Corps Regulatory Program – Waters and Wetlands

Regulatory Jurisdiction

CESWF-DE-R
Fort Worth District
July 2014
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

Section 404
Section 10

High Tide Line
Mean High Water
Tideland
Coastal Wetlands
Vegetation associated with salt & brackish water

Ground Water line

Fresh Waters

Section 404
Section 10 (if navigable)

Ordinary High Water
Fresh Water Wetlands
Marshes, swamps, bogs, & similar areas

Uplands

Uplands

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, pilings, 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
(1997 COE Wetlands Delineation Manual)

<table>
<thead>
<tr>
<th>Project/Site:</th>
<th>Applicant/Owner:</th>
<th>Investigator:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date:</td>
<td>County:</td>
<td>State:</td>
</tr>
</tbody>
</table>

**Do Normal Circumstances Exist on the site?**
- Yes
- No

**Is the site significantly disturbed (Abnormal Situation)?**
- Yes
- No

**Is the area a potential Problem Area?**
- Yes
- No

**Percent of Dominant Species that are CEBL, FACW, or FAC**
(excluding FAC): __________

**Remarks:**

**VEGETATION**

<table>
<thead>
<tr>
<th>Dominant Plant Species</th>
<th>Stratum Indicator</th>
<th>Dominant Plant Species</th>
<th>Stratum Indicator</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

**HYDROLOGY**

- Recorded Data (Describe in Remarks):
  - Stream, Lake, or Tidal Gauge
  - Aerial Photographs
  - Other
  - No Recorded Data Available

**Field Observations:**
- Depth of Surface Water: __________ (m.)
- Depth to Free Water in Pit: __________ (m.)
- Depth to Saturated Soil: __________ (m.)

**Wetland hydrology indicators:**
- Inundated
- Saturated in Upper 12 inches
- Water Marks
- Drill Lines
- Sediment Deposits
- Drainage Patterns in Wetlands

**Secondary Indicators (2 or more required):**
- Oxidized Root Channels in Upper 12" or more
- Water-Stained Leaves
- Local Soil Survey Data
- FAC-Neutral Test
- Other (Explain in Remarks)

**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
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.

<table>
<thead>
<tr>
<th>Hydrophytic Vegetation Present?</th>
<th>Yes _____ X _____ No _____</th>
<th>Is the Sampled Area within a Wetland?</th>
<th>Yes _____ X _____ No _____</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hydric Soil Present?</td>
<td>Yes _____ X _____ No _____</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wetland Hydrology Present?</td>
<td>Yes _____ X _____ No _____</td>
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</tr>
</tbody>
</table>

Remarks: Drought
Wrong or Missing Data

### Vegetation - Use scientific names of plants

<table>
<thead>
<tr>
<th>Tree Stratum (Plot size: 30-ft)</th>
<th>Absolute % Cover</th>
<th>Dominant Indicator Species?</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>Pinus palustris</strong></td>
<td>40</td>
<td>Y</td>
<td>FAC</td>
</tr>
<tr>
<td>2. <strong>Celtis occidentalis</strong></td>
<td>40</td>
<td>Y</td>
<td>FACU</td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.</td>
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</tbody>
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**Sapling/Shrub Stratum (Plot size: ________)**

<table>
<thead>
<tr>
<th>1.</th>
<th>2.</th>
<th>3.</th>
<th>4.</th>
<th>5.</th>
<th>= Total Cover</th>
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</thead>
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**Herb Stratum (Plot size: ________)**

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<th>1.</th>
<th>2.</th>
<th>3.</th>
<th>4.</th>
<th>5.</th>
<th>= Total Cover</th>
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</table>

**Woody Vine Stratum (Plot size: ________)**

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<thead>
<tr>
<th>1.</th>
<th>2.</th>
<th>= Total Cover</th>
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</tbody>
</table>

- **Remarks:**

- **Hydrophytic Vegetation Indicators:**
  1. Rapid Test for Hydrophytic Vegetation
  2. Dominance test is >50%
  3. Prevalence Index is ≤3.0
  4. Morphological Adaptations? (Provide supporting data in Remarks or on separate sheet)
  5. Problematic Hydrophytic Vegetation? (Explain)

- **Hydrophytic Vegetation Present?** Yes ______ No ______

**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:**
- 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 = ______

Indicators of hydric soil and wetland hydrology must be present, unless disturbed or problematic.
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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