



**US Army Corps
of Engineers**
Fort Worth District

U.S. Army Corps of Engineers Regulatory Program Overview

March 17, 2003



Abstract

The Regulatory Program of the U.S. Army Corps of Engineers (Corps) plays a critical role in the protection of the aquatic ecosystem and navigation. Important elements of the program implemented by the Corps under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 include conducting jurisdictional determinations for wetlands and other waters of the United States and navigable waters of the United States; authorizing activities in these jurisdictional areas through individual and general permits; ensuring compliance of issued permits; and enforcing requirements of the law for unpermitted activities. The Corps works closely with other federal and state natural resource agencies and the public in exercising these responsibilities.

Introduction

The U.S. Army Corps of Engineers (Corps), acting under Section 404 of the Clean Water Act, provides a vital function in protecting our valuable aquatic resources, including wetlands. The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Under Section 404 of the Clean Water Act, the Secretary of the Army is responsible for administering a Regulatory Program that requires permits for the discharge of dredged or fill material into waters of the United States, including wetlands. The Secretary operates this program through the Corps. Each District Engineer and his staff carry out the day-to-day functions of this program. The Corps also implements Section 10 of the Rivers and Harbors Act of 1899 in the Regulatory Program.

Jurisdiction

Areas regulated under Section 404 are collectively referred to as "waters of the United States." Included are any part of the surface water tributary system down to the smallest of streams, any lake, pond, or other water body on those streams, and adjacent wetlands. Isolated waters such as playa lakes, prairie potholes, old river scars, cutoff sloughs, and abandoned construction and mining pits may also be waters of the United States if they meet certain criteria. An important point is that waters of the United States include areas that are man-made, or man-induced, as well as natural.

Wetlands are found in many different forms including bottomland hardwood forests, wooded swamps, marshes, wet meadows, bogs, and playa lakes. Wetlands have been identified as being of particular concern because they perform valuable functions in restoring and maintaining the quality of the Nation's waters. These functions include sediment trapping, nutrient removal, chemical detoxification, shoreline stabilization, aquatic food chain support, fish and wildlife habitat, flood water storage, and ground water recharge.

Prime examples of the adverse impacts associated with the loss of wetlands are the effects of Hurricane Andrew in Florida in 1992 and the Mississippi River flood in 1993. In areas where wetlands

were still present, tremendous benefits were realized including flood protection, erosion prevention, and storm surge buffering. Where wetlands had been eliminated, or reduced in extent, storm and flood damages were much more extensive.

Wetland delineations under Section 404 are currently made as a part of determinations of waters of the United States primarily by the Corps and occasionally by the U.S. Environmental Protection Agency (EPA) using the 1987 Corps of Engineers Wetlands Delineation Manual. However, the Department of the Army signed a Memorandum of Agreement (MOA) with the Department of Agriculture (DOA), Department of the Interior, and EPA in January 1994 for wetland delineations on agricultural lands. Under this MOA, the Corps 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 wetland jurisdiction if the delineation relates to an agricultural action. This MOA may eventually be revised because of amendments to the Food Security Act since the original MOA. Corps district offices have developed local agreements with the NRCS of the DOA in order to more efficiently integrate the two agencies' programs.

The National Academy of Sciences completed a study on wetland delineation in May 1995. The National Academy of Sciences study concluded that the Corps 1987 Manual is scientifically sound, but that improvements to the manual can, and should be made. The Corps, along with the other responsible federal agencies, has been evaluating the results of that study and will determine, with full opportunity for public comment, if the 1987 Corps of Engineers Wetland Delineation Manual should be revised. To date no changes have been proposed.

The Corps also regulates navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899 in the Regulatory Program. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce. 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.

Permitting

Section 404 of the Clean Water Act is the Nation's primary wetland regulatory authority. Under Section 404, a permit is required from the Corps for any activity involving the discharge of dredged or fill material into waters of the United States, including wetlands. The term "discharge of dredged material" includes the redeposit of dredged or excavated material into a water of the United States, when such redeposit has the effect of destroying or degrading waters of the United States. This includes the addition or redeposit of material associated with mechanized land clearing, ditching, channelization, sidecasting, temporary stockpiling, and other ground disturbing activities. The term "discharge of fill material" includes the addition of material into a water of the United States where the material has the effect of replacing a water of the United States, such as a wetland, with dry land or of changing the bottom elevation of any portion of a water of the United States. An example of a discharge of fill material would be the placement of clean soil into a wetland to create dry land so that an apartment complex could be built on the site.

The Corps issued regulations in August 1993 that included a revised definition of "discharge of dredged material" and clarified that prior converted croplands are not waters of the United States. The

definition of discharge of dredged material included discharges associated with excavation activities. However, because of subsequent decisions by the United States in the U.S. District Court for the District of Columbia and the U. S. Circuit Court for the District of Columbia in the case of *American Mining Congress v. Corps*, the Corps no longer regulates incidental fallback discharges of dredged material into waters of the United States associated with excavation activities. Incidental fallback is the redposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal.

Certain activities in waters of the United States are exempt by law from regulation under Section 404(f), including certain farming, ranching, and forestry activities. Included are normal farming, silvicultural, and ranching activities; maintenance of recently damaged structures; construction and maintenance of farm ponds and irrigation ditches; construction of temporary sedimentation basins; and construction and maintenance of farm, forest, and mining roads using approved best management practices. However, the exemptions are applied carefully and are not intended to exempt activities with more than minor adverse impacts to the aquatic ecosystem.

Under Section 10, the Corps regulates all work and structures in, or affecting, the course, condition, or capacity of navigable waters of the United States. Examples of activities and structures that require authorization under this statute include dredging, filling, excavation, weirs, power lines, tunnels, piers, wharves, dolphins, breakwaters, booms, bulkheads, revetments, riprap, jetties, permanent mooring structures, aids to navigation, permanently moored floating facilities, and pilings.

Authorizations may be in one of three primary forms: general permits, letters of permission, and standard individual permits. In any case, the purpose of the permit process is to reduce the potential impact of construction projects on our important aquatic resources.

Activities requiring authorization that are similar in nature and would cause only minimal individual and cumulative environmental impacts may qualify for general permits. These general permits may be either nationwide or regional in scope. There are 43 nationwide general permits currently in effect that address Section 404 and Section 10 activities. These permits may be used to authorize specified activities as long as the impact of the work on the aquatic ecosystem is minor and the person or group responsible for the work meets certain conditions. Some general permits require that the Corps be notified before work begins. Other general permits do not require notification as long as all of the terms and conditions of the permit are met. The Corps issued the most current set of nationwide permits on January 15, 2002 (effective date March 18, 2002). The current nationwide permits expire on March 18, 2007.

In addition to the nationwide general permits, regional general permits may be issued for certain types of projects and geographic areas. These regional general permits may cover a variety of activities including utility lines and intake and outfall structures; boat ramps and minor facilities; and oil, gas, and water exploration and production wells. Regional general permits also include conditions that must be met for the authorization to be valid and may require Corps notification.

The letter of permission is another Corps permit option. This is a form of individual permit issued through an abbreviated process that includes coordination with federal and state fish and wildlife agencies and a public interest evaluation, but without the publication of an individual public notice. For cases subject to Section 404, the Corps must issue a public notice requesting comments and offering an opportunity for public hearing on the categories of activities and the proposed letter of permission procedures, and receive water quality certification from the state, before using this approach. Letters of

permission require the submittal of an application to the Corps in every case.

If a project does not meet the requirements of a general permit and cannot be authorized by a letter of permission, a standard individual permit is required. The project evaluation process for this type of permit includes: pre-application consultation; submittal of a completed application form; a public notice and comment period on the permit application; evaluation of the permit application; preparation of permit decision documents, including a discussion of the environmental impacts of the project, the findings of the Corps public interest review process and compliance determinations with the Section 404(b)(1) Guidelines; and the permit decision. The Corps will issue a permit if the proposal being reviewed is found not to be contrary to the public interest and meets the requirements of the Section 404(b)(1) Guidelines and other legal requirements.

The Corps public interest review is of great importance to the project evaluation. The public and private benefits and detriments of all factors relevant to each case are carefully evaluated and balanced. Relevant factors may include conservation, economics, aesthetics, wetlands, cultural resources, navigation, fish and wildlife values, water supply, water quality, and any other factors judged important to the needs and welfare of the people.

The Section 404(b)(1) Guidelines, published by EPA, are the substantive aquatic ecosystem standards by which all Section 404 permit applications are evaluated. To highlight the efforts of the Corps to protect waters of the United States and heighten our environmental sensitivity, the Corps entered into a MOA with EPA for determining the type and level of mitigation necessary to demonstrate compliance with the Section 404(b)(1) Guidelines. The joint memorandum prescribes a sequence of steps for evaluating proposed projects that require an individual permit. This sequence begins with an evaluation of all practicable alternatives. The Corps will authorize only the practicable alternative that is the least damaging to the aquatic ecosystem and does not cause or contribute to significant degradation of waters of the United States. This reflects the objective of avoiding adverse impacts to aquatic ecosystems whenever practicable. Once the appropriate alternative is identified, all practicable steps must be taken to minimize impacts to the aquatic ecosystem. Finally, the Corps must insure that appropriate and practicable compensation is provided for any unavoidable adverse impacts. Mitigation, particularly compensatory mitigation, is addressed most recently in Regulatory Guidance Letter 02-2 “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899” dated December 24, 2002.

Mitigation banking is restoration, enhancement, creation, and, in exceptional circumstances, preservation undertaken in advance of multiple projects to compensate for adverse impacts to the aquatic ecosystem. Mitigation banking may be an acceptable form of compensatory mitigation for adverse impacts associated with permits issued by the U. S. Army Corps of Engineers under Section 404 of the Clean Water Act under circumstances outlined primarily in “Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks” dated November 28, 1995.

Other approaches to mitigation and wetland protection and enhancement are available to those who are interested. These approaches include joint-project mitigation; in-lieu fee mitigation; federal, state, and local incentive programs; and aquatic ecosystem restoration projects through Congressionally authorized programs.

Numerous other environmental laws must be addressed in the evaluation of all permit applications, including the National Environmental Policy Act, Endangered Species Act, and the National Historic

Preservation Act. While the final decision regarding Department of the Army permit applications rests solely with the Corps, federal and state natural resource agencies have an important, sometimes mandatory, advisory role in the Regulatory Program. Examples of such partnering agencies are the EPA, the U. S. Fish and Wildlife Service, the state fish and wildlife agency, and the state water quality agency. In addition, no permit can be issued under Section 404 without the issuance of water quality certification by the responsible state agency (the Texas Commission on Environmental Quality in the state of Texas).

On March 9, 1999, the Corps published a final regulation establishing an administrative appeal process for the Regulatory Program. Effective August 6, 1999, Corps division offices will conduct reviews of appeals filed by applicants on standard individual permits denied with prejudice by a district engineer and permits declined by an applicant who objected to certain terms or conditions. The appeal process was expanded to include jurisdictional determinations on March 28, 2000.

Enforcement and Compliance

Enforcement authority is shared by the Corps and EPA under Section 404 and is the sole responsibility of the Corps under Section 10. The partnering effort with EPA in Section 404 in identifying potential violations is very important in the implementation of the regulatory program. Unauthorized activities may be discovered by a number of methods, including reporting by other agencies and the public. When unauthorized activities are discovered, the Corps works to ensure compliance through various means, including voluntary restoration, other remedial measures, and after-the-fact permitting. Substantial penalties and fines may be used to deter further violations. The Corps also monitors authorized projects for compliance with permit terms and conditions, and to confirm that impacts to the aquatic system are no greater than expected and that any mitigation work is completed and successful.

Federal Wetland Policy

The Corps strongly supports the goal of no overall loss of the Nation's remaining wetlands, and the long-term goal of increasing the quality and quantity of the wetland resource base. Federal wetland policy seeks to ensure that regulatory programs are efficient, fair, flexible, and predictable; promote non-regulatory programs to protect wetlands and accomplish long-term wetland gains; expand partnerships with state, tribal, and local governments, private groups, and individuals in protecting and restoring wetlands through ecosystem/watershed approaches; and base federal wetlands policy on the best scientific information available.

The Corps and other federal agencies have taken many steps to protect the aquatic environment, including wetlands, while providing efficient decision-making and fair and reasonable decisions. Included are streamlining the permitting program for transportation, energy, and national security projects; responding to the concerns of farmers and small landowners; improving cooperation with private landowners to protect and restore wetlands; and increasing the role of state, local, and tribal governments in wetlands protection. Actions taken by the Corps include: exempting prior converted cropland from Section 404 requirements; implementing an appeal process for landowners for permit conditions and permit denials; streamlining permit application processing for private landowners; emphasizing mitigation needs and improving mitigation options; and increasing certainty and flexibility for identifying wetlands through increased coordination with the NRCs on agricultural lands.

Conclusion

The Corps is committed through the Regulatory Program to the protection of wetlands and other waters of the United States. This commitment is a partnership in water between federal, state and local agencies, and the general public.

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 Office (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 Corps Regulatory Office. On the Internet, you can visit the Fort Worth District's 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/>.

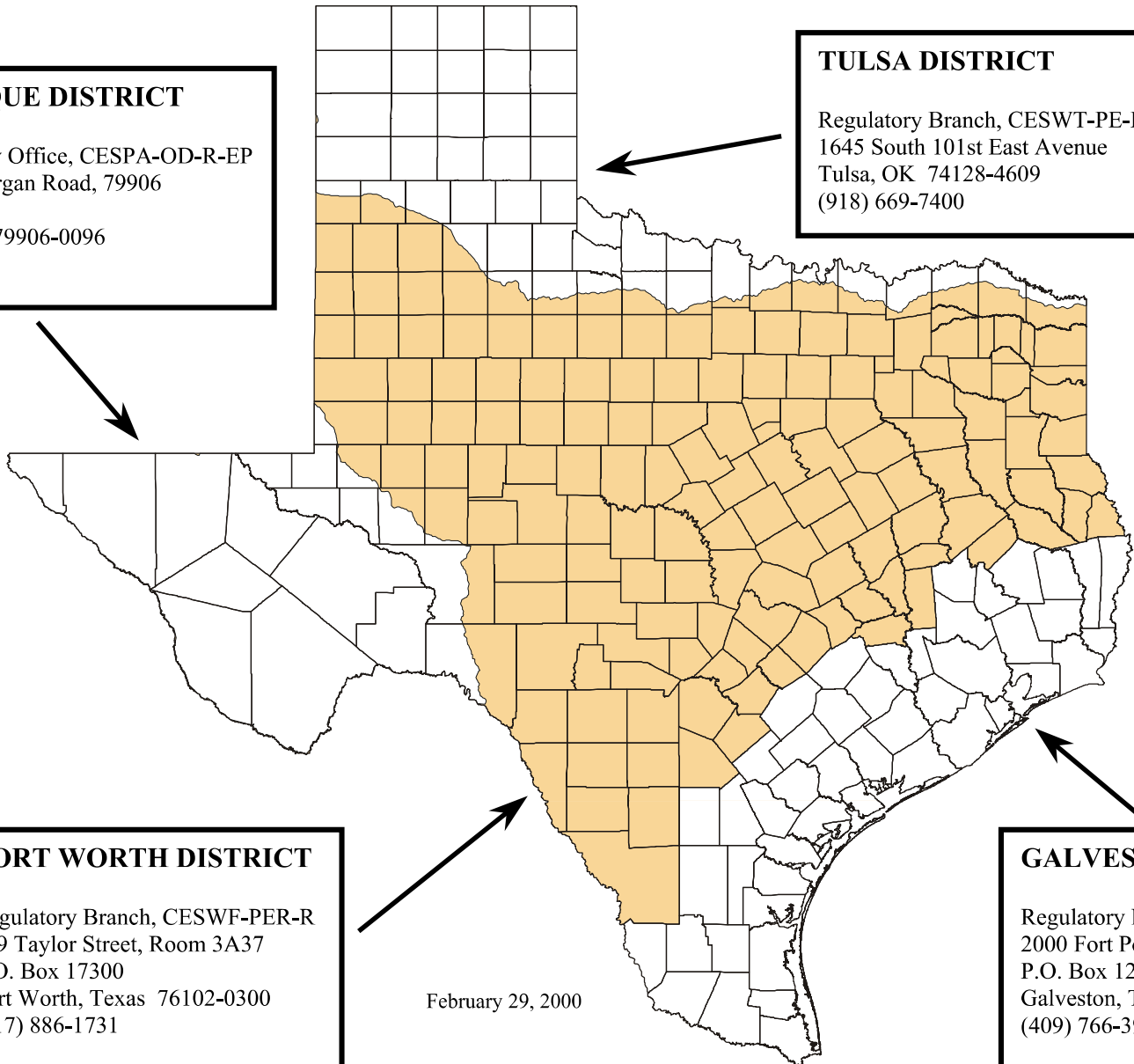
U.S. Army Corps of Engineers Districts within the State of Texas

ALBUQUERQUE DISTRICT
El Paso Regulatory Office, CESPA-OD-R-EP
Building 6380 Morgan Road, 79906
P.O. Box 6096
Fort Bliss, Texas 79906-0096
(915) 568-1359

TULSA DISTRICT
Regulatory Branch, CESWT-PE-R
1645 South 101st East Avenue
Tulsa, OK 74128-4609
(918) 669-7400

FORT WORTH DISTRICT
Regulatory Branch, CESWF-PER-R
819 Taylor Street, Room 3A37
P.O. Box 17300
Fort Worth, Texas 76102-0300
(817) 886-1731

GALVESTON DISTRICT
Regulatory Branch, CESWG-PE-R
2000 Fort Point Road
P.O. Box 1229
Galveston, Texas 77553-1229
(409) 766-3930



February 29, 2000