

# Corps Regulatory Program – Waters and Wetlands

## Regulatory Jurisdiction

CESWF-DE-R  
Fort Worth District

July 2014



US Army Corps of Engineers  
**BUILDING STRONG®**

# Regulatory Program Authorities

**Construction and dredging Section 10  
Rivers and Harbors Act**



**Discharge of dredged and fill material  
Section 404 Clean Water Act**



**Transport and discharge of  
Dredged material  
Section 103 Ocean Dumping Act**



# Rivers and Harbors Act of 1899

- “...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.”
- Section 9
  - ▶ Construction of dams or dikes across navigable waters
    - If interstate, requires Congressional consent
    - If intrastate, requires state legislature consent
  - ▶ Construction of bridges and causeways
    - Transferred to Secretary of Transportation in 1966
    - Corps still authorizes discharges of fill under CWA §404



# Rivers and Harbors Act of 1899

- Section 10

- ▶ Regulate the obstruction or alteration of navigable waters

- Constructing structures in, over, under navigable waters
    - Excavation/dredging
    - Depositing material
    - Any other work that affects the course, location, condition, or capacity of navigable waters

- ▶ Also applies to the construction of artificial islands or installations on the outer continental shelf



# Clean Water Act Section 404

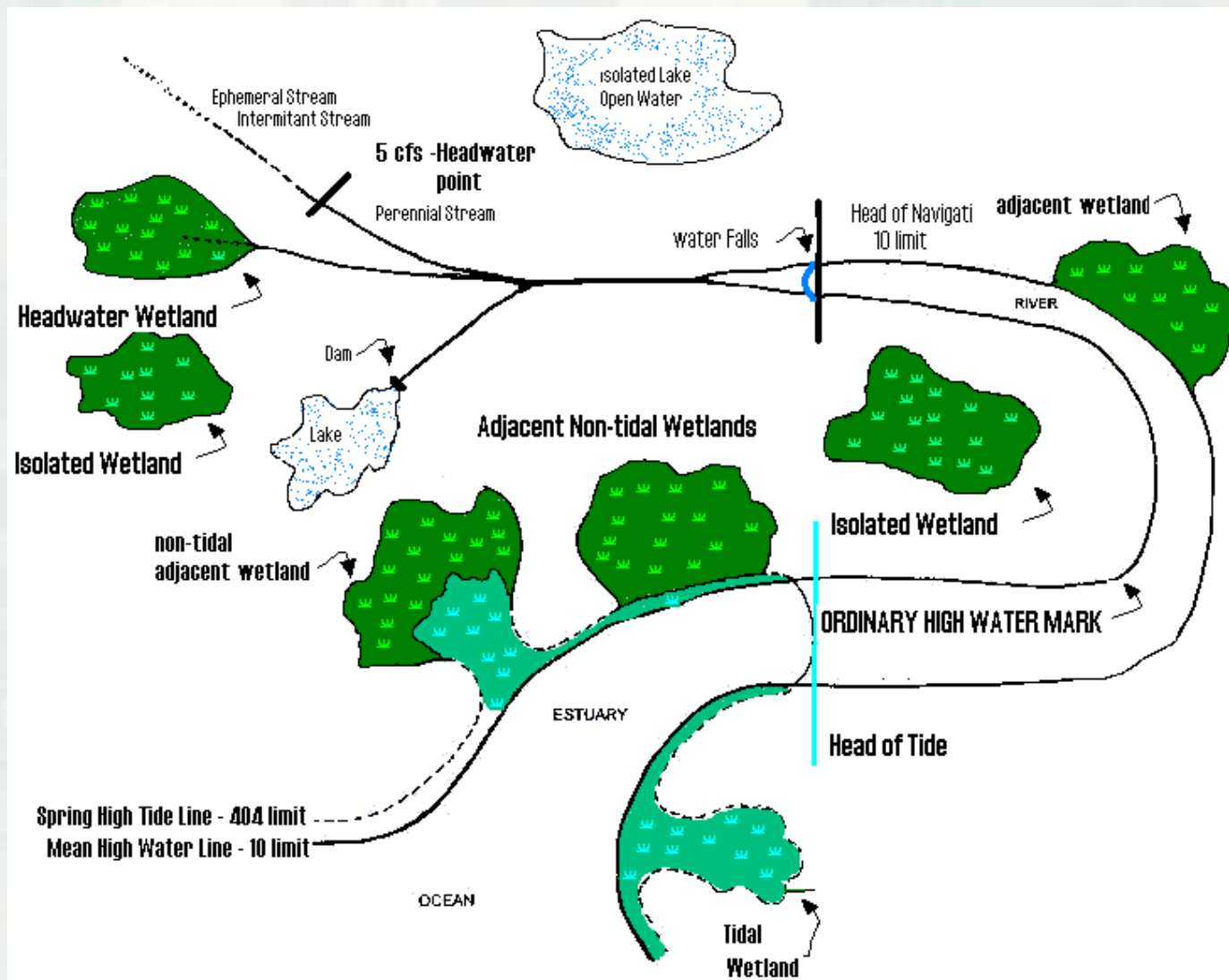
- The Corps regulates the “...discharge of dredged or fill material into the navigable waters at specified disposal sites.”
  - ▶ Fill material – replaces a water with dry land or raises the bottom elevation of a waterbody
  - ▶ Discharge of dredged material – any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, waters of the United States
- Navigable waters ≡ “waters of the United States”
- EPA can veto



