



# WHAT'S ASSUMABLE?

Defining Assumable Waters for 404 Assumption in Oregon

# Who Gets to Decide?

The U.S. Army Corps of Engineers, Portland District does.

- 
- Offer the Corps a fully-formed proposal as best approach for starting conversation.
  - Use CWA, Section 404 (g)(1) as foundation for State's proposal.
  - Outcome is codified in MOA between DSL and Corps.

**Goal:** Define assumable waters in a way that minimizes case-by-case determinations and maximizes applicant's ability to self-identify need for Corps permit using web tools.

# CWA 404 (g)(1)

“The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.”...

# Breaking It Down

## □ Non-assumable waters include:

1. Waters subject to ebb & flow of tide (incl. ocean)
2. Waters *currently* used for interstate/foreign commerce
3. Waters *susceptible* to use for interstate/foreign commerce (in natural condition or w/reasonable improvement)
4. Wetlands adjacent to 1-3, above.

*OR's best available information; final determinations are made by COE*

# 1. Waters Subject to Ebb/Flow of Tide

- Longitudinal limit: head of tide
  - ▣ Head of tide pinpointed for most coastal streams (DSL 1989) Not all streams evaluated (e.g., v. small coastal tribs.; tidal tribs. of Columbia R.). *Maps 1, 2, 3*
  - ▣ Direct observation
  - ▣ What about tidegates? Tidegate locations for most coastal waters mapped in 2011. Can we say a tidegate = head of tide? *Maps 4, 5, 6*

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# 1. Waters Subject to Ebb/Flow of Tide

- Elevation limit: mean higher high water (MHHW) elevation
  - DLCD mapping – limited coverage Map 7
  - Business as usual for the rest?:
    - Tidal station data
    - Field indicators

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## 2. Waters Currently Used for Interstate or Foreign Commerce

- Corps Portland District published 1993 list of navigable waters
  - ▣ List includes currently and historically navigable waters. (Note: historically navigable waters are assumable)
  - ▣ 124 waterways = 1,470 miles (excl. ocean); 50% of that is Columbia + Willamette + Snake
  - ▣ DSL has mapped these waters. [Map 8, 9](#)

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### 3. Waters Susceptible to Use for Interstate or Foreign Commerce

Unclear if Portland District's 1993 list of navigable waters includes "susceptible" waters. Requires further discussion with Corps.

*OR's best available information; final determinations are made by COE*



# 4. Adjacent Wetlands

- Not defined in Fed. Code of Regulations nor any published guidance
- New Jersey: Wetlands within 1,000 feet of navigable and tidal waterways.
- Michigan: Case-by-case assessment based primarily on connection by flowing water.

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# 4. Adjacent Wetlands

## Proposal Options for Oregon:

- ▣ Fixed distance from navigable/tidal waterway (NJ)
  - Easy but arbitrary    *Maps 10, 11*
- ▣ Case-by-case using defined parameter(s) (MI)
  - Uncertain; applicants can't self-identify
- ▣ Wetlands within 100-year floodplain of navigable or tidal waterway    *Maps 12, 13*
  - Generous interpretation; mapping limitations; boundary problem
- ▣ Mapped tidal wetlands    *Map 14*
  - Generous interpretation; defensible; only for coast
- ▣ Others??

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# Next Steps

- Continue info gathering with COE
  - ▣ Interpretation of their navigable waters list
  - ▣ Other tidal waters information?
  
- Assess level of permit activity likely associated with each option
  
- Construct a proposal for Corps consideration