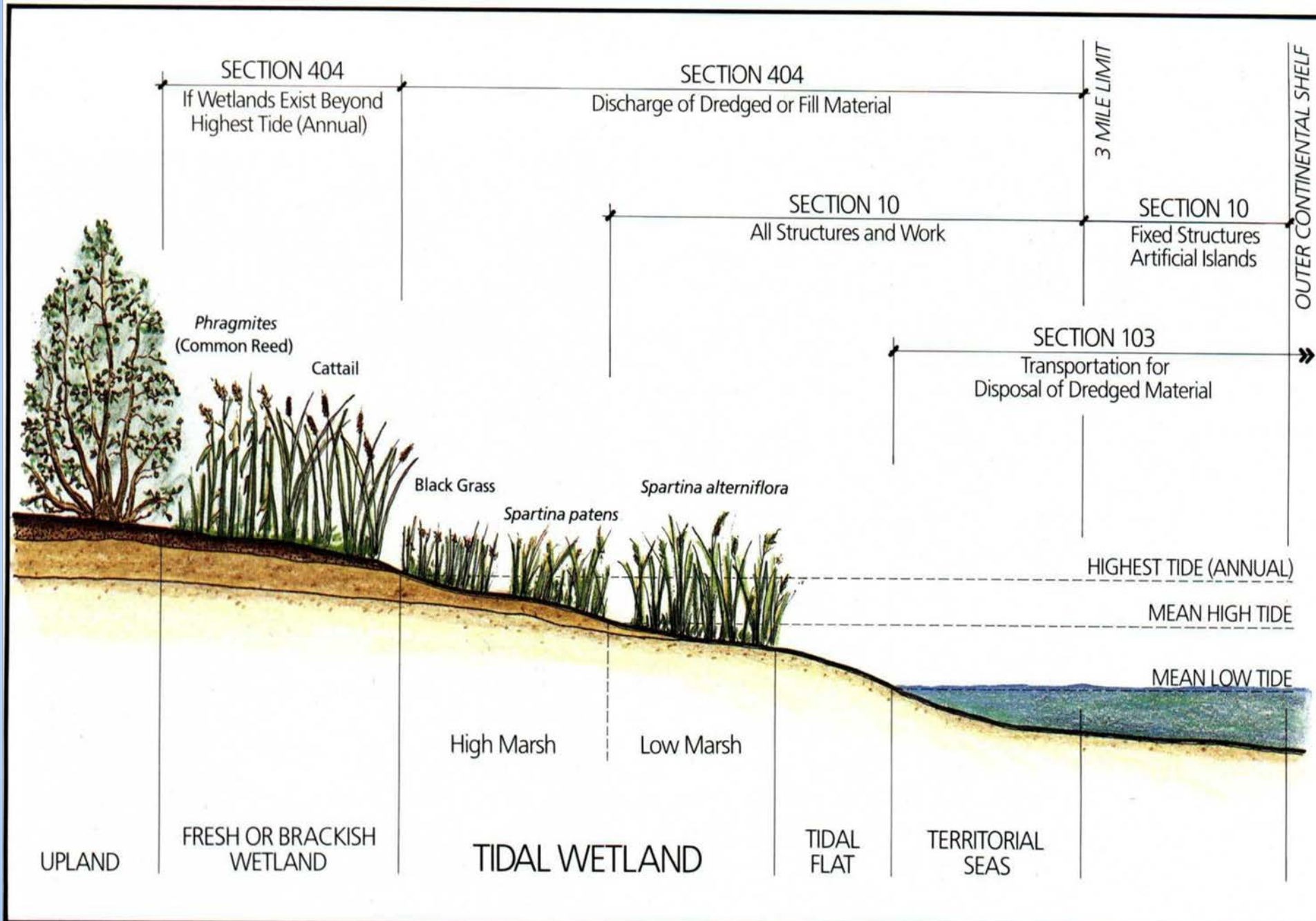
# STATUTORY AUTHORITIES

- ▶ **Section 9 - Rivers and Harbors Act of 1899**  
*...Construction of a dike or dam in navigable waters*
- ▶ **Section 10 - Rivers and Harbors Act of 1899**  
*...Protect Navigation - 33 USC 403*
- ▶ **Section 404 - Clean Water Act of 1972**  
*...Protect Aquatic Environment, Foster Balanced Development - 33 USC 1344*
- ▶ **Section 103 - Marine Protection Research and Sanctuaries Act of 1972**  
*... Allows for Transportation of Dredged Material for Purpose of Ocean Disposal - 33 USC 1413*