# Waters of the United States

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and wetlands
3. Intrastate waters where destruction or degradation could affecting interstate or foreign commerce (HQ approval required)
  - ▶ Waters used for recreation or other purposes
  - ▶ Waters with fish or shellfish sold in interstate or foreign commerce
  - ▶ Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. Wetlands adjacent to waters of the U.S.



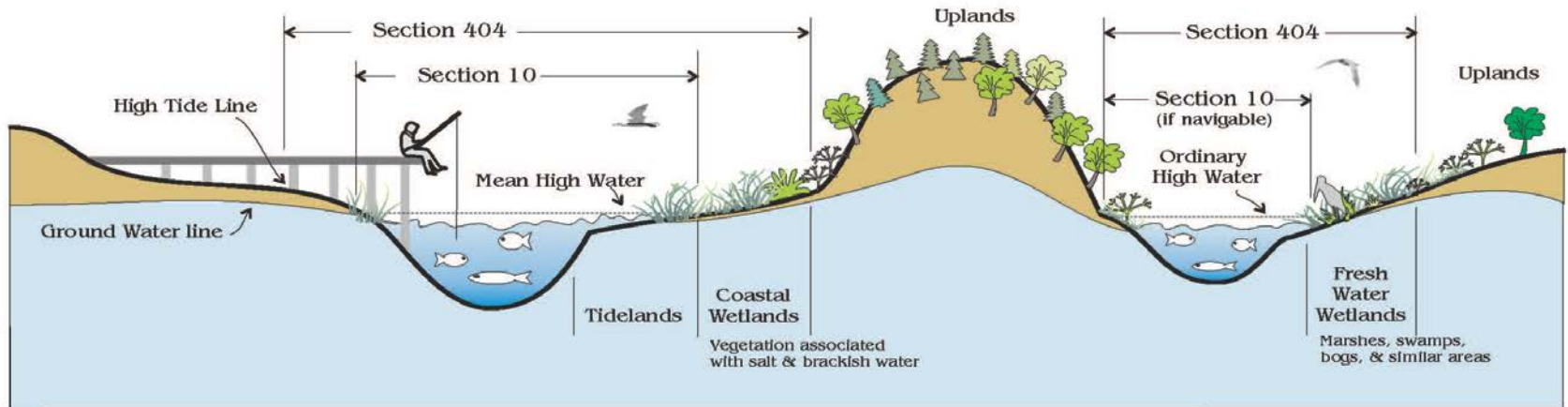




# CORPS OF ENGINEERS REGULATORY JURISDICTION

## Tidal Waters

## Fresh Waters



### Section 103 Ocean Discharge of Dredged Material

Typical examples  
of regulated activities

Ocean discharges of  
dredged material

### Section 404 Disposal of Dredged or Fill Material (all waters of the U.S.)

All filling activities, utility lines, outfall structures,  
road crossings, beach nourishment, riprap,  
jetties, some excavation activities, etc.

### Section 10 All Structures and Work (navigable waters)

Dredging, marinas, piers, wharves,  
floats, intake / outtake pipes,  
pillings, bulkheads, ramps, fills,  
overhead transmission lines, etc.



