

# FEDERAL WETLANDS PERSPECTIVE

## DEPARTMENT OF THE ARMY REGULATORY PROGRAM

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



# Regulatory Statutory Authorities

- RIVERS AND HARBORS ACT OF 1899
- CLEAN WATER ACT and Amendments  
(fka Federal Water Pollution Control Act of 1972)



# Section 10 of the RHA of 1899 (Rivers and Harbors Act)

- Requires prior authorization from the Secretary of War for any work or structures which could affect the location, course, condition, or capacity of Navigable waters
- Secretary of War authority delegated to the District Engineers
- Navigable waters is a subset of the more inclusive “waters of the United States” subject to CWA



# Section 404 CWA (Clean Water Act)

CWA Objective: To restore and maintain the chemical, physical, and biological integrity of Nation's waters

-Section 404 requires prior authorization from the Corps of Engineers for the discharge (*placement*) of dredged or fill material into “waters of the United States”

-Waters of the United States includes coastal and navigable waters and all interstate waters and ...

-Intrastate waters where the use, degradation, or destruction of which could affect interstate or foreign commerce

- extended program jurisdiction to rivers, lakes, streams, intermittent and ephemeral streams, natural ponds, and “adjacent” wetlands



# Activities Requiring Section 404 Authorization

Bridge and road construction

Erosion protection - bank stabilization

Stream modification for residential and commercial development

Fill placement in wetland for development

Stream channel modification

Buried utility line placement

Mechanized land-clearing in wetlands

Temporary activities such as access roads, stream crossings, etc.



# USACE Wetland Definition

- 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
  - ▶ Transitional areas between fully aquatic and terrestrial
  - ▶ Saturation may be limited to wettest season or inundation may be extended & persistent
  - ▶ Definition says nothing about adjacency or abutting
    - That is a matter of legal jurisdiction under CWA



# Wetland Recognition

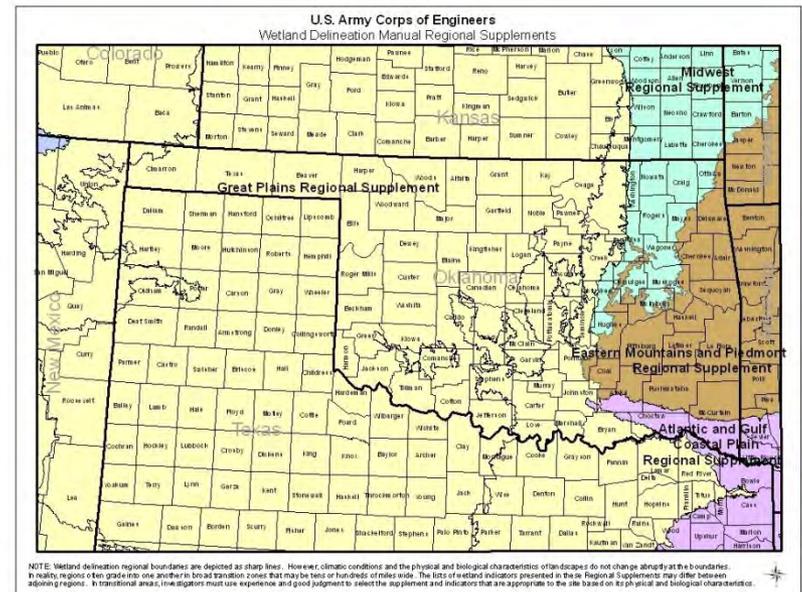
Must use Corps Wetland Delineation Manual and Supplemental Guidance for determining boundary

- WDM developed into Regional Supplements

Oklahoma is covered by Four Regional Supplements

- Great Plains Supplement
- Midwest Supplement
- Eastern Mountains & Piedmont Supplement
- Atlantic & Gulf Coastal Plain Supplement

USFWS NWI Maps are NOT a suitable substitute for determining CWA Jurisdiction with accuracy



# Clean Water Act Jurisdiction

## Waters of the United States includes:

1. Navigable waters / Traditional navigable waters (TNW)
2. **Wetland adjacent to TNWs**
3. Relatively Permanent Waters (RPW) that flow year-round directly or indirectly to TNWs
4. Relatively Permanent Waters that flow at least seasonally directly or indirectly to TNWs
5. **Wetlands directly abutting RPWs**
6. **Wetlands adjacent to RPWs** \*
7. *Non-RPWs that flow directly or indirectly to TNW* \*
8. **Wetlands adjacent to non-RPWs** \*
9. Impoundments of jurisdictional waters
10. Isolated waters and wetlands, **only** where there is a proven interstate commerce nexus\*\*

*\*Requires a Significant Nexus Evaluation*

*\*\* Requires a Significant Nexus Evaluation and concurrence by EPA*



# Clean Water Act Jurisdiction



Blackfork Creek (High Quality Water), Pushmataha County OK



Unnamed ephemeral stream, Tulsa County, OK

- Jurisdiction applies to *relatively permanent waters* (Rapanos Case Plurality Test) and to waters/wetlands that *significantly* affect the **chemical, physical, and biological integrity** of traditional navigable waters (Rapanos Case Kennedy Test)



# Questions of Jurisdiction

- Is the wetland connected or adjacent to the tributary system, performing ecological functions beneficial to downstream navigable water?
- Is the wetland isolated from tributary system?
- If isolated, does the wetland have a proven interstate commerce “nexus” that warrants jurisdiction under the CWA?
- Isolated wetlands and waters not regulated by the Corps are still “waters of the state”, subject to state statutes.



# Special Considerations for Wetlands

- Section 404(b)(1) Guidelines Decision Criteria
- One of Six identified “Special Aquatic Sites”
  - ▶ Others: sanctuaries, mudflats, vegetated shallows, coral reefs, riffle/pool complexes
- Two Rebuttable Presumptions for Activities proposed in wetlands:
  - ▶ There are practicable alternatives to discharges associated with “non-water dependent” activities
  - ▶ Alternatives to construction in SAS are less damaging to the aquatic ecosystem and are preferable



# Aquatic Resource Impact Mitigation

Applicant must first, [Avoid](#) impacts

Then, [Minimize](#) remaining impacts

- consider suitable location configuration changes
- application must include statement summarizing the applicant's examination of impact avoidance & minimization

Lastly, [Compensate](#) for unavoidable impacts (through off-set or replacement)

- must include a proposal for offsetting compensatory mitigation or a statement why mitigation should not be required
- USACE has final decision whether mitigation is required



# Compensatory Mitigation

- Compensatory Mitigation to offset losses may take the form of:
  - Restoration (of converted or severely degraded wetlands)
  - Enhancement (ecological improvement of degraded wetlands)
  - Establishment (construction of new wetlands)
  - Preservation (of existing aquatic sites & essential buffers)
- Can be achieved through:
  - restoring drained wetlands
  - constructing new wetlands
  - restoring wooded stream corridors
  - improving existing aquatic habitat
  - removing features or activities which degrade water quality or integrity
  - reversing past degradation of aquatic resources in the watershed
  - preserving threatened aquatic resources

***Mitigation Value = Ecological Boost***

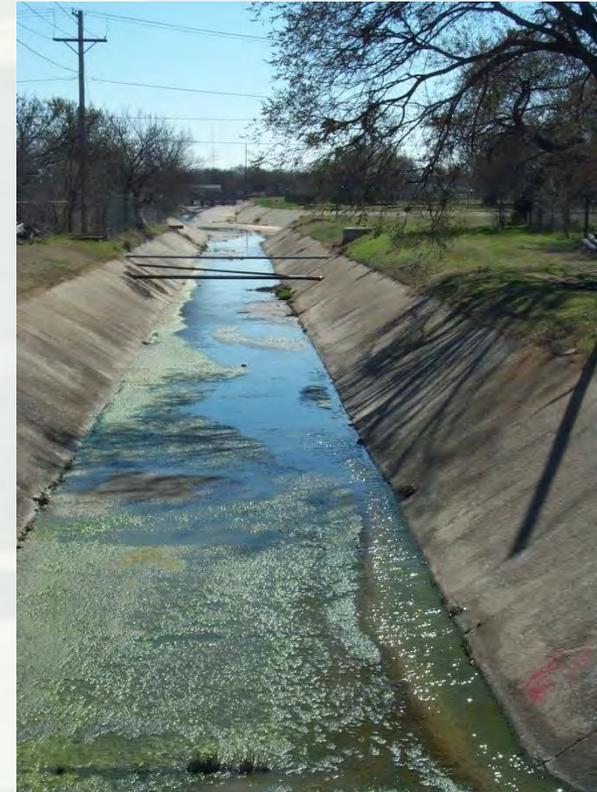


# Aquatic Resource Functions



Intermittent Stream in forested watershed

- Water quality maintenance
- Fish and wildlife habitat
- Food web support
- Organic matter & prey export
- Flood storage & flood flow dampening
- Stream flow maintenance
- Sediment export & transport
- Nutrient conversion
- Contaminant uptake



Channelized stream in urbanized area



# Administrative Appeals

## Administrative Appeals of Corps Decisions

- Approved Jurisdictional Determinations (JD) (waters of the United States, wetland presence & extent, navigable waters)
- Decisions to deny an Individual Permit (IP)
- Special Conditions of Individual Permits

Appeal only by affected party (landowner or permit applicant); no third party appeals

Handled by Appeals Review Officer in Dallas COE

One SWT Appeal pending in SWD at this time  
(only a handful in history of appeal program)



# Enforcement and Compliance

- Activities conducted without authorization are considered violations
  - EPA has primacy for enforcement against unauthorized activities
  - Corps manages daily administration of enforcement activities and investigation, referring only select cases to EPA
- Activities conducted not in accordance with permit conditions are non-compliance actions
  - Corps has primacy for enforcement against violations of permit conditions



# Challenges

## Mitigation of Aquatic Resources

- predictable, meaningful and sustainable
- shifting from acreage offsets to assessment based on function
- suitable comparative measure between impacts & anticipated mitigation gains

## Litigation Outfall – changes to the program from Case Law

### Jurisdiction Case Law - Where is the limit of the Corps jurisdiction?

Solid Waste Agency of Northern Cook County (SWANCC) Case – “navigable has to mean something” (Supreme Court 2001)

Rapanos Case – “is a hydrologic connection through a man-made ditch sufficient to establish jurisdiction in a wetland?” (Supreme Court 2004)

Carabell Case – “is separation by a berm sufficient to sever jurisdiction in a wetland?” (Supreme Court 2004)

CWA Waters of US Rule-Making in 2014-15 by EPA/Corps - Controversy



# Regulatory Program Mission

To protect the Nation's aquatic resources while allowing reasonable and appropriate development through fair, flexible, and balanced permit decisions



Cucumber Creek (Outstanding Resource Water), Le Flore County OK



# Regulatory Program Goals



- **Avoidance and Minimization of impacts to aquatic resources**
- **No Net Loss of Wetlands (on a program basis)**
- **Expedite permit processing timeframes**
  - **Embodied in strong protection of the Nation's aquatic environment, including wetlands**
  - **Enhancing the efficiency of the Corps administration of its Regulatory Program**
  - **Ensuring that we provide the regulated public with fair, reasonable and timely decision**



# Questions ?