## REGULATORY JURISDICTION







Corps of Engineers Regulatory Jurisdiction in **TIDAL WATERS**



## SECTION 10 - RIVERS & HARBORS ACT of 1899



- ▶ Regulates any **“work”** in, **over or under navigable waters** of the U.S. that may affect their course, condition, location or capacity of the waters.
- ▶ **Prohibits the unauthorized obstruction or alteration** of a navigable water.







## SECTION 10 - RIVERS & HARBORS ACT of 1899



- ▶ **“Navigable Waters”** are those waters subject to the ebb and flow of the tide, waterward of MHW and/or those waters that are presently used, have been used in the past, or may be susceptible for use in the future for the transport of interstate commerce.





## SECTION 10 - Activities, Structures

- Dredging & disposal of dredged material
- Directional Drilling, Trenching
- Piers, docks, wharves, breakwaters, groins, jetties, revetments, bulkheads, seawalls, etc.
- Marinas & other recreational structures
- Any permanent or semi-permanent structure or potential obstacle to navigation (includes moorings, pile driving, utility lines)





# SECTION 404 - CLEAN WATER ACT of 1972



- ▶ **“To restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”**
- ▶ Requires a Dept. of Army (Corps) authorization for **discharge of dredged or fill material** into Waters of the U.S. and adjacent wetlands.
- ▶ All **discharges of dredged or fill material** in Waters of the U.S. requires a Corps Permit.
- ▶ Applies to **permanent and temporary** discharges
- ▶ **Waters of the U.S. includes** navigable waters, inland rivers, lakes, streams and adjacent, contiguous and bordering wetlands





# SECTION 404 - Fill Activities



- Bedding & backfill
- Trenching/Jet Plow
- Access roads
- Cofferdams
- Bank stabilization
- Land development
- Hazardous waste remediation  
UNLESS Superfund Site





# TYPES OF PERMITS

## GENERAL PERMIT - 2 CATEGORIES: “SV” OR “PCN”

- Minimal Impact Work
- Must comply with terms and conditions of GP
- Expedited Process, 30-60 days from complete application

## INDIVIDUAL PERMIT

- Larger, more controversial
- Requires **analysis of alternatives**, public interest review
- Requires WQC and/or CZMC authorization or waiver from CT DEEP



# CORPS REGULATORY REVIEW under CWA: SECTION 404(b)(1)\* - Environmental Considerations

- If a project involves a discharge of **fill**, Corps must consider practicable alternatives (i.e., **“alternatives analysis”**) to **reduce effects** of the discharge.
- **Avoid & minimize** discharge to greatest extent practicable
- Evaluate the impact on substrate, water circulation/quality, aquatic function, secondary & cumulative impacts
- **Unavoidable impacts contributing to wetland loss mitigated\*\***
- Corps **can only issue an authorization for the least environmentally damaging practicable alternative (LEDPA)**

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\* 404(b)(1) Guidelines published in Federal Register - Dec 1980

\*\* **“compensatory mitigation”**



## 2008: Mitigation Rule - Definitions (332.2)

- ▶ **Sequencing: Avoid, Minimize, Compensate**
- ▶ Avoid using non-degraded uplands for wetland creation (establishment)
- ▶ **Mitigation type order of preference:**
  - ▶ Mitigation Bank
  - ▶ In-Lieu Fee Program (“ILF”)
  - ▶ Permittee-Responsible Mitigation (“PRM”)



# 2008: Mitigation Rule - Definitions (332.2)



- ▶ **Mitigation Bank**
  - ▶ Commercial entity or a single user (e.g., State DOT)
  - ▶ One or more **sites** where **larger compensatory mitigation** projects are done
  - ▶ **Permittees obtain credits** from sponsor
  - ▶ Sponsor assumes responsibility for providing the mitigation
- ▶ **In-Lieu Fee program (“ILF”)**
  - ▶ **Government (Non-Corps) or non-profit natural resource management entity**
  - ▶ Collects **fees from permittees to do larger compensatory mitigation** projects
  - ▶ Sponsor assumes responsibility for providing mitigation
- ▶ **Permittee-Responsible Mitigation (“PRM”)**
  - ▶ **Compensatory mitigation activity undertaken by permittee or contractor**
  - ▶ (cont.)





# Summary:

- ▶ **“To restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”**
- ▶ **CT GP Streamlines permit processing**
- ▶ **Evaluate alternatives to minimize impacts**
- ▶ **Sequence: Avoid, Minimize, Compensate**
- ▶ **Corps Compensatory Mitigation follows 2008 Mitigation Rule:**
- ▶ **Mitigation type order of preference:**
  - ▶ **Mitigation Bank**
  - ▶ **In-Lieu Fee Program (“ILF”)**
  - ▶ **Permittee-Responsible Mitigation (“PRM”)**





# Questions?



## Corps New England District Regulatory:

<https://www.nae.usace.army.mil/Missions/Regulatory.aspx>

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# Extra Slides



## Before the 2008 Mitigation Rule: National Defense Authorization Act for FY 2004

- ▶ Section 314 of Public Law 108-136
- ▶ Ensure opportunities for Federal agency participation in mitigation banking
- ▶ **Establish performance standards and criteria for the use of on-site, off-site, in-lieu fee mitigation, and mitigation banking as compensation for lost wetland functions in DA (Corps) permits**
- ▶ (cont.)



# National Defense Authoriz. Act FY 2004 (cont.)



## ▶ Standards and criteria shall:

- ▶ Maximize available **credits and opportunities** for **mitigation**
- ▶ Provide **flexibility for regional variation** in wetland conditions, functions, and values
- ▶ To the maximum extent practicable, **apply equivalent standards to each type of compensatory mitigation**



## 2008: Mitigation Rule - General Principles

- ▶ **Mitigation sequence unchanged:**
  - ▶ **Avoidance, minimization, compensation**
  - ▶ **Rule's focus is on compensation for unavoidable impacts**
- ▶ Focus on compensatory mitigation planning and performance **to get self-sustaining aquatic resources that provide desired functions**
- ▶ **Clear standards, more accountability, better performance**
- ▶ **Compensatory mitigation requirements must be commensurate with amount and type of impact**
- ▶ (cont.)



## Mitigation Rule - General Principles (cont.)

- ▶ **Preference for mitigation banks and in-lieu fee programs**
  - ▶ Consolidated aquatic resource restoration, establishment, enhancement, and/or preservation projects
  - ▶ Provide higher level of planning and scientific expertise
  - ▶ **Help lessen risks and uncertainty for compensatory mitigation project success**
  - ▶ Allows **more efficient compliance efforts** (one large mitigation site vs. many small, scattered sites)
  - ▶ **Helps streamline permit process**, by reducing need to evaluate and approve individual permittee-responsible mitigation plans (need only approve use of credits)



# 2008 Mitigation Rule Development - background



- ▶ **Main sources for principles in the rule:**
  - ▶ National Research Council report on compensatory mitigation in §404 permit program (2001)
  - ▶ Regulatory Guidance Letter 02-02
  - ▶ 1995 Mitigation Banking Guidance
  - ▶ 2000 In-lieu fee Guidance
  - ▶ 1990 Mitigation Memorandum of Agreement
- ▶ Proposed rule published in Federal Register on March 28, 2006