# Landward limits of waters of the United States

- Tidal waters
  - ▶ High tide line
  - ▶ Limits of adjacent non-tidal wetlands
- Non-tidal waters
  - ▶ Ordinary high water mark, in the absence of adjacent wetlands
  - ▶ Limits of adjacent wetlands
  - ▶ If it is only a wetland, the wetland boundary



# Ordinary High Water Mark

33 CFR 328.3(e) - RLG 05-05

The term *ordinary high water mark* (OHWM) means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a 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.



# Ordinary High Water Mark



# Changes in limits of waters of the United States

- Permanent changes in shoreline result in different limits for waters of the U.S.
- Gradual changes over time as a result of natural causes can also change those boundaries:
  - ▶ Changing sea levels
  - ▶ Land subsidence
  - ▶ Siltation
  - ▶ Change in drainage
- Man-made changes
  - ▶ Permanent changes need to be verified by the district engineer



# Who makes jurisdictional determinations?

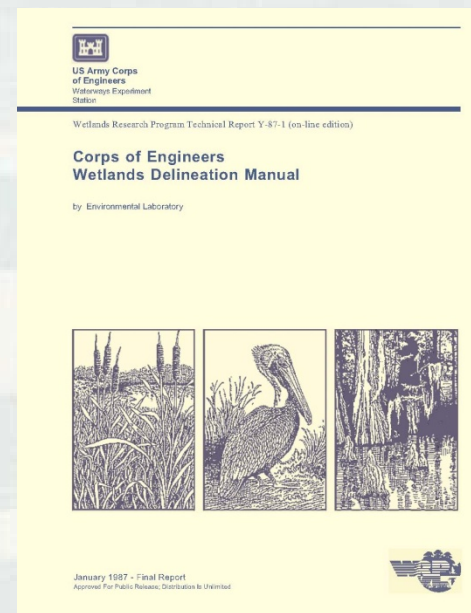
- District engineers determine waters that are:
  - ▶ Navigable waters of the U.S. (RHA §10)
  - ▶ Waters of the U.S. (CWA §404)
- Exceptions:
  - ▶ Division engineer makes a navigability determination
  - ▶ EPA makes a CWA §404 jurisdictional determination
    - 1979 Attorney General opinion
    - Special case authority under 1989 Jurisdictional Determination Memorandum of Agreement

# Types of jurisdictional determinations

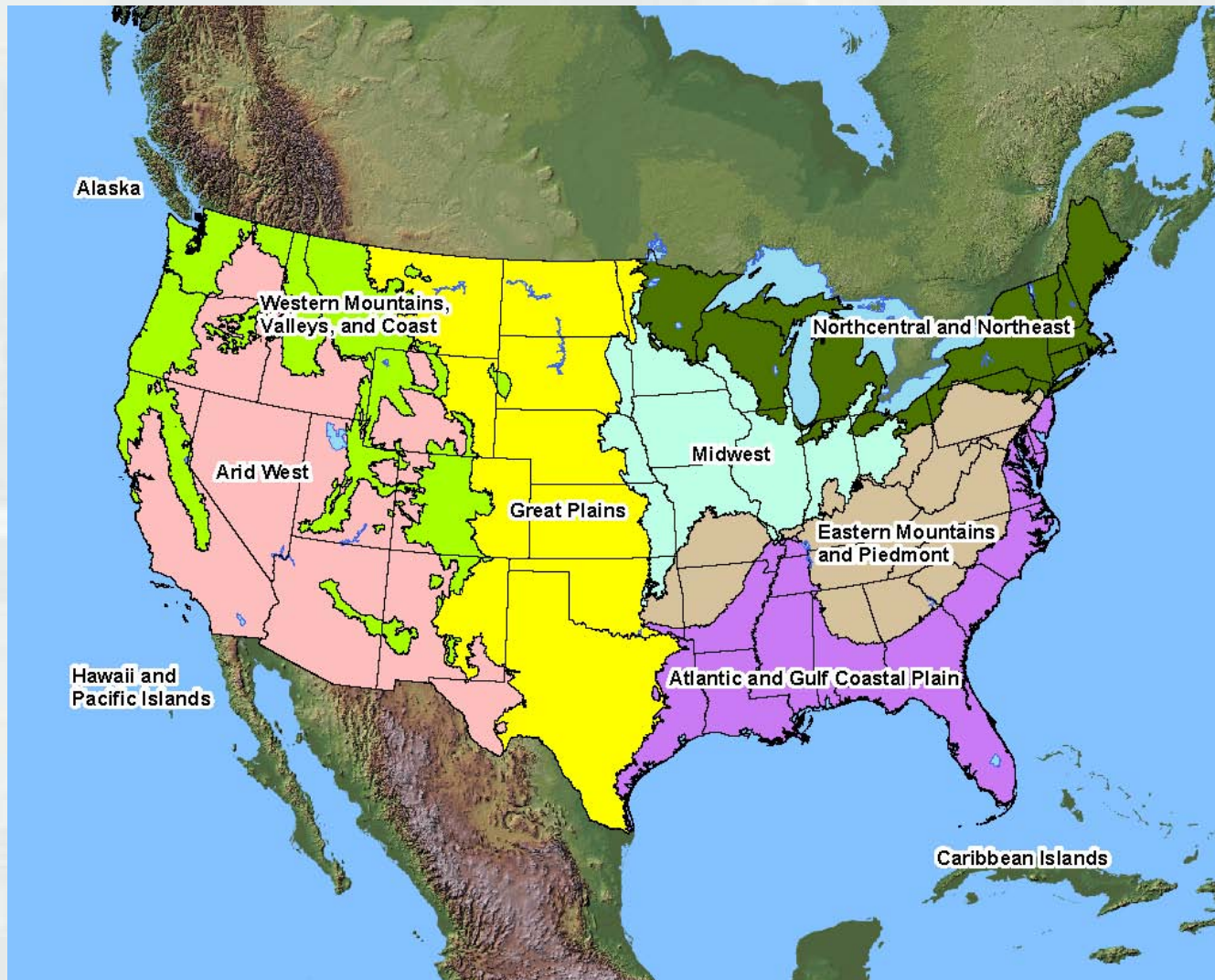
- Approved Jurisdictional Determinations
  - ▶ Official Corps determination that jurisdictional waters are present or absent on a site
  - ▶ Valid for 5 years, unless new information or changing environmental conditions warrant a revision
  - ▶ May also identify the limits of jurisdictional waters
  - ▶ Can be appealed to Division Engineer
- Preliminary Jurisdictional Determinations
  - ▶ Non-binding written indications that there may be waters of the United States on a site
  - ▶ Advisory in nature
  - ▶ Cannot be appealed to Division Engineer
  - ▶ No expiration date

# Identifying wetlands

- 1987 Corps of Engineers Wetland Delineation Manual
- Applicable regional supplement
- Examine:
  - ▶ Plant community
  - ▶ Soil indicators (hydric soils)
  - ▶ Presence of water



# Wetland delineation manual regional supplements





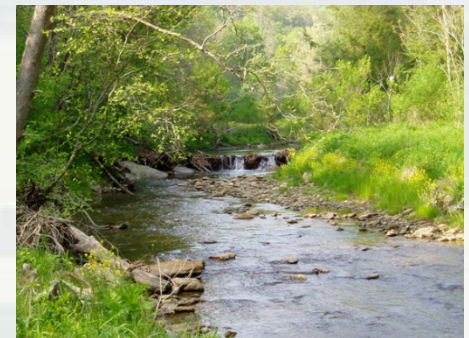
# Criteria for Clean Water Act jurisdiction

- General categories of jurisdictional waters and wetlands:
  - ▶ Traditional navigable waters
  - ▶ Wetlands adjacent to traditional navigable waters
    - bordering, contiguous, neighboring
  - ▶ Non-navigable tributaries of traditional navigable waters that have relatively permanent flow
    - Flow year round
    - Flow seasonally (at least 3 months)
  - ▶ Wetlands that directly abut non-navigable tributaries with relatively permanent flow

# Criteria for Clean Water Act jurisdiction

- Waters that require a case-specific finding of a significant nexus to a traditional navigable water:
  - ▶ Non-navigable tributaries that do not have relatively permanent flow
  - ▶ Wetlands adjacent to non-navigable tributaries that do not have relatively permanent flow
  - ▶ Wetlands adjacent to, but do not directly abut, a non-navigable tributary with relatively permanent flow

**Significant nexus:** Do the waters significantly affect the chemical, physical or biological integrity of downstream traditional navigable waters?



# Waters generally not jurisdictional under CWA

- Isolated, intrastate, non-navigable waters based on use by migratory birds
- Upland swales or gullies
- Ditches (including roadside ditches) excavated in and draining only uplands and that do not carry a relatively permanent flow of water
- Prior converted cropland
- Existing waste treatment facilities constructed in waters to satisfy Clean Water Act requirements
- Water-filled depressions created incidental to construction activity
- Ornamental ponds constructed in uplands

# Common JD Problems

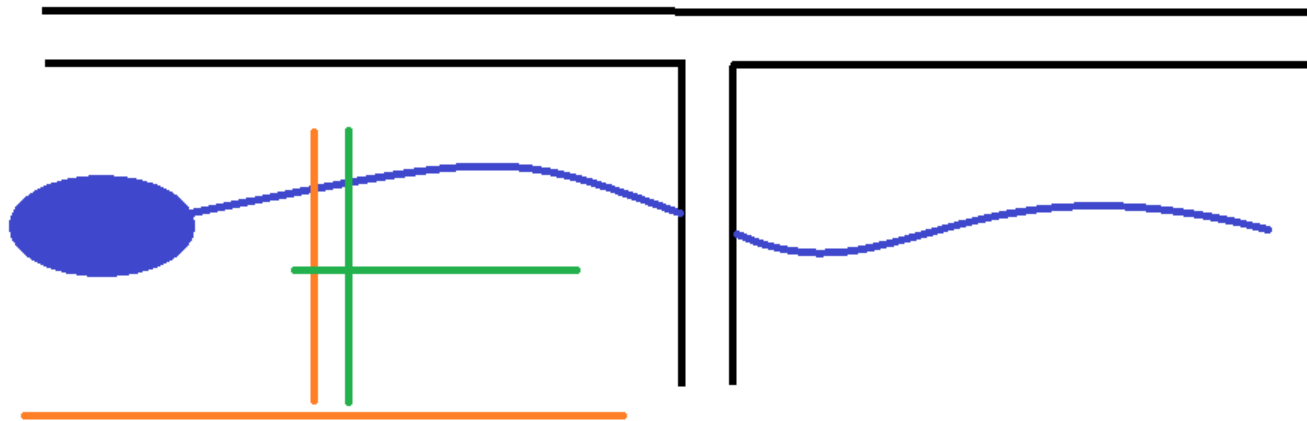
- Inconsistent Data
- Wetland Delineation Only (No Streams)
- Stream Delineation Only (No Wetlands)
- Unclear Maps and Exhibits
- Incorrect Coordinates
- Wrong Form; Missing Data; Incomplete Form
- Misapplying Dominance Test
- Wrong or No Stream Classification
- No Photographs; No Date on Photographs



# Unclear Maps and Exhibits

- Maps should have appropriate details
  - ▶ Date
  - ▶ North arrow
  - ▶ Scale
  - ▶ Title
  - ▶ Feature labels
  - ▶ Legend
  - ▶ Data source
  - ▶ Acreages, linear footages, coordinates
  - ▶ Width of streams
  - ▶ USACE project number

# Unclear Maps and Exhibits



**MAP A: Waters of The U.S.**

# Unclear Maps and Exhibits



# Wrong Form

## DATA FORM ROUTINE WETLAND DETERMINATION (1987 COE Wetlands Delineation Manual)

Project/Site: _____		Date: _____
Applicant/Owner: _____		County: _____
Investigator: _____		State: _____
Do Normal Circumstances Exist on the site?	Yes No	Community ID : _____
Is the site significantly disturbed (Atypical Situation)?	Yes No	Transect ID: _____
Is the area a potential Problem Area?	Yes No	Plot ID: _____
(If needed, explain on reverse.)		

### VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. _____	_____	_____	9. _____	_____	_____
2. _____	_____	_____	10. _____	_____	_____
3. _____	_____	_____	11. _____	_____	_____
4. _____	_____	_____	12. _____	_____	_____
5. _____	_____	_____	13. _____	_____	_____
6. _____	_____	_____	14. _____	_____	_____
7. _____	_____	_____	15. _____	_____	_____
8. _____	_____	_____	16. _____	_____	_____
Percent of Dominant Species that are OBL, FACW or FAC (excluding FAC-). _____					
Remarks: _____					

### HYDROLOGY

<input type="checkbox"/> Recorded Data (Describe in Remarks): <input type="checkbox"/> Stream, Lake, or Tide Gauge <input type="checkbox"/> Aerial Photographs <input type="checkbox"/> Other <input type="checkbox"/> No Recorded Data Available	Wetland hydrology Indicators: Primary Indicators: <input type="checkbox"/> Inundated <input type="checkbox"/> Saturated in Upper 12 Inches <input type="checkbox"/> Water Marks <input type="checkbox"/> Drift Lines <input type="checkbox"/> Sediment Deposits <input type="checkbox"/> Drainage Patterns in Wetlands Secondary Indicators (2 or more required): <input type="checkbox"/> Oxidized Root Channels in Upper 12" <input type="checkbox"/> Water-Stained Leaves <input type="checkbox"/> Local Soil Survey Data <input type="checkbox"/> FAC-Neutral Test <input type="checkbox"/> Other (Explain in Remarks)
Field Observations:  Depth of Surface Water: _____ (in.)  Depth to Free Water in Pit: _____ (in.)  Depth to Saturated Soil: _____ (in.)	
Remarks: _____	



# Wrong or Missing Data

## WETLAND DETERMINATION DATA FORM – Great Plains Region

Project/Site: Hill County Car Wash City/County: Hill County Sampling Date: July 4, 2014  
 Applicant/Owner: USACE State: Texas Sampling Point: 1 Wetland  
 Investigator(s): F. Land Section, Township, Range: NA  
 Landform (~~hillslope~~, terrace, etc.): Depression Local relief (concave, convex, none): Concave Slope (%): 0 – 5  
 Subregion (LRR): Southwestern Prairies (J) Lat: 32.12345 Long: 97.12345 Datum: NAD 83  
 Soil Map Unit Name: Trinity Clay NWI classification: PFO  
 Are climatic / hydrologic conditions on the site typical for this time of year? Yes \_\_\_\_\_ No X (If no, explain in Remarks.)  
 Are Vegetation No, Soil No, or Hydrology No significantly disturbed? Are "Normal Circumstances" present? Yes X No \_\_\_\_\_  
 Are Vegetation No, Soil No, or Hydrology No naturally problematic? (If needed, explain any answers in Remarks.)

### SUMMARY OF FINDINGS – Attach site map showing sampling point locations, transects, important features, etc.

Hydrophytic Vegetation Present?	Yes <u>X</u> No _____	Is the Sampled Area <u>within a Wetland</u> ? Yes <u>X</u> No _____
Hydric Soil Present?	Yes <u>X</u> No _____	
Wetland Hydrology Present?	Yes <u>X</u> No _____	
Remarks: Drought		

# Wrong or Missing Data

**VEGETATION – Use scientific names of plants.**

Tree Stratum (Plot size: 30-ft)		Absolute % Cover	Dominant Species?	Indicator Status
1.	<i>Pinus palustris</i>	40	Y	FAC
2.	<i>Celtis occidentalis</i>	40	Y	FACU
3.				
4.				
		= Total Cover		
Sapling/Shrub Stratum (Plot size: )				
1.				
2.				
3.				
4.				
5.				
		= Total Cover		
Herb Stratum (Plot size: )				
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
		= Total Cover		
Woody Vine Stratum (Plot size: )				
1.				
2.				
		= Total Cover		
% Bare Ground in Herb Stratum				
Remarks:				

**Dominance Test worksheet:**

Number of Dominant Species That Are OBL, FACW, or FAC (excluding FAC-): 1 (A)

Total Number of Dominant Species Across All Strata: 2 (B)

Percent of Dominant Species That Are OBL, FACW, or FAC: 50 (A/B)

**Prevalence Index worksheet:**

Total % Cover of: Multiply by:

OBL species x 1 =

FACW species x 2 =

FAC species x 3 =

FACU species x 4 =

UPL species x 5 =

Column Totals: (A) (B)

Prevalence Index = B/A =

**Hydrophytic Vegetation Indicators:**

1 - Rapid Test for Hydrophytic Vegetation

2 - Dominance Test is >50%

3 - Prevalence Index is ≤3.0<sup>1</sup>

4 - Morphological Adaptations<sup>1</sup> (Provide supporting data in Remarks or on a separate sheet)

Problematic Hydrophytic Vegetation<sup>1</sup> (Explain)

<sup>1</sup>Indicators of hydric soil and wetland hydrology must be present, unless disturbed or problematic.

**Hydrophytic Vegetation Present?** Yes No

# Stream Classification

72 FR 11196

- An **ephemeral** stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.



# Ephemeral Stream





# Stream Classification

- An **intermittent** stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow

# Intermittent Stream



# Stream Classification

- A **perennial** stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.



# Perennial Stream





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