

# A SMART PLANNING POLICY EXCEPTION CASE STUDY: WHEN CORPS POLICY, THE ENDANGERED SPECIES ACT, AND MARINE MAMMAL PROTECTION ACT CONFLICT

Quana Higgins, HQUSACE  
Evie Haberer, HQUSACE  
Kate Bliss, POD  
Mike Salyer, POA

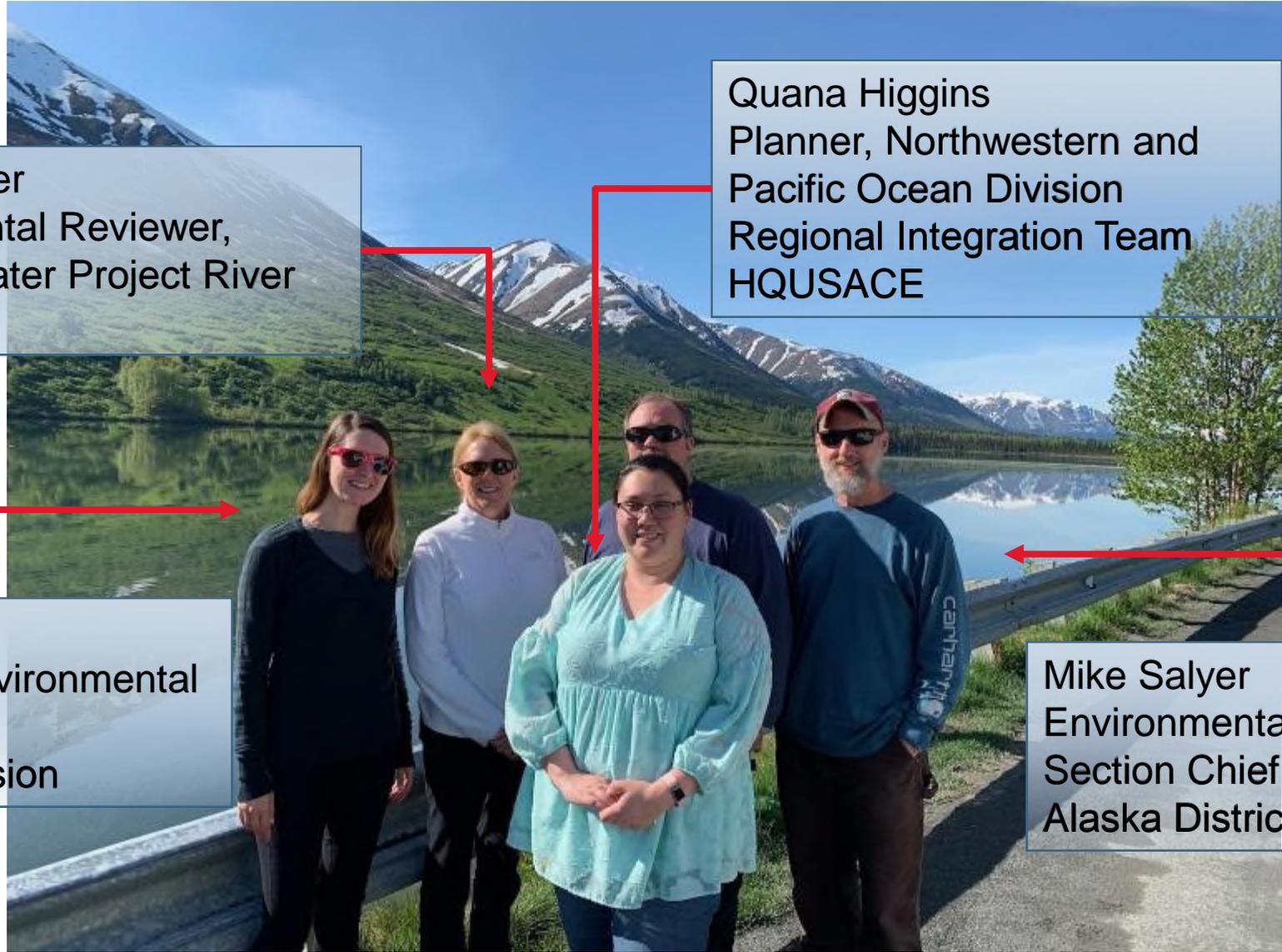
Date: 11 June 2020



US Army Corps  
of Engineers®



# PRESENTERS AND ROLES



Evie Haberer  
Environmental Reviewer,  
Office of Water Project River  
HQUSACE

Quana Higgins  
Planner, Northwestern and  
Pacific Ocean Division  
Regional Integration Team  
HQUSACE

Kate Bliss  
Regulatory and Environmental  
Program Manager  
Pacific Ocean Division

Mike Salyer  
Environmental Resources  
Section Chief  
Alaska District



## WHAT LEVEL OF EXPERIENCE DO YOU HAVE WITH ENDANGERED SPECIES ACT?

**Little or none**

**Moderate**

**Extensive**

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# WHAT LEVEL OF EXPERIENCE DO YOU HAVE WITH LISTED MARINE MAMMALS ON YOUR PROJECTS?

**Little or none**

**Moderate**

**Extensive**

**Click on the Annotation option *N* on the left side of your screen and then use the Pencil Tool or checkmark to mark your response.**



# AGENDA



1. References / Applicable Laws
2. Background on the Unalaska (Dutch Harbor) Study
3. Overview of Laws and Policies & How They Conflict
4. Interactions with the Resource Agencies
5. Policy Exception Development, Review and Approval Process
6. Lessons Learned





# BOTTOM LINE UP FRONT



The goal is to be in compliance with all applicable federal laws, policies, and regulations by the end of feasibility.

Project-specific challenges often find PDTs in a gray area with respect to policy.

So what happens when compliance adds significant time and cost to complete your study?

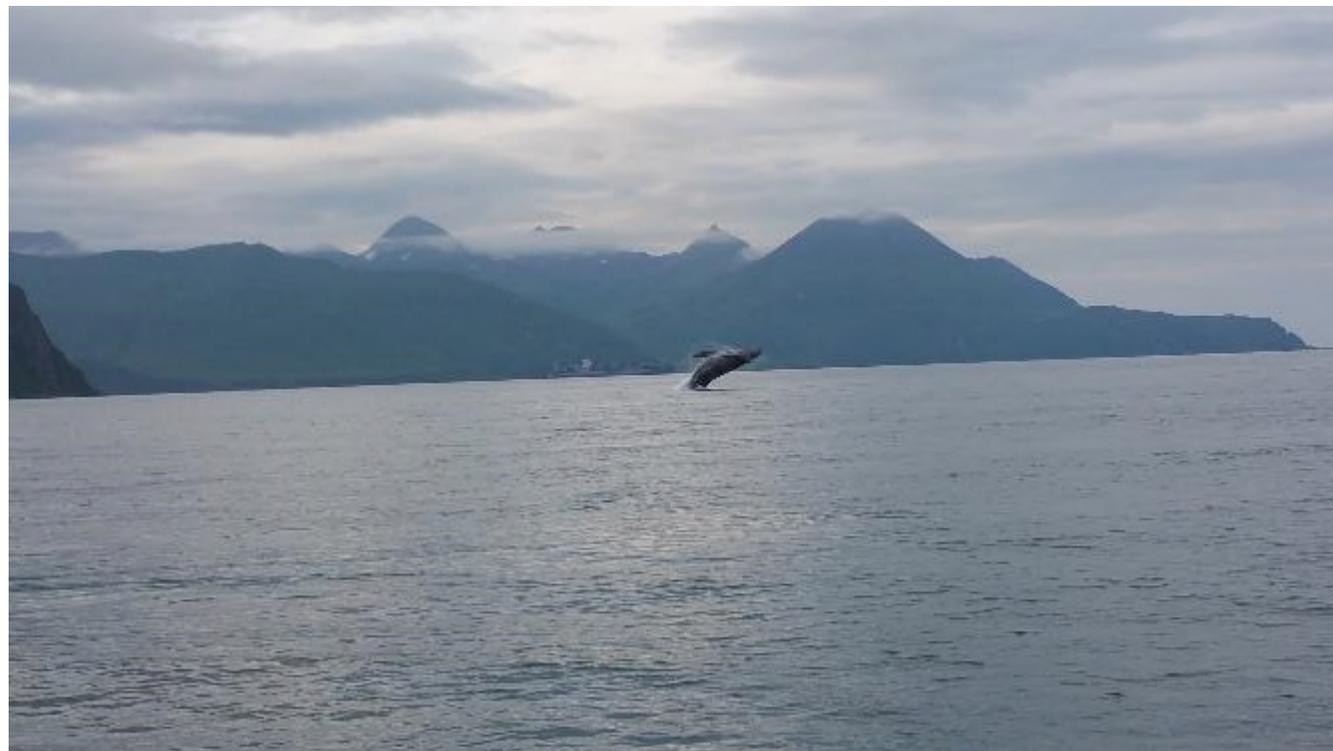




# ACRONYMS USED THROUGHOUT THE PRESENTATION



- AOR – Area of Responsibility
- BiOp – Biological Opinion
- COA – Course of Action
- CW – Civil Works
- ESA – Endangered Species Act
- MMPA – Marine Mammal Protection Act
- PED – Pre-Construction Engineering and Design
- PDT – Project Delivery Team
- POA – Alaska District
- POD – Pacific Ocean Division





# REFERENCES & APPLICABLE LAWS



Helpful background:

- EP 1105-2-60, “Environmental Evaluation and Compliance” (formerly Appendix C)
- ER 200-2-2 (33 CFR 230), “Procedures for Implementing NEPA”
- Section 1005 of WRRDA 2014, “Project Acceleration”
- SMART Planning Guide with the Services

This webinar will focus on:

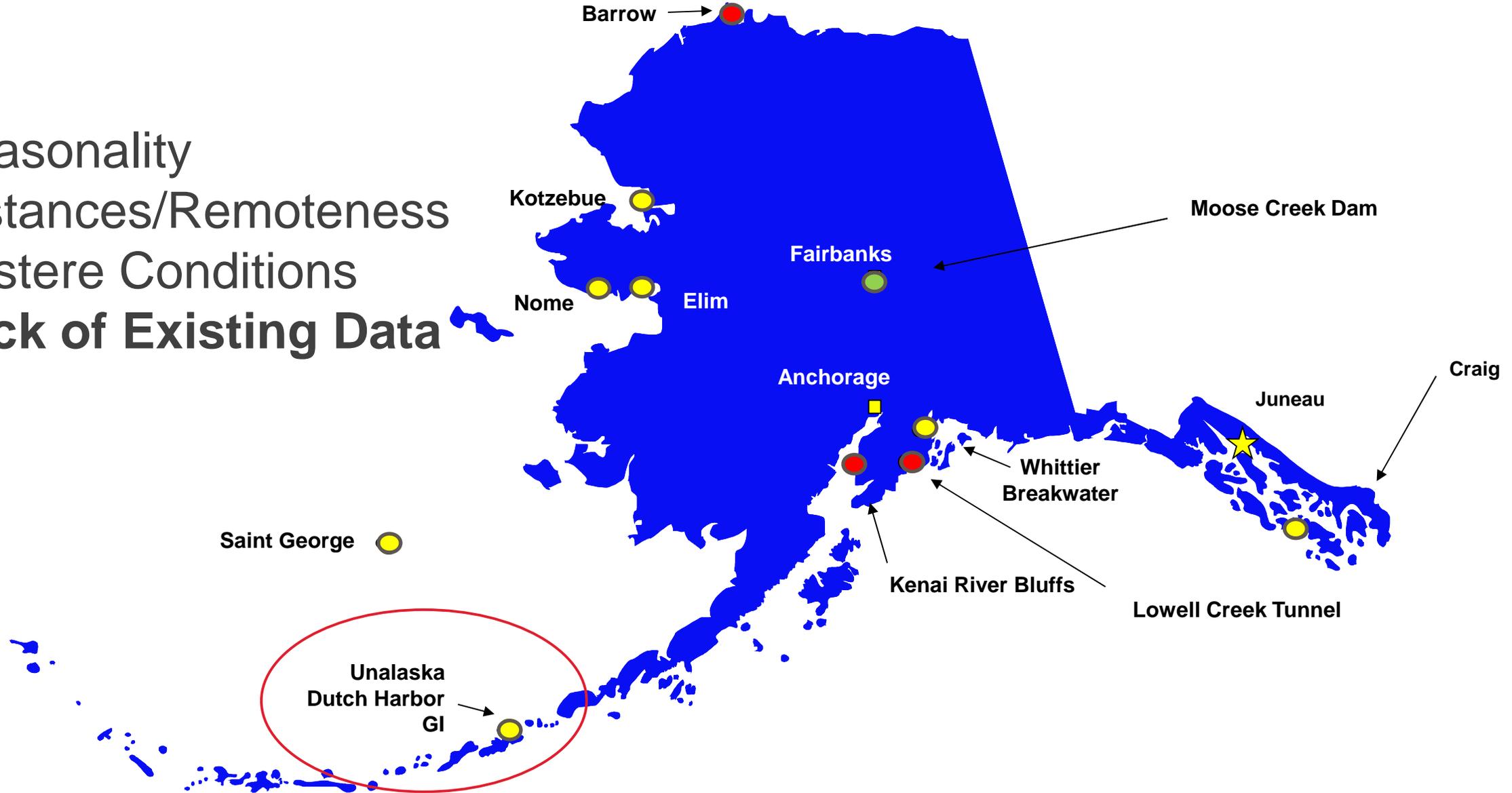
- PB 2018-01(S), “Feasibility Study Milestones”
- Endangered Species Act
- Marine Mammal Protection Act
- Section 1001 WRRDA 2014, “Vertical Integration and Acceleration of Studies”



# CHALLENGES IN ALASKA

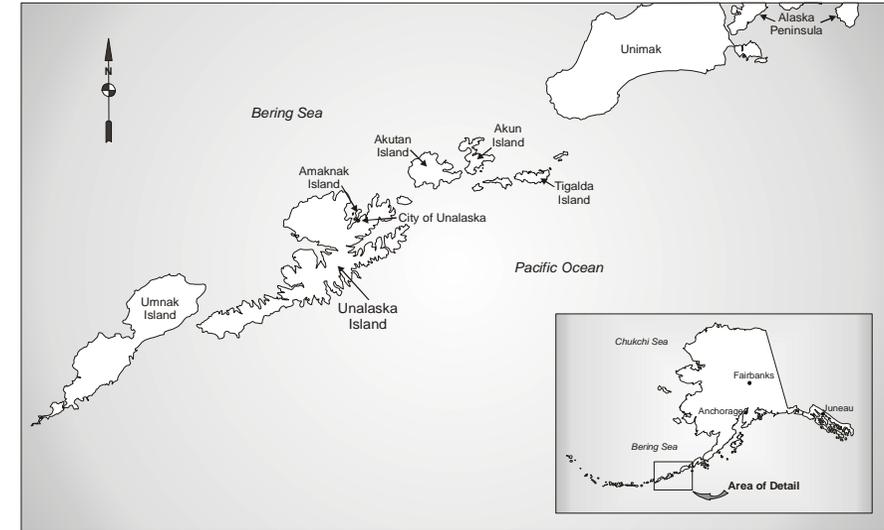


- Seasonality
- Distances/Remoteness
- Austere Conditions
- **Lack of Existing Data**





# UNALASKA (DUTCH HARBOR) STUDY BACKGROUND



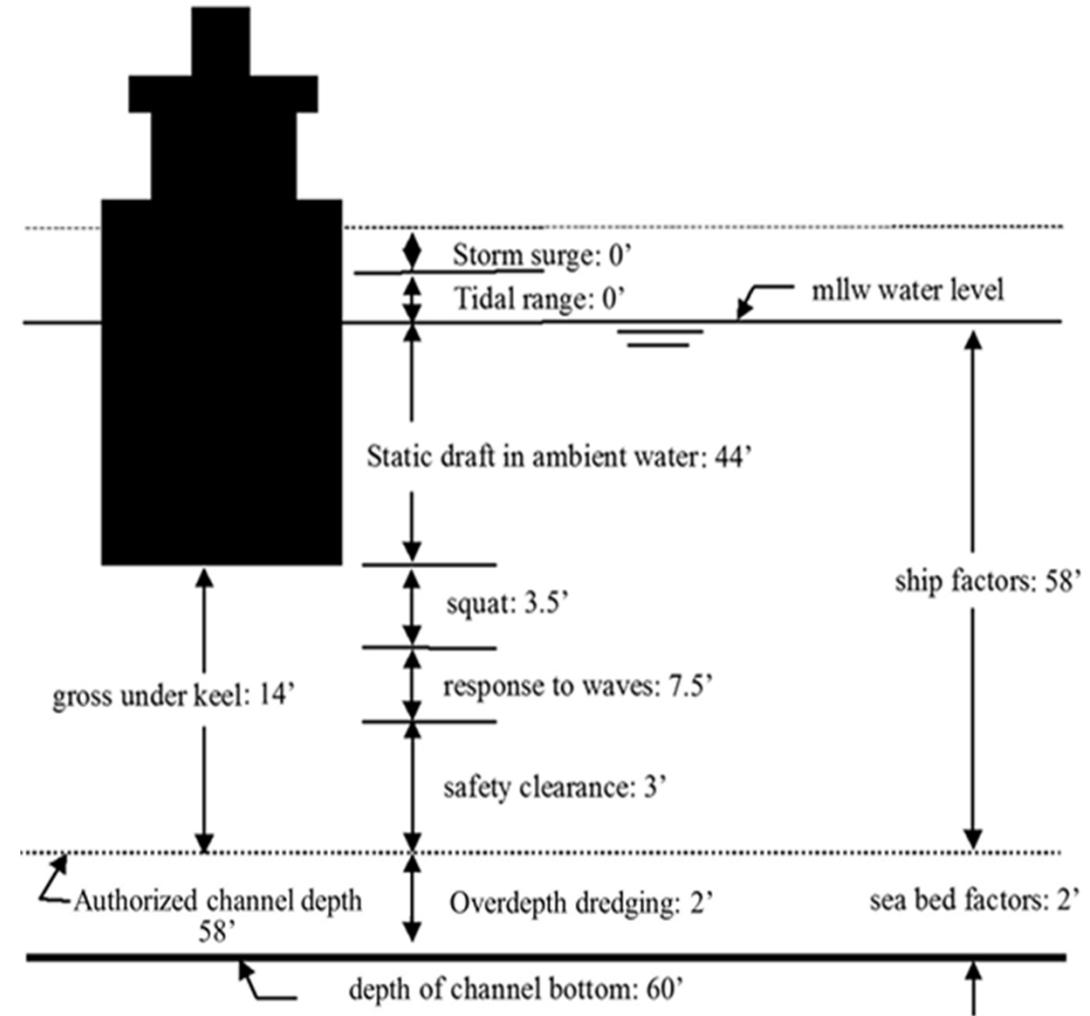
- #1 U.S. commercial fishing port by quantity of catch since 1997
- Contains numerous sites designated as a Potential Places of Refuge by Alaska Department of Environmental Conservation (ADEC)
- Only deep draft, year-round ice-free port along 1,200 mile Aleutian Islands, serving the North Pacific and Bering Sea



# UNALASKA (DUTCH HARBOR) STUDY BACKGROUND



- Primary issue: shallow bar restricts vessels in and out of Iliuliuk Bay
- ShipSym Modeling for austere conditions
- Recommended Plan: 600'x600' channel dredged to -58' MLLW

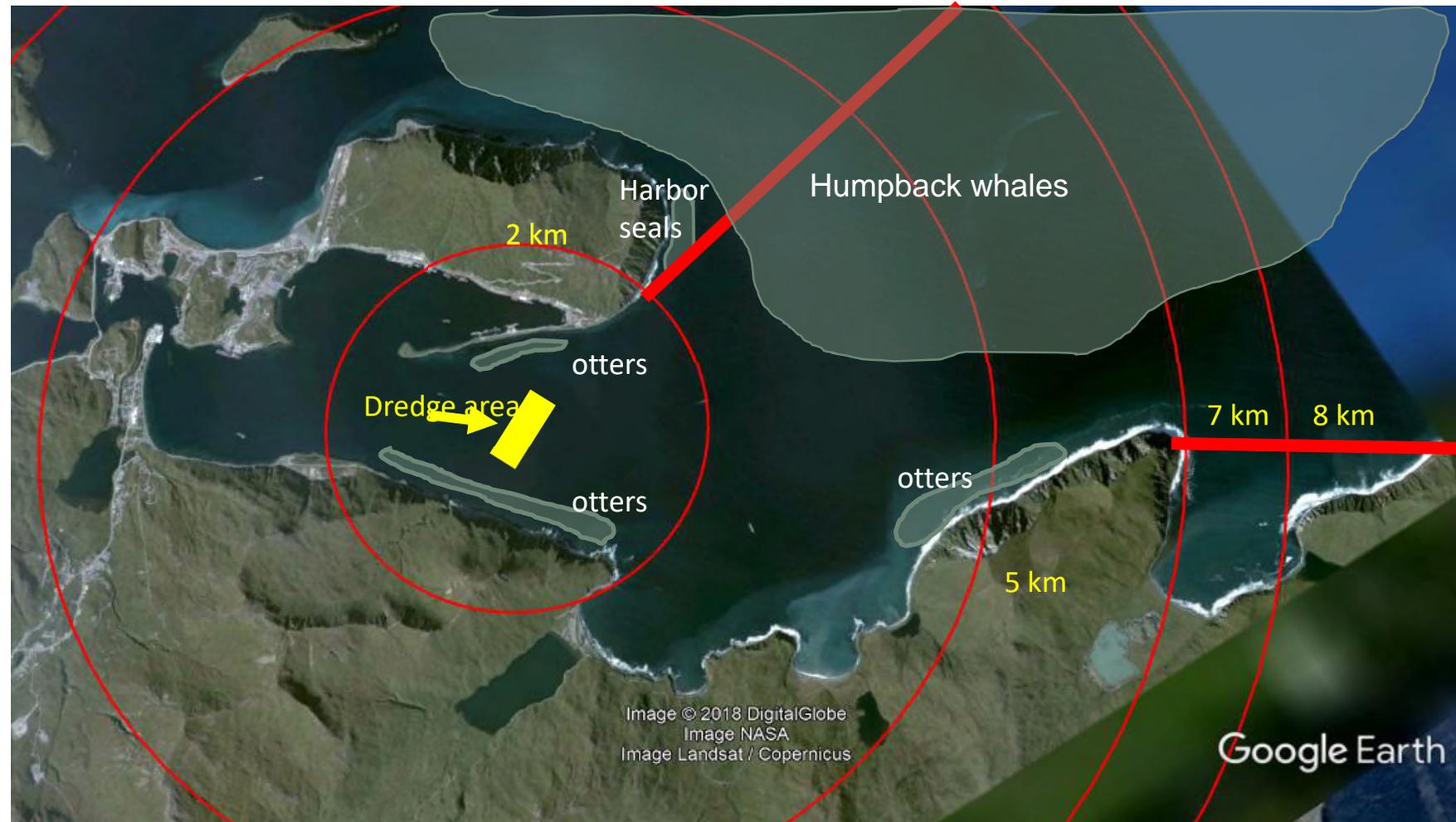




# UNALASKA (DUTCH HARBOR) STUDY BACKGROUND



- Potential blasting needed to dislodge the existing glacial moraine in order to deepen the channel.
- The impacts associated with blasting would potentially result in creating an acoustic signature that has the potential to be harmful to species utilizing the area





# RESOURCE AGENCY COORDINATION



## DO's

- Resource Agency Coordination = Relationship/friendship
- Resource Agency Participation/Attendance at beginning (i.e. Charette)
- District Staff conduct field work with Resource Agencies

## DON'Ts

- Letter only to agencies
- Sit back and wait for response to letter
- Communication only in a Regulatory context



**CONCLUSION:** Must change the culture of only engaging with Resource Agencies in Regulatory Context. Must bring them in early for their expertise (whatever it may be) and their input on how to solve the problem at hand. Our processes are predicated on us hearing from them and using their input.



# GUESS: WHICH LAW PROTECTS THIS SPECIES?



*Spotted Seal, Alaska*

Endangered Species Act

Marine Mammal Protection Act

BOTH

**Click on the Annotation option  $\mathcal{N}$  on the left side of your screen and then use the Pencil Tool or checkmark to mark your response.**



# GUESS: WHICH LAW PROTECTS THIS SPECIES?



*Humpback Whale, Alaska*

Endangered Species Act

Marine Mammal Protection  
Act

BOTH

**Click on the Annotation option  $\mathcal{N}$  on the left side of your screen and then use the Pencil Tool or checkmark to mark your response.**



# GUESS: WHICH LAW PROTECTS THIS SPECIES?



*Polar Bear, Kaktovik, Alaska*

Endangered Species Act

Marine Mammal Protection Act

BOTH

**Click on the Annotation option  on the left side of your screen and then use the Pencil Tool or checkmark to mark your response.**



# CHECK IN POINTS FOR VERTICAL ALIGNMENT

## SMART Feasibility Study Process

Up to 3-years

Scoping

Alternative  
Formulation  
& Analysis

Feasibility  
Level  
Analysis

Chief's  
Report

AM

TSP

ADM

Final  
Report

Major Milestones

- AMM: Geotech data critical to understanding resource impacts identified early in study
- TSP: Team identified level of detail concern in order to complete IHA (MMPA).
- ADM: 50/50 chance that underwater blasting may be required to deepen the channel.

***The vertical team agreed to complete the IHA in PED, but why couldn't we get a BiOp in feasibility???***



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
P.O. Box 21668  
Juneau, Alaska 99802-1668  
April 19, 2019



United States Depart

U.S. FISH AND WIL  
1011 East T  
Anchorage, Alaska

IN REPLY REFER TO:  
AFES/MMM

Mr. Michael Salyer  
Alaska District  
U.S. Army Corps of Engineers  
2204 3<sup>rd</sup> Street  
Joint Base Elmendorf-Richardson, Alaska 99506

Dear Mr. Salyer:

The U.S. Fish and Wildlife Service (Service) was Engineers (USACE) to discuss the proposed dred Harbor, Alaska. The area provides habitat for not listed under the Endangered Species Act. Most re and Ms. Kimberly Klein from the Service's Marir Ms. Brandy Kethchum, Mr. Chris Hoffman, and y effects on sea otters. The dredging project may g causing harassment of sea otters. The Service has Incidental Harassment Authorization (IHA) under Protection Act (MMPA) for take of sea otters by l

To issue an IHA, the MMPA requires findings to affected, the effects of the project on the stock, an We have discussed the process for requesting an I assessment of the feasibility of issuing an IHA giv timelines, and the potential effects to sea otters in information needed to apply for an IHA and has a information. We have discussed the approach to i believe that the USACE has the tools and skills ne also expressed an intent to apply suitable mitigati

Our preliminary evaluation of the project indicate that a full analysis cannot be conducted, or that t critical to making the necessary findings. The scope and scale of the proposed project alone are not likely to prevent the Service from making the necessary findings, but the complete analysis is necessary before the Service can confirm whether an IHA can be issued.

Colonel Phillip J. Borders  
Commander, Alaska District  
U.S. Army Corps of Engineers  
PO Box 6898  
Joint Base Elmendorf-Richardson, AK 99506-0898

Dear Colonel Borders:

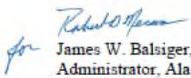
Thank you for providing an Endangered Species Act (ESA) Biological Assessment (BA) for the Unalaska (Dutch Harbor) Channels project. The National Marine Fisheries Service (NMFS) understands that the Corps of Engineers intends to seek a Marine Mammal Protection Act (MMPA) Incidental Harassment Authorization (IHA) for construction of this project because it involves confined underwater blasting in an area with a variety of marine mammals. As discussed below, we recommend delaying the ESA Section 7 consultation until the IHA process is well underway and details about the required blasting for the project are more certain.

Since the Corps has determined that the action "may affect, and is likely to adversely affect" ESA-listed marine mammals, the formal ESA consultation procedures established by 50 CFR 402 et seq. are triggered, which will lead to the development of a Biological Opinion by NMFS. Section 7(b)(4)(C) of the ESA provides that if an endangered or threatened marine mammal is involved, the taking must first be authorized by Section 101(a)(5) of the MMPA. Accordingly, the terms of an incidental take statement and the exemption from Section 9 of the ESA would become effective only upon the issuance of MMPA authorization to take the marine mammals identified in our Biological Opinion, and absent such authorization, the incidental take statement would be inoperative.

NMFS will need to develop a Biological Opinion on our issuance of the IHA (NMFS consulting on a NMFS action). Because your BA lacks important details regarding this project that are not currently available, we recommend that the Corps submit a revised BA once you know more of the specifics regarding the proposed blasting and you have applied for an IHA. We will then prepare one Biological Opinion that covers both the Corps' action and NMFS's MMPA action, with an incidental take statement that authorizes the anticipated level of take of ESA-listed marine mammals.

This approach – completing the ESA consultation later in the planning process when additional project details are known, such that you can submit a complete application for an IHA – is appropriate for any Corps Civil Works projects that involve ESA-listed marine mammals, and thus require both formal consultation under the ESA and an IHA under the MMPA.

Sincerely,

  
for James W. Balsiger, Ph.D.  
Administrator, Alaska Region

ALASKA REGION - <http://alaskafisheries.noaa.gov>



*“NMFS will need to develop a Biological Opinion on our issuance of the IHA (NMFS consulting on a NMFS action). Because your BA lacks important details regarding this project that are not currently available, we recommend that the Corps submit a revised BA once you know more of the specifics regarding the proposed blasting and you have applied for an IHA. We will then prepare one Biological Opinion that covers both the Corps’ action and NMFS’s MMPA action, with an incidental take statement that authorizes the anticipated level of take of ESA-listed marine mammals.*

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## Endangered Species Act

- BLUF: Completion of consultations for final feasibility reports
- No Effect: no consultation required
  - Must be documented in the report
- May affect, not likely to adversely affect: informal consultation
  - Letter of concurrence from USFWS/NMFS
- Likely to adversely affect: formal consultation
  - Receipt of Biological Opinion



Steller's Eider



# KEY FEDERAL LAWS & FEASIBILITY COMPLIANCE



## Marine Mammal Protection Act

- If marine mammal taking or harassment is unavoidable, Corps and NMFS/USFWS continue to coordinate throughout the study
  - Documentation / official letters must be included in final study report
- With HQ concurrence, the NEPA decision may be finalized with a condition to complete the MMPA ITA in the next phase but prior to construction
- Requires Corps to complete a risk assessment and acknowledgment in FONSI or ROD



Harbor Seal



Orca



# WHY DID WE PURSUE A POLICY EXCEPTION FOR DUTCH HARBOR?



**Planning Bulletin 2018-01(S):** Requires ESA consultation to be completed before the Final Feasibility Report Package is submitted to HQUSACE.

**Section 7(b)(4)(C) of Endangered Species Act:** When you are formally consulting for a marine mammal, the taking must first be authorized by the Marine Mammal Protection Act.

**50 CFR 216.104 of Marine Mammal Protection Act:** Requires detailed construction information in order to complete consultation, which is normally developed in Pre-Construction Engineering and Design. MMPA can be deferred to PED, but we need MMPA Incidental Take Authorization to complete ESA consultation.

**WRRDA 2014, Section 1001:** Feasibility studies must be completed in less than 3 years and with less than \$3M in funding.

*Can't be in compliance with the WRRDA 2014 (3x3) OR can't be in compliance with PB 2018-01.*



# WORKSHOP WITH USACE, USFWS & NMFS



- A workshop was held in Alaska in June 2019 with USFWS, NMFS, HQUSACE, POD, POA to gain a common understanding of each agencies' processes and regulations and explore options to be in compliance with Corps policy and Service's regulations.

## **Outcomes:**

- Services gained a better understanding of the Corp's two-part CW process: Authorization (Feasibility) and Appropriation (PED & Construction). This seems to be unique to our federal agency.
- The Corps gained a better understanding of the information that the Services need to evaluate CW projects under both ESA and MMPA and how these two laws interact.
- Various alternatives were explored to determine if any other avenues might be viable to help us meet Corps policy and compliant with regulations:
  - Programmatic/framework consultation - designed to address program level management plans, not single projects.
  - Incremental Step Consultations – can only be used for oil and gas leases and sales



# OPTIONS FOR UNALASKA FEASIBILITY STUDY



## COA 1: Obtain ESA Policy Exception

Outcome: Complete feasibility on time and budget, but do not complete ESA consultation

Additional Time: 6 months for review and approval, no additional funds required. 3x3 exemption required.

Additional Funding: None

Considerations: The Services could not guarantee a “No Jeopardy” opinion for the study

## COA 2: Complete Compliance in Feasibility Phase

Outcome: Obtain ESA and MMPA compliance in feasibility

Additional Time: 18 months

Additional Funding: \$500K

Considerations: Low risk, but requires an exemption to 3 years and \$3M for feasibility studies

## COA 3: Develop Programmatic BiOp

Outcome: Programmatic BiOp to cover the POA CW program for these specific construction activities/impacts

Additional Time: 2-3 years

Additional Funding: Unknown

Considerations: Would still need to consult for individual projects, so doesn't solve the issue.

## COA 4: Terminate Study

Outcome: Abandon feasibility study

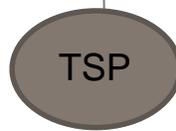
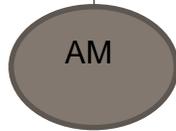
Additional Time: None

Additional Funding: None

Considerations: Goal of the study to provide harbor improvements would not be met. Sponsor has invested \$1M into the study. Considerable political backlash. Damage Corps reputation.



# WHEN DO YOU NEED A POLICY EXCEPTION?



**TSP:** Policy exceptions should be identified prior to and discussed at the TSP  
**ADM:** Prior to this milestone, the policy exception should be submitted to ASA(CW) for review and approval.  
**Final Report:** Submittal package should include signed and approved policy exception requests.



# POLICY EXCEPTION DEVELOPMENT: DUTCH HARBOR DOCUMENTATION



## Submittal Package Included:

1. District Engineer / Division Commander Transmittal Memorandums
2. Issue Paper
3. Legal Opinion
4. Resource Agency Letter(s)
5. Study MFR(s) supporting decision to pursue policy exception



\* Separately submitted a 3x3 exemption request for time.



# POLICY EXCEPTION DEVELOPMENT: DUTCH HARBOR DOCUMENTATION



## Issue Paper Contained:

- Concisely described the issue
- Identified desired outcome
- Provided background information
- Identified environmental resources and impacts (draft BA)
- Identified applicable guidance with interpretation
- Recommended solution or COAs
- Legal opinion

### *Why do we need a legal opinion for a policy issue?*

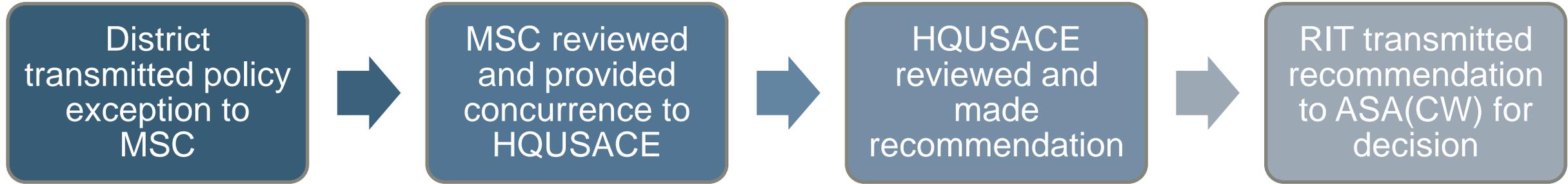
The ESA statute requires that any take of a marine mammal authorized by a BiOp must be authorized under the Marine Mammal Protection Act.

The legal opinion addressed the necessity of complying with the MMPA before ESA compliance could be fulfilled at this site.





# REVIEW AND APPROVAL PROCESS FOR DUTCH HARBOR



## *The ASA(CW) was weighing...*

- What does it cost in time and funding to complete the compliance in feasibility?
- What risk are we accepting by deferring completion of environmental compliance to PED?
- Would the selected plan be different had the formal consultation occurred in feasibility?
  - Mitigation Requirements
  - Jeopardy opinion post-authorization
  - Economic justification of project





# LESSONS LEARNED



Be patient and start coordinating early! You may be explaining complicated information several times to several people. A policy exception request requires a concerted effort of vertical team communication between the district, division, headquarters, and the ASA(CW).

This is not necessarily the only way to resolve a conflict between our process and another agencies' requirements. The policy exception is what we determined was the best path forward for this particular scenario based on our vertical team coordination and discussions with ASA(CW).

You may not be aware that a policy exception was needed for ESA and MMPA if:

- You have marine mammals in your AOR that are not protected under the ESA.
  - Example: bottle-nose dolphins
- You have never made a “likely to adversely affect” determination, and therefore no BiOp was required on marine mammals protected under ESA.
  - Example: Construction windows that mitigate effects of the project on manatees to a “not likely to adversely affect” determination



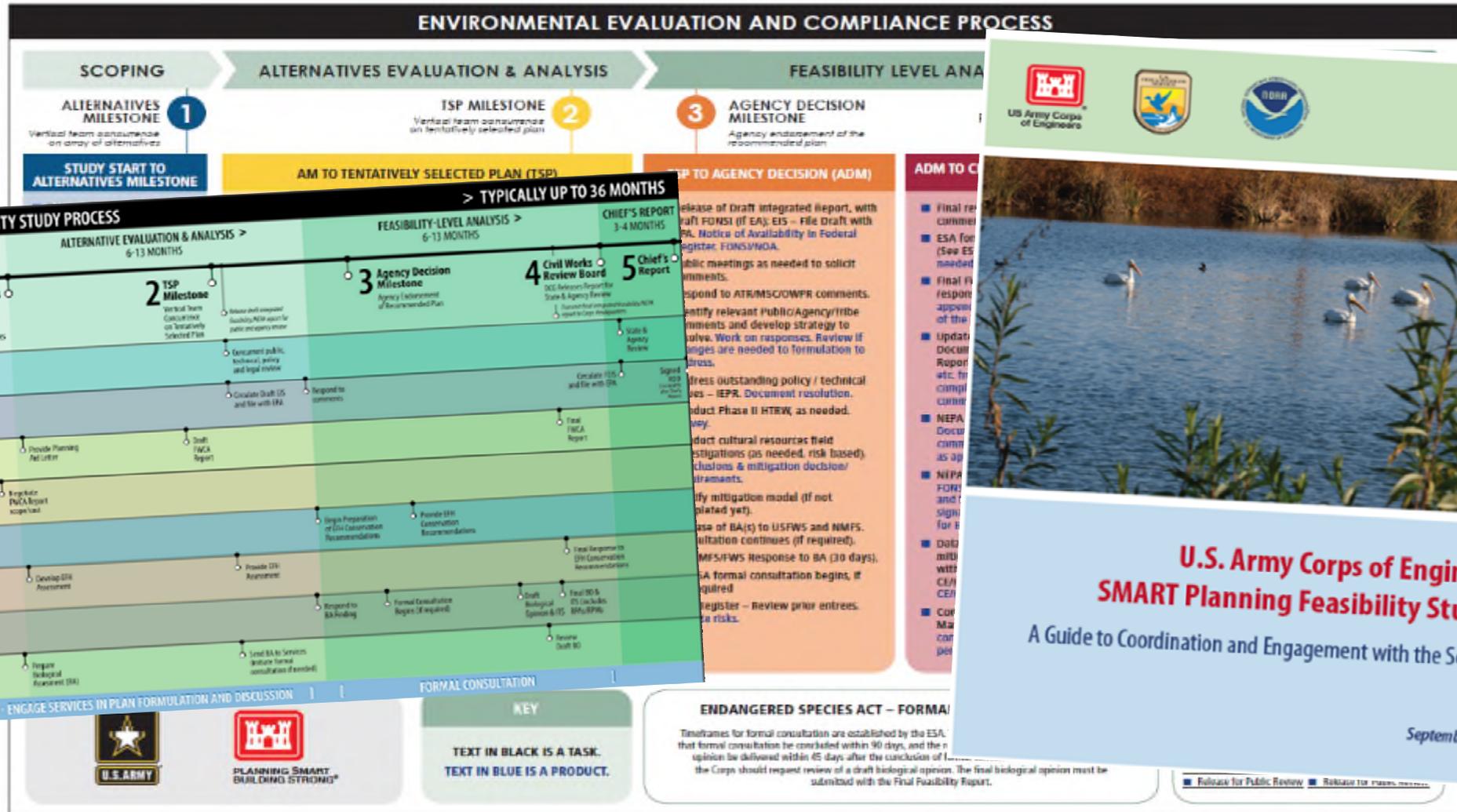
# CLOSING THOUGHTS



- An exemption to the 3x3 for time/money may be more appropriate depending on what the vertical team determines acceptable from a risk standpoint.
  - What if the risk was high for this to lead to a jeopardy opinion?
  - What if we had not fully coordinated or incorporated potential migration requirements?
  - What if the cost of mitigation leads to an unjustified recommendation... or worse, what if this isn't determined until PED and now we are facing a Section 902 cost bust?
- Deferring environmental compliance to PED ultimately takes away from informing the District Engineers recommendation on environmental acceptability of the plan and informing the local sponsor regarding the full nature of their commitments.
- If you have ESA species that aren't marine mammals, you should not have this issue.



# ENVIRONMENTAL RESOURCES



**U.S. Army Corps of Engineers**  
**SMART Planning Feasibility Studies**  
A Guide to Coordination and Engagement with the Services  
September 2015

<https://planning.erdc.dren.mil/toolbox/index.cfm>

QUESTIONS?



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