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Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives

February 2004

WATERS AND WETLANDS

Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction

GAO-04-297

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GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-04-297, a report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives

Why GAO Did This Study

Each year the U.S. Army Corps of Engineers (Corps) receives thousands of Clean Water Act permit applications from project proponents wishing to fill waters and wetlands. The first step in the permitting process is to determine if the waters and wetlands are jurisdictional. Prior to 2001, if migratory birds used the waters or wetlands as habitat, they were usually jurisdictional. In 2001, the Supreme Court— in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)—struck down the migratory bird rule, leaving the Corps to rely on other jurisdictional criteria. GAO was asked to describe the (1) regulations and guidance used to determine jurisdictional waters and wetlands and related developments since *SWANCC*, (2) extent to which Corps district offices vary in their interpretation of these regulations and guidance, and (3) extent to which Corps district offices document their practices and make this information publicly available.

What GAO Recommends

GAO recommends that the Corps, in consultation with the Environmental Protection Agency (EPA): (1) survey district office practices in making jurisdictional determinations to determine if significant differences exist, (2) evaluate whether and how these differences need to be resolved, and (3) require districts to document their practices and make this information publicly available.

www.gao.gov/cgi-bin/getrpt?GAO-04-297.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Anu Mittal at (202) 512-3841, and mittala@gao.gov.

What GAO Found

EPA's and the Corps' regulations defining waters of the United States establish the framework for determining which waters fall within federal jurisdiction. However, the regulations leave room for interpretation by Corps districts when considering (1) adjacent wetlands, (2) tributaries, and (3) ditches and other man-made conveyances. Since the *SWANCC* decision, the Corps and EPA have provided limited additional guidance to the districts concerning jurisdictional determinations, and the Corps has prohibited the districts from developing new local practices for determining the extent of Clean Water Act regulatory jurisdiction. In January 2003, the Corps and EPA published an Advance Notice of Proposed Rulemaking (ANPRM) soliciting comments on whether there was a need to revise the regulations that define which waters should be subject to federal jurisdiction. The ANPRM generated approximately 133,000 comments representing widely differing views. The agencies decided in December 2003 that they would not proceed with a rulemaking. Additionally, since *SWANCC*, 11 federal appellate court decisions relating to the extent of jurisdictional waters have been rendered; and 3 of these decisions are on appeal with the Supreme Court, with review denied for 2 others.

Corps districts differ in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to federal jurisdiction. For example, one district generally regulates wetlands located within 200 feet of other jurisdictional waters, while other districts consider the proximity of wetlands to other jurisdictional waters without any reference to a specific linear distance. Additionally, some districts assert jurisdiction over all wetlands located in the 100-year floodplain, while others do not consider floodplains as a factor. Although districts used generally similar criteria to identify the jurisdictional limits of tributaries, they used differing approaches in how they apply these criteria. Whether or to what degree individual differences in Corps district office practices would result in different jurisdictional determinations in similar situations is unclear, in part, because Corps staff consider many factors when making these determinations. Nevertheless, Corps headquarters officials stated that GAO had documented enough differences in district office practices to warrant a more comprehensive survey, which would include the other districts not surveyed in this report. This would help to ensure that the Corps is achieving the highest level of consistency possible under the current circumstances.

Only 3 of the 16 districts that GAO reviewed made documentation of their practices available to the public. Other districts generally relied on oral communication to convey their practices to interested parties.

Contents

Abbreviations

ANPRM	Advance Notice of Proposed Rulemaking
C.F.R.	Code of Federal Regulations
CWA	Clean Water Act
EPA	Environmental Protection Agency
SWANCC	*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*

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United States General Accounting Office
Washington, D.C. 20548

February 27, 2004

The Honorable Doug Ose
Chairman, Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
House of Representatives

Dear Mr. Chairman:

The Clean Water Act prohibits the discharge of pollutants into "navigable waters"—defined in the act as the "waters of the United States"—without a permit.[1] For most pollutants the permit program is administered by the Environmental Protection Agency (EPA), or EPA-approved states and tribes. However, for section 404 of the act, the Army Corps of Engineers (the Corps), with EPA oversight, is responsible for issuing permits for the discharge of dredged or fill material into the waters of the United States. Under section 404, project proponents who seek to fill in wetlands or waters on their property are required to obtain a permit from the Corps before they can undertake such activities, if the water or wetland falls within federal jurisdiction. Each year, the Corps receives thousands of applications for permits under section 404.

Regulations applicable to federal jurisdiction under the Clean Water Act, including the section 404 program, define "waters of the United States" for which a permit must be obtained to include, among other things, interstate waters; navigable waters; waters such as wetlands, the use or degradation of which could affect interstate commerce; tributaries of the waters identified above; and wetlands adjacent to these waters. In addition, in 1986, the Corps stated in a preamble to wetlands program regulations that its definition of "[w]aters of the United States" included waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties." This statement became known as the migratory bird rule; and under it, the Corps was able to regulate almost any body of water or wetland.

The Corps' implementation of the section 404 program changed significantly in January 2001, when the Supreme Court struck down the

[1]Under 33 C.F.R. § 328.3(a)(1)-(a)(7) "waters of the United States" can include many types of waters, such as rivers, wetlands, impoundments, the territorial seas, and waters used in interstate commerce. For the full text of the regulation, please see appendix II.

migratory bird rule. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*),[2] the Supreme Court ruled that the Corps had exceeded its authority in asserting jurisdiction over certain ponds based on their use by migratory birds. The breadth of the *SWANCC* holding has been the subject of considerable dispute. In a 2001 memorandum, EPA and the Corps interpreted the Supreme Court's opinion as applying only to isolated, intrastate, nonnavigable waters. Some project proponents have disputed this interpretation in court, arguing that, under *SWANCC*, the Corps also lacks authority to regulate such bodies of water as nonnavigable tributaries and ditches and wetlands adjacent to these bodies of water.

In this context, you asked us to provide information on the Corps' practices in making jurisdictional determinations since the *SWANCC* decision. Specifically, this report describes the (1) regulations and guidance used by the Corps for making jurisdictional determinations for waters and wetlands and administrative and judicial developments that have affected this process since the Supreme Court decision, (2) extent to which Corps district offices vary in their interpretation and application of the regulations (hereafter referred to as practices), and (3) extent to which Corps districts document their practices and make this information publicly available. To meet our objectives, we examined 16 of the Corps' 38 district offices, selected for geographic diversity. We interviewed officials from these offices and reviewed the practices they used to determine jurisdictional waters. Appendix I provides a more detailed description of the scope and methodology for this review.

Results in Brief

EPA's and the Corps' regulations defining waters of the United States provide the framework for determining which waters fall within federal jurisdiction. However, the regulations leave room for interpretation by the Corps districts when considering jurisdiction over, for example, (1) adjacent wetlands, (2) tributaries, and (3) ditches and other man-made conveyances. Since the *SWANCC* decision, the Corps and EPA provided limited additional guidance to the districts concerning jurisdictional determinations. Specifically, the Corps instructed its district offices to no longer assert jurisdiction over any waters solely on the basis of use by migratory birds and prohibited them from developing new local practices

[2]531 U.S. 159 (2001).

for determining the extent of Clean Water Act section 404 regulatory jurisdiction. In addition, in January 2003 the Corps and EPA published an Advance Notice of Proposed Rulemaking (ANPRM), soliciting comments on, among other things, whether the regulations should define the term isolated waters and whether any other revisions are needed to the regulations defining waters of the United States. In response to the ANPRM, the agencies received approximately 133,000 comments representing widely differing views and decided in December 2003 that they would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. Moreover, in the 3 years since the *SWANCC* decision, 11 federal appellate court decisions interpreting the term "waters of the United States" have been issued. Project proponents in three of these cases are seeking Supreme Court review, and review has been denied for two others.

In certain circumstances, Corps districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government. Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States and are subject to federal regulation. For example, one district generally regulates wetlands located within 200 feet of other waters of the United States, while other districts consider the proximity of the wetland to other waters of the United States on a case-by-case basis without any reference to a specific linear distance. Districts also differ in how they regulate wetlands connected to other waters of the United States by ditches, pipes, storm sewers and other man-made conveyances. For example, one district generally regulates a wetland connected to another water of the United States by a ditch, only if the ditch modifies or replaces a natural stream. Other districts generally regulate the wetland, regardless of whether the ditch modifies or replaces a natural stream. Other differences in identifying the jurisdictional limits of rivers and streams stemmed from the diverse environmental factors present in various districts. For example, districts in the arid West developed a method for identifying the jurisdictional boundaries of dry channels that flood occasionally, expanding several times their normal size. Whether or to what degree the individual differences in Corps district office practices would result in different jurisdictional determinations in similar situations is unclear, in part, because Corps staff consider many factors when making jurisdictional determinations. Nevertheless, Corps headquarters officials said that differences in district office practices that we identified were sufficiently prevalent to warrant a more comprehensive survey of district office practices. We are recommending that the Corps survey its district

offices, evaluate their practices for making jurisdictional determinations, and, if necessary, resolve differences among them.

Few districts make documentation of their practices for making jurisdictional determinations publicly available. Specifically, only 3 of the 16 districts that we reviewed made documentation of their practices available to the public. The other districts generally relied on oral communication to convey their practices to interested parties. To provide greater clarity to the regulated community, we are recommending that Corps districts prepare documentation that specifies the practices used in making jurisdictional determinations and make it publicly available.

Background

The Clean Water Act prohibits the discharge of pollutants, including dredged or fill material, into "navigable waters," defined in the act as the "waters of the United States," without a permit. The act's objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Congress' intent in passing the act was to establish an all-encompassing program of water pollution regulation. The act contains several programs designed to protect waters of the United States, including section 303, which calls for development of water quality standards for waters of the United States; section 311, which establishes a program for preventing, preparing for, and responding to oil spills that occur in waters of the United States; section 401, which establishes state water quality certification of federally issued permits that may result in a discharge to waters of the United States; and section 402, which establishes a permitting system to regulate point source discharges of pollutants (other than dredged and fill material) into waters of the United States.

Section 404 of the Clean Water Act generally prohibits the discharge of dredged or fill material into waters of the United States without a permit from the Corps.[3] Corps and EPA regulations under the section 404 program define "waters of the United States" for which a permit must be obtained to include, among other things, (1) interstate waters; (2) waters which are or could be used in interstate commerce; (3) waters such as wetlands, the use

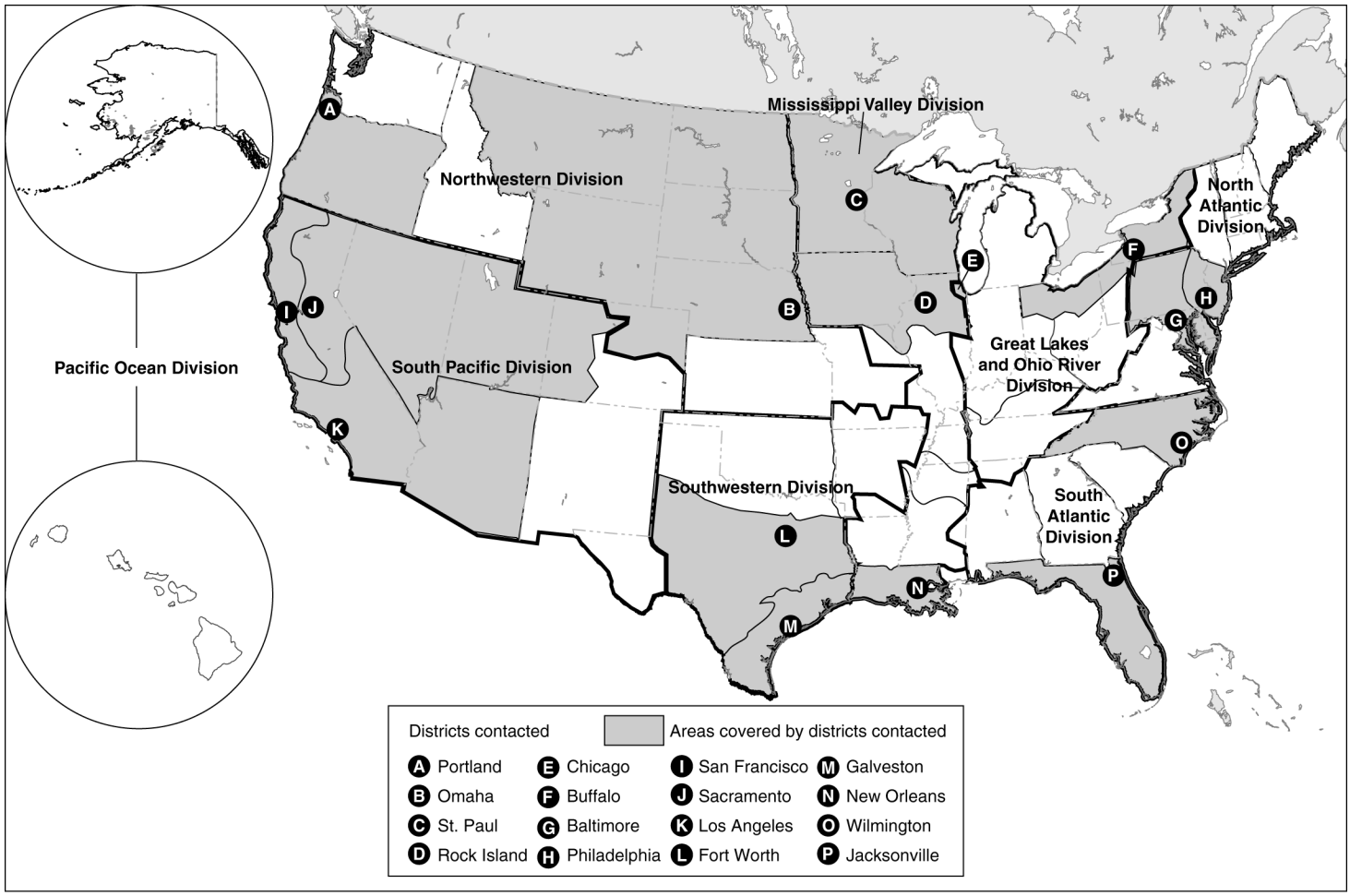
[3]Section 404(e) of the Clean Water Act authorizes the Corps to develop general permits on a geographic basis for categories of activities having minimal adverse environmental impact. Section 404(f) identifies activities exempt from the permitting requirement, including certain ongoing farming activities. Section 404(g) authorizes states (and tribes) to establish their own permit programs.

or degradation of which could affect interstate commerce; (4) tributaries of the waters identified above and (5) wetlands adjacent to these waters. As such, this program is the nation's primary wetland protection program. In addition to the federal regulation of wetlands, some state and local governments have developed wetland protection programs.

The Corps administers the permitting responsibilities of the section 404 program, while EPA in conjunction with the Corps establishes the substantive environmental protection standards that permit applicants must meet. EPA also has final administrative responsibility for interpreting the term "waters of the United States," a term that governs the scope of many other programs that EPA administers under the Clean Water Act.[4] Day-to-day authority for administering the permitting program rests with the 38 Corps district offices, whereas Corps division and headquarters offices exercise policy oversight (see fig. 1). Under section 404(q), EPA and other federal agencies, such as the Department of the Interior's Fish and Wildlife Service, can request that a permit application receive a higher level of review within the Department of the Army. Under a memorandum of agreement between EPA and the Corps, EPA may also initiate a "special case," in which EPA determines the scope of jurisdiction for a particular site or issue for section 404 purposes. EPA also has "veto" authority over section 404 permitting decisions under section 404(c). However, EPA has rarely used its 404(c) authority to intervene in or overrule Corps permit decisions. EPA also exercises independent enforcement authority.

[4]43 Op. Atty. Gen. 197 (1979).

Figure 1: Map of Corps Divisions and Districts that GAO Contacted



Source: U.S. Army Corps of Engineers.

Wetlands are areas that are inundated or saturated with surface or ground water at a frequency and duration sufficient to support vegetation adapted for life in saturated soil conditions. Wetlands include swamps, marshes, bogs, and similar areas. They are characterized by three factors: (1) frequent or prolonged presence of water at or near the soil surface, (2) hydric soils that form under flooded or saturated conditions, and (3) plants that are adapted to live in these types of soils. Wetlands play valuable ecological roles by reducing flood risks, recharging water supplies, improving water quality, and providing habitats for fish, aquatic birds, and

other plants and animals, including a number of endangered species. As the Supreme Court has recognized in upholding Corps' authority under the Clean Water Act to regulate wetlands adjacent to waters of the United States, "[t]he regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system."[5] Further, water moves in hydrologic cycles and pollution of one part of an aquatic system can affect other waters within that aquatic system.

The regulations also extend federal jurisdiction under section 404 to tributaries. The federal government has argued in court that it must regulate tributary waters well beyond the point at which they are navigable because any pollutant or fill material that degrades water quality in a tributary has the potential to move downstream and degrade the quality of navigable waters themselves. Similarly, according to the Corps, drainage ditches constructed in uplands that connect two waters of the United States may themselves be jurisdictional.

The first step in the regulatory process is a jurisdictional determination, in which the Corps determines whether a water or wetland is a "water of the United States." In general, Corps staff conduct jurisdictional determinations by considering a range of factors, and they often view each factor's importance within the context of the actual site of a proposed project. While many jurisdictional determinations are simple to perform, some can be complex and require considerable effort. For example, a relatively simple jurisdictional determination might involve a proposed project for the placement of a pier on the Mississippi River. In this case, Corps staff may only consult a map to determine that the activity falls within the Corps' jurisdiction. In contrast, a more complex jurisdictional determination might arise when a property owner wants to fill in multiple wetlands to build a parking lot. This kind of jurisdictional determination would likely require additional time and resources because Corps staff might need to consult a variety of maps and aerial photographs and then visit the site. Once on site, Corps staff would verify the exact locations of the wetlands. If the Corps determines that a water or wetland is jurisdictional, a permit applicant then has the option of filing an administrative appeal challenging this determination and could subsequently pursue the matter in court.

[5]*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (quoting a Corps preamble at 42 Fed. Reg. 37128 (1977)).

If a water or wetland is found to be jurisdictional, the property owner would take the next step in the process and apply for a section 404 permit from the Corps. The Corps bases its decision to issue a permit on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on the public interest. The decision should reflect the national concern for both the protection and utilization of important resources. As part of the balancing process, the Corps may require project modifications designed to avoid and minimize impacts on natural resources. Depending on the individual and cumulative impacts of the regulated activity, these modifications can range from requiring little or no additional effort by the property owner to requiring the property owner to incur significant costs. According to the Corps, in approving permits, the agency requires permit applicants to avoid, minimize, or mitigate impacts to wetlands and waters in most cases.[6] The Corps approves virtually all section 404 permit applications. In fiscal year 2002, for example, of 85,445 section 404 permit applications filed, the Corps denied 128 and 4,143 were withdrawn by the applicant.

While the interpretation of Clean Water Act jurisdiction has evolved over time, the Corps' implementation of section 404 of the act changed significantly in January 2001, when the Supreme Court in the *SWANCC* decision ruled that Corps guidance known as the migratory bird rule could no longer be used as a basis to assert jurisdiction over a water or wetland. Discussed in the preamble to regulations issued in 1986—but never itself promulgated as a regulation—this provision stated that jurisdictional waters include waters that "are or would be used as habitat by birds protected by migratory bird treaties," or that "are or would be used as habitat by other migratory birds that cross state lines."[7] Under this provision, nearly all waters and wetlands in the United States were potentially jurisdictional. The Supreme Court held that the Clean Water Act did not authorize the Corps to require a permit for filling an isolated, intrastate, nonnavigable pond where the sole basis for the Corps' authority

[6]The section 404 regulatory program relies upon a sequential approach to mitigating these harmful effects by first avoiding unnecessary impacts, then minimizing environmental harm, and, finally, compensating for remaining unavoidable damage to wetlands and other waters through, for example, the restoration or creation of wetlands.

[7]The preamble also addressed, (1) waters that "are or would be used as habitat for endangered species" and (2) waters used to irrigate crops sold in interstate commerce.

was that the pond had been used by migratory birds.[8] The extent to which the reasoning in the *SWANCC* decision applies to waters other than those specifically at issue in that case has been the subject of considerable debate in the courts and among the public. Some groups have argued the *SWANCC* decision precludes the Corps from regulating virtually all isolated, intrastate, nonnavigable waters, as well as nonnavigable tributaries to navigable waters, while others have argued that it merely prohibits the regulation of isolated, intrastate, nonnavigable waters and wetlands solely on the basis of use by migratory birds. In the context of this decision, the Corps and EPA considered whether to modify the definition of "waters of the United States." However, any modification of the scope of waters of the United States would have implications for other Clean Water Act programs that cover "navigable waters," including section 303 (governing water quality standards), section 311 (governing oil and hazardous substance spills), and section 402 (regulating discharges of pollutants other than dredged and fill material).

Federal Regulations That Define Jurisdictional Waters Allow for Interpretation by Individual Corps Districts and Are Currently the Subject of Debate

EPA's and the Corps' regulations defining waters of the United States provide a framework for determining which waters are within federal jurisdiction. The regulations leave room for judgment and interpretation by the Corps districts when considering jurisdiction over, for example, (1) adjacent wetlands, (2) tributaries, and (3) ditches and other man-made conveyances. Prior to the 2001 *SWANCC* decision, the Corps generally did not have to be concerned with such factors as adjacency, tributaries, and other aspects of connection with an interstate or navigable water body, if the wetland or water body qualified as a jurisdictional water on the basis of its use by migratory birds. Since the *SWANCC* decision, the Corps and EPA have provided limited additional guidance to the districts concerning jurisdictional determinations. Specifically, the Corps told districts that they may not assert jurisdiction over any waters solely on the basis of use by migratory birds and that they should not develop new local practices for determining the extent of Clean Water Act section 404 regulatory jurisdiction or use local practices that were not in effect prior to the

[8]*SWANCC* involved an abandoned sand and gravel pit, containing several permanent and seasonal ponds at which migratory bird species had been observed. In striking down the migratory bird rule, the Supreme Court stated that Congress' use of the phrase "waters of the United States" to define navigable waters did not constitute a "basis for reading the term 'navigable waters' out of the statute" and that "it is one thing to give a word limited effect and quite another to give it no effect whatever." 531 U.S. at 172.

SWANCC decision. Additionally, in January 2003, the Corps and EPA published an ANPRM, soliciting public comments on, among other things, whether isolated, intrastate, nonnavigable waters are jurisdictional under the Clean Water Act, whether the regulations should define the term isolated waters and whether any other revisions are needed to the regulations defining "waters of the United States." According to EPA officials, respondents submitted approximately 133,000 comments with widely differing views on the need for a new regulation and the scope of Clean Water Act jurisdiction. In December 2003, the Corps and EPA decided that they would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. In the almost 3 years since the *SWANCC* decision, 11 federal appellate court decisions interpreting the term "waters of the United States" have been issued. Project proponents in three of these cases are seeking Supreme Court review, and review has been denied for two additional cases.

Regulations and Guidance Define Waters of the United States but Do Not Specify Detailed Aspects of Making a Jurisdictional Determination

EPA's and the Corps' regulations defining waters of the United States establish the framework for determining which waters are within federal jurisdiction. In addition, the agencies have provided some limited additional national guidance to aid interpretation by the Corps districts. The regulations and national guidance leave room for judgment and interpretation by the Corps districts when considering jurisdiction over, for example, (1) adjacent wetlands, (2) tributaries, and (3) ditches and other man-made conveyances.

For example, federal regulations state that wetlands adjacent to other waters of the United States, other than waters that are themselves wetlands, are to be considered waters of the United States. The regulations specify that adjacent means "bordering, contiguous, or neighboring," and that wetlands separated from other waters of the United States by barriers such as man-made dikes, natural river berms, and beach dunes may be considered adjacent wetlands. This definition of adjacency leaves some degree of interpretation to the Corps districts. For example, the regulations and subsequent national guidance do not fully define the circumstances under which wetlands that do not touch waters of the United States may be considered jurisdictional waters.

The regulations also specify that tributaries to waters of the United States are to be considered waters of the United States. The regulations do not define "tributaries," but state that in the absence of adjacent wetlands, lateral jurisdiction over nontidal waters extends to the ordinary high water

mark. The ordinary high water mark is the line on the shore caused by fluctuations of water and can be characterized by a clear bank, shelving, debris, or changes in vegetation.[9] The Corps further states that the ordinary high water mark should be used to identify the upstream limits of jurisdiction for tributary waters. Thus, federal jurisdiction generally extends up the banks and upstream of a tributary to the point where the ordinary high water mark is no longer discernible. Additionally, the Corps states that ephemeral tributaries—which have flowing water only at certain times of year or only after certain storm events in a typical year—are to be considered jurisdictional, provided that an ordinary high water mark is present.[10] Tributary waters can thus range from substantial rivers and streams with definite ordinary high water marks, to channels that are usually dry, and may have very faint or ill-defined ordinary high water marks.

The regulations do not further define the physical characteristics of an ordinary high water mark. As a result, it is possible that well trained and competent staff might interpret the term differently. The definition refers to factors such as changes in the character of the soil, absence of terrestrial vegetation, and the presence of litter and debris; but both the interpretation and weight assigned to each of these factors is left to the official conducting the jurisdictional determination. Neither the Corps nor EPA have issued any additional clarifying national technical guidance for use by Corps staff in identifying ordinary high water marks.

The regulatory definition of waters of the United States also does not specifically discuss the jurisdictional status of ditches and other man-made conveyances, and guidance issued by the Corps and EPA leaves room for interpretation. The Corps has stated that certain man-made conveyances, such as nontidal drainage and irrigation ditches excavated on dry land, are generally not considered waters of the United States. In other situations, however, the Corps may determine that man-made conveyances are waters of the United States. For example, natural streams that have been diverted into man-made channels are jurisdictional. Also, ditches that extend the

[9]Specifically, the regulation states that an ordinary high water mark is "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."

[10]65 *Fed. Reg.* 12823 (2000).

ordinary high water mark of a water of the United States are jurisdictional. However, the Corps guidance provides little additional direction on when asserting jurisdiction over man-made conveyances is warranted, leaving that decision to individual Corps districts. The Corps guidance allows districts discretion when determining whether man-made channels dug on dry land are jurisdictional.

Administrative Actions to Clarify Jurisdiction After *SWANCC*

Since the *SWANCC* decision in January 2001, Corps and EPA headquarters have moved cautiously to address its implications. In a series of memoranda, the Corps has outlined some of the issues raised by the decision, but it has provided limited specific guidance as to how Corps districts are to respond to it. Specifically, the Corps has taken the following three steps.

- In a memorandum issued 10 days after the *SWANCC* decision in January 2001, EPA and Corps headquarters instructed field staff that they could no longer assert jurisdiction over waters and wetlands, solely on the basis of use by migratory birds. The memorandum also noted that because the *SWANCC* decision was limited to isolated, intrastate, nonnavigable waters, the Corps could continue asserting jurisdiction over all other waters covered by its regulations, such as adjacent wetlands and tributaries. However, the memorandum noted the Supreme Court's opinion raised questions about—but did not specifically address—what, if any, connections to interstate commerce could be used to assert jurisdiction over isolated, intrastate, nonnavigable waters. Consequently, the memorandum instructed Corps districts to consult agency legal counsel when such cases arose.[11]

- In May 2001, the Corps issued another memorandum that prohibited the districts from developing local practices for asserting jurisdiction and from using any practices not in effect before the *SWANCC* decision. The memorandum said that a prohibition on new practices was necessary to minimize any inconsistencies among the districts.

[11]Specifically, districts were instructed to consult with agency legal counsel before asserting jurisdiction over isolated, intrastate, nonnavigable waters based upon 33 C.F.R. § 328.3(a)(3) (jurisdictional waters include all waters the use, degradation, or destruction of which could affect interstate commerce).

- In January 2003, the Corps and EPA issued an ANPRM seeking public comment on issues associated with the definition of "waters of the United States" and soliciting information from the general public, the scientific community, and federal and state resource agencies on the implications of *SWANCC* for jurisdictional decisions under the Clean Water Act.[12] Attached to the notice was a joint memorandum between EPA and the Corps designed to provide clarifying guidance regarding *SWANCC* and to address several legal issues that had arisen since the *SWANCC* decision concerning jurisdiction under various factual scenarios. For example, the joint memorandum stated that, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to Clean Water Act jurisdiction.[13] The guidance called for field staff to continue to assert jurisdiction over traditional navigable waters, their tributaries, and adjacent wetlands. The joint memorandum directed field staff to make jurisdictional determinations on a case-by-case basis, considering the guidance in the memorandum as well as applicable regulations and any relevant court decisions in addition to those discussed in the memorandum. The joint memorandum also reiterated that field staff were no longer to assert jurisdiction over an isolated, intrastate, nonnavigable water on the basis of the factors listed in the migratory bird rule. It also noted that, in light of the *SWANCC* decision, it is uncertain whether there remains any basis for jurisdiction

[12]Specifically, the ANPRM requested information, data, and comments on six major topics: (1) whether the factors listed in 33 C.F.R. § 328.3 (a)(3) or any other factors are a basis for Clean Water Act jurisdiction over isolated wetlands; (2) whether the regulations should define "isolated waters," and if so, using what factors; (3) the effectiveness of federal and state programs in protecting waters and wetlands; (4) whether any other changes are needed to the jurisdictional regulations; (5) the resource impacts of *SWANCC* on isolated, intrastate, nonnavigable waters; and (6) the function and values of wetlands and other waters that might be affected by the issues discussed in the ANPRM.

[13]Jurisdiction over these waters is based upon 33 C.F.R. § 328.3(a)(1) (jurisdictional waters include all waters that are currently used, were used in the past, or may be susceptible to use in interstate commerce).

over any isolated, intrastate, nonnavigable waters. In view of these uncertainties, the joint memorandum stated that field staff should seek formal headquarters approval before asserting jurisdiction over such waters.[14]

The ANPRM generated significant interest, as evidenced by the approximately 133,000 comments submitted by state agencies, national development organizations, environmental groups, and other parties. According to EPA, 99 percent of the comments on the need for a new rule submitted to EPA and the Corps in response to the ANPRM were opposed to a new rule. Some groups, such as industry representatives, generally indicated that they favor a rulemaking because they believe the *SWANCC* decision created, among other things, a great deal of uncertainty, resulting in unequal treatment and significant financial burden to the regulated community. These groups further stated that the current breadth of federal jurisdiction is too great and that, under the principles of federalism, state and local governments are the appropriate regulators of nonnavigable waters within their borders. In contrast, other groups, such as environmentalists, indicated a general opposition to any rulemaking effort, expressing concerns that a new rule would result in reduced federal jurisdiction under section 404 and other programs under the Clean Water Act. Furthermore, these other groups argued that it is unlikely that other federal and state programs provide the oversight or require the mitigation that would be sufficient to protect wetlands and other waters that were no longer covered under the section 404 program. An EPA official stated that 41 of the 43 states that submitted comments were concerned about any major reduction in Clean Water Act jurisdiction. This official also said that most states are concerned that political, legal, and budgetary constraints complicate efforts to regulate certain types of waters and wetlands at the state level. In December 2003, EPA and the Corps announced that they would not issue a new rule on federal regulatory jurisdiction over isolated wetlands.

Along with the ANPRM, attempts have been made to coordinate Corps and EPA efforts to address the implications of the *SWANCC* decision. In

[14]Since January 2003, there have been eight cases in which districts sought headquarters' approval to assert jurisdiction over isolated, intrastate, nonnavigable waters, based upon 33 C.F.R. § 328.3(a)(3). In six of these cases, Corps headquarters ultimately determined that the water in question was navigable-in-fact. In one case, headquarters determined the water in question was not jurisdictional; and, in another, the district withdrew its request for headquarters' approval.

October 2003, the Corps agreed to an EPA request to collect data measuring the extent to which the Supreme Court's *SWANCC* ruling prompted Corps district offices to avoid the regulation of wetlands and other waters. Specifically, the Corps has agreed to have district offices report quarterly to EPA any negative jurisdictional determinations for 1 year—that is any decision not to regulate waters or wetlands—based on issues raised by the *SWANCC* decision and the districts' basis and reasoning for making these determinations. EPA has also requested that Corps district offices coordinate with them before declining jurisdiction over waters or wetlands, based upon issues raised by the *SWANCC* decision. However, the Corps has declined EPA's request, stating that it is "most prudent to continue the present policy regarding interagency coordination."

Clean Water Act Jurisdiction Has Been Litigated in Several Appellate Courts Since *SWANCC*

Since January 2001, 11 federal appellate court cases have considered the scope of the term "waters of the United States" in situations other than those involving the migratory bird rule. Table 1 summarizes these cases. In three cases, the affected project proponents are seeking Supreme Court review, while the Supreme Court denied review in two others.

Table 1: Appellate Court Cases Decided Post-*SWANCC*

Case	Appellate Court	Date of decision	Summary of decision	Petition for Supreme Court review pending?
Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526.	Ninth Circuit	March 2001	Court held that irrigation canals in question were tributaries of navigable waters, and therefore within Clean Water Act jurisdiction.	No
Rice v. Harken Exploration Co., 250 F.3d 264.	Fifth Circuit	April 2001	Court held that a generalized assertion that waters of the United States will eventually be affected by remote, gradual, and natural seepage from contaminated groundwater is insufficient to establish liability under the Oil Pollution Act; court stated that under *SWANCC* it appears that a body of water is subject to regulation if the body of water is actually navigable or is adjacent to an open body of navigable water.	No[a]
United States v. Interstate General Co., 39 Fed. Appx. 870.	Fourth Circuit	July 2002	Court held that Corps jurisdiction extended to wetlands adjacent to tributaries of traditional navigable waters.	No

(Continued From Previous Page)

Case	Appellate Court	Date of decision	Summary of decision	Petition for Supreme Court review pending?
United States v. Krilich, 303 F.3d 784.	Seventh Circuit	September 2002	Court refused to reopen consent decree, concluding defendants were bound by their jurisdictional stipulations and rejecting their argument that *SWANCC* removed from the Corps' jurisdiction all waters not adjacent to open water, concluding that *SWANCC* did not affect the law regarding adjacency as a basis for jurisdiction.	No[b]
Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943.	Ninth Circuit	September 2002	Court held that concentrated animal feeding operation drainage ditch, which discharged directly or by connecting waterways into a navigable water, was subject to Clean Water Act jurisdiction.	No
United States v. Rueth Development Co., 335 F.3d 598.	Seventh Circuit	July 2003	Court refused to reopen consent decree, concluding that *SWANCC* did not affect the Corps' adjacency jurisdiction, and suggesting that wetlands adjacent to tertiary tributaries of navigable waters are jurisdictional.	No[b]
United States v. Deaton, 332 F.3d 698.	Fourth Circuit	June 2003	Court held that Corps reasonably interpreted regulations defining "waters of the United States" to include nonnavigable tributaries, such as the roadside ditch at issue, and adjacent wetlands.	Yes
United States v. Rapanos, 339 F.3d 447.	Sixth Circuit	August 2003	Court held that wetlands at issue were within Clean Water Act's jurisdiction because there was a hydrological connection between the wetlands, an adjacent drainage ditch, and navigable waters.	Yes
Treacy v. Newdunn, 344 F.3d 407.	Fourth Circuit	September 2003	Court held that wetlands adjacent to a ditch hydrologically connected to navigable waters were jurisdictional, and the fact that ditch was man-made, as opposed to a natural watercourse was irrelevant.	Yes
In re Needham, 354 F.3d 340.	Fifth Circuit	December 2003	Court held that bayou flowing directly into navigable waters was jurisdictional, but stated that Oil Pollution Act was not so broad as to permit the federal government to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters.	No[a]
United States v. Phillips, No. 02-30035.	Ninth Circuit	January 2004	Court refused to overturn defendant's conviction for Clean Water Act violations, holding that district court correctly rejected the defendant's theory that criminal prosecutions under the Clean Water Act were limited to discharges into navigable-in-fact waters.	No

Source: GAO.

[a]Federal agencies and the parties seeking Supreme Court review disagree over whether the Fifth Circuit's statements in *Rice* and *Needham* concerning the scope of the Clean Water Act are in conflict with the holdings of other circuits (which would increase the likelihood of the Supreme Court granting review) or simply *dicta* unnecessary to the decisions. GAO expresses no view on this question.

[b]Supreme Court denied review.

Corps District Offices Use Differing Practices to Make Jurisdictional Determinations

There are several differences in the practices Corps districts use to make jurisdictional determinations.[15] Specifically, districts sometimes differ when (1) identifying jurisdictional wetlands adjacent to waters of United States; (2) identifying jurisdictional limits of tributaries; and (3) regulating wetlands connected to waters of the United States by man-made conveyances, such as ditches. Corps headquarters officials said that there are enough differences in district office practices that a comprehensive survey of them is warranted.

District Offices Use Different Factors to Identify Adjacent Wetlands

All Corps districts that we reviewed regulated wetlands that are contiguous with—directly touching—other waters of the United States. However, when making jurisdictional determinations for wetlands not touching waters of the United States, districts consider several factors, including hydrologic connections between wetlands and other waters of the United States, the proximity of wetlands to other waters of the United States, and the number of barriers separating wetlands from other waters of the United States. Districts differed in the way they considered and weighed these various factors.

Hydrologic Connections

Districts use different approaches to determine whether there is a sufficient hydrologic connection between a wetland and a water of the United States to consider the wetland jurisdictional. In making determinations, some factors that are considered by some districts but not others include the likelihood that a water of the United States will flood into a wetland in any given year and whether the wetland is connected to a water of the United States through a periodic sheet flow.

We found differences in how districts apply these considerations. For example, districts differed in their use of floodplains to make jurisdictional determinations. Some districts often use the 100-year floodplain to determine if wetlands are adjacent to waters of the United States.[16] For example, written guidance from the Galveston District states that the

[15]We did not attempt to compare districts' practices before and after the *SWANCC* decision.

[16]The 100-year floodplain is defined as "the lowland and relatively flat area adjoining inland and coastal waters, including at a minimum, that area subject to a 1 percent or greater chance of flooding in any given year." The Federal Emergency Management Agency routinely maps the 100-year floodplain for large rivers and streams for purposes of flood insurance and management.

district generally regulates wetlands located in the 100-year floodplain because this type of flooding is sufficient evidence of a hydrological connection between a wetland and a water of the United States.[17] Alternatively, officials from other districts, such as Jacksonville and Philadelphia, stated that they may consider the 100-year floodplain as one of many factors when making jurisdictional determinations for adjacent wetlands, but they do not consider it sufficient evidence on its own. Still other districts, such as Chicago and Rock Island, do not consider the 100-year floodplain at all when making jurisdictional determinations. Rock Island District officials said that they do not use the 100-year floodplain because headquarters never suggested it as a possible criterion. Moreover, these officials were concerned that if they used this practice, there were parts of the Rock Island District where the practice would be very inclusive because the 100-year floodplain can extend several miles inland from the banks of the Mississippi River.

Additionally, districts varied in their use of sheet flow—that is overland flow of water outside of a defined channel—for making jurisdictional determinations. In certain circumstances, some districts, such as San Francisco, Sacramento, and Los Angeles, used sheet flow between a wetland and a water of the United States as a basis for regulating the wetland. For example, San Francisco District officials said they would assert jurisdiction over a series of vernal pools—intermittently flooded areas—that are hydrologically connected to each other and a water of the United States through directional sheet flow during storm events. These officials said that this kind of sheet flow is common in the San Francisco District because the clay soils do not allow for rapid rates of infiltration, and the water flows more easily across the surface. In contrast, both the New Orleans District and the Galveston District do not consider sheet flow between a wetland and a water of the United States when making jurisdictional determinations. Officials from the Galveston District said they do not consider sheet flow when asserting jurisdiction because they believe sheet flow is not well defined and that, in its broadest interpretation, could cover nearly all waters in their district.

[17]Galveston District does not consider the 100-year floodplain to determine adjacency on the coastal barrier islands. Additionally, under Galveston District's approach, if a wetland is separated from a water of the United States by two or more natural or man-made barriers, the wetland is considered isolated, even if the wetland lies in a 100-year floodplain.

Proximity

Districts also vary in their use of proximity as a factor in making jurisdictional determinations. Some districts set a specific distance from a water of the United States within which a wetland must lie to be jurisdictional. For example, officials from the Jacksonville District said that they regulate almost all wetlands located within 200 feet of other waters of the United States, and they generally do not assert jurisdiction beyond that distance. According to these officials, the district set this distance because it needed an approximate distance for enforcement purposes, and it gradually became a rule of thumb. Philadelphia District officials said they generally consider a different specific distance to determine whether wetlands are jurisdictional. These officials said they generally do not consider a wetland adjacent if it is located more than 500 feet away from a water of the United States, although not all wetlands located within 500 feet of waters of the United States are regulated.

Other districts, such as Portland and Sacramento, have not established specific distances between a wetland and a water of the United States that would make the wetland jurisdictional or nonjurisdictional. However, these districts do include proximity as an important consideration when making jurisdictional determinations. For example, Sacramento District officials said that a wetland that is 50 feet away from a water of the United States is more likely to be considered adjacent than a wetland that is 1,000 feet away. These officials explained that the farther a wetland is away from a water of the United States the greater the emphasis placed on other factors, such as the wetlands' location in the 100-year floodplain. Similarly, Portland District officials asserted that it is important to consider different relationships—hydrological, ecological, and others—between a wetland and water of the United States, along with the distance between the two to provide the most meaningful basis for a jurisdictional determination.

Man-Made and Natural Barriers

According to federal regulations, a jurisdictional wetland may be separated from a water of the United States by man-made or natural barriers, such as dikes and dunes. The regulations do not specify the number of barriers necessary to break a jurisdictional connection, and district officials that we contacted applied different practices. Officials at several districts, such as Buffalo, Chