US Army Corps
of Engineers
Fort Worth District

Procedures for Jurisdictional Determinations

March 24, 2003

Introduction

The United States Army Corps of Engineers (USACE), acting under Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act of 1899, regulates certain activities occurring in waters of the United States. Under Section 404 of the Clean Water Act, authorization must be obtained from the USACE for discharges of dredged and fill material into waters of the United States, including jurisdictional wetlands. Under Section 10 of the Rivers and Harbors Act of 1899 the USACE regulates work in, or affecting, navigable waters of the United States.

For the purposes of Section 404 of the Clean Water Act, waters of the United States are defined at 33 CFR 328.3 as:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

2. All interstate waters including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

   a. which are or could be used by interstate or foreign travelers for recreational or other purposes; or

   b. from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

   c. which are used or could be used for industrial purpose by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under the definition;

5. Tributaries of waters identified in paragraphs 1-4 above;

6. The territorial seas;

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1-6 above.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Under Section 10 of the River and Harbors Act of 1899, the USACE regulates navigable waters of the United States, a subset of waters of the United States. Navigable waters of the United States are defined at 33 CFR 329 as those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or

events which impede or destroy navigable capacity. Navigable waters of the United States include many coastal waters, including bays, and portions of major rivers, such as the Trinity, Sabine, Brazos, Colorado, and Rio Grande in Texas. The USACE, Fort Worth District maintains a list of all navigable waters located within the Fort Worth District at http://www.swf.usace.army.mil/regulatory/local/navlist.pdf.

The limit of USACE jurisdiction for non-tidal waters of the United States in the absence of adjacent wetlands, is the ordinary high water mark. "Ordinary high water mark" is defined as that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands. Wetlands are defined as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Delineations of wetlands must be conducted using the "Corps of Engineers Wetland Delineation Manual", USACE Waterways Experiment Station Wetlands Research Program Technical Report Y-87-1, dated January 1987 (on-line edition available at http://www.wes.army.mil/el/wetlands/wlpubs.html), including all supplemental guidance (currently includes guidance dated October 7, 1991, and March 6, 1992). The supplemental guidance is included in the on-line version and may also be obtained from your USACE district office. Adjacent is defined as bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

Jurisdictional Determinations

To determine whether a permit is required under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act for a project, it is necessary first to delineate the location and boundaries of waters of the United States, including adjacent wetlands, and navigable waters of the United States within the project area. This involves:

1. the delineation of potential waters of the United States, including water features that possess an ordinary high water mark and those that meet the definition of a wetland as described above; and

2. a determination of which water features meet the definition of waters of the United States and navigable waters of the United States.

Jurisdictional Determination Reports

Jurisdictional Determination reports prepared for Department of the Army permit applications to document the process should include the following:

1. Purpose;

2. Methods, including:

   a. the name, address, telephone number, and other appropriate contact information for the property owner;

   b. a description of the approach used to delineate wetlands and other waters of the United States. Use of the 1987 Wetland Delineation Manual is mandatory for delineating wetlands. However, the manual identifies different methods for conducting delineations. The approach for each case should be specified.

c. a description of the conventions used to map the limits of waters of the United States, e.g. point to point survey performed by a registered professional land surveyor, Global Positioning System (GPS) mapping with a description of the limits of accuracy, etc.

3. Results, including:

a. a vicinity map or maps, (preferably USGS 7.5 minute or other smaller scale topographic maps) depicting the location of the site and showing the limits of the site investigated;

b. a narrative addressing the size of the site in square feet and/or acres; a description of any physical features (particularly those that correspond to property boundaries); and information on existing site conditions, including present and past land uses, site modifications, recent disturbances, topography, etc.;

c. a characterization of hydrology addressing direction, source, frequency, and duration of on-site drainage; identification of any named waterways on or in the vicinity of the site; and other pertinent information on hydrology;

d. a characterization of vegetative communities and dominant species (listed by *Genus species*) occurring within each community type;

e. a characterization of soils present on the project site using information derived from county soil surveys, evaluation of soil samples, and other sources. Include soil survey maps for the area with the study area boundaries shown;

f. a comparison of the soils, vegetative, and hydrologic conditions between wetland and upland areas,

g. a description of riparian and other buffer features around water features;

h. photographs taken from several locations throughout the project site, particularly up-slope and down-slope of any drainage features (streams, ditches, swales, etc.) and at the location of any wetland or ordinary high water mark delineation sample locations, with the locations of data sheets and directional location of ground photos shown;

i. current and historic aerial photographs; and

h. any other relevant descriptions or maps.

4. Conclusions, including:

a. a description of, and map depicting, potential waters of the United States (water features that have an ordinary high water mark or are wetlands) present in the study area. Include

(1) the wetland type(s), e.g. emergent, forested, scrub-shrub, etc. and

(2) the other water type(s), e.g. perennial, intermittent, or ephemeral stream, reservoir, pond, etc., as appropriate.

Identify the naming convention used, e.g. the U. S. Fish and Wildlife Service's Classification of Wetlands and Deepwater Habitats of the United States for wetlands and the 2002 Nationwide Permit definitions for streams. Include size/dimensions of the water feature such as approximate distance between ordinary high water marks for open waters (streams, reservoirs, etc.) and area in acres and/or square feet for wetlands.

b. a description of, and map depicting, likely waters of the United States and navigable waters of the United

States present in the study area based on the definitions at 33 CFR 328 and 329. Include appropriate reasoning why the water features meet the appropriate definitions. Information addressed in items 4.a. and 4.b. may be included on the same map.

5. Supporting information, including:

a. 1987 Manual wetland determination data forms, preferably one form completed for each habitat type observed within the project area; and

b. references.

All Maps must include, at a minimum, a title block with the title, date, number scheme (sheet __ of __), and source; a North indicator; a scale, the map author, the study area boundary, areas delineated as water features, areas determined likely to be waters of the United States or navigable waters of the United States and a legend that clearly identifies features presented. Whenever water features are depicted on a map it is preferable to distinguish between wetlands and other water features, such as streams and on-channel ponds. Maps should be developed so that information presented is clearly marked and shown in relation to the nearest roads, water features, and cities and towns. All maps must be in black and white on 8.5 by 11 inch paper. Base map sources include: U. S. Geological Survey (USGS) maps, state, county, and city maps, soil survey maps, and floodplain maps.

The USACE will review jurisdictional determination reports and either verify the conclusions in the report or request changes to the report based on the review. Once the USACE agrees with the conclusions presented in the jurisdictional determination report, the USACE will make a jurisdictional determination. The USACE may then proceed with the evaluation of a permit application submittal (individual permit application, general permit preconstruction notification, or general permit verification request). The USACE may also send a letter affirming a preliminary or approved jurisdictional determination.

This procedure is applicable to all projects that involve non-agricultural land or agricultural land that is proposed to be converted to non-agricultural use. The USACE signed a Memorandum of Agreement (MOA) with the Department of Agriculture (DOA), Department of the Interior, and the U. S. Environmental Protection Agency (EPA) in January 1994 for wetland delineations on agricultural lands. Under this MOA, the USACE and EPA will accept written Natural Resource Conservation Service (NRCS) wetland delineations for agricultural land under the Food Security Act as the final government position on the extent of Section 404 jurisdiction in wetlands. This MOA is currently being revised because of recent amendments to the Food Security Act. USACE district offices are also developing local agreements with the NRCS in order to more efficiently integrate the two agencies' programs.

Contacts

The USACE is committed through the Regulatory Program to protect waters of the United States, including wetlands. For more information about the Regulatory Program for activities in the State of Texas, please refer to the attached map showing district boundaries and contact the appropriate Corps Regulatory Branch (Fort Worth District, (817) 886-1731; Galveston District, (409) 766-3930; Tulsa District, (918) 669-7400; and Albuquerque District, El Paso Office, (915) 568-1359). For information in other states, contact the appropriate USACE Regulatory Office. On the Internet, you can visit the Fort Worth District Regulatory Branch homepage at http://www.swf.usace.army.mil/regulatory/ or the national USACE Regulatory Program homepage at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/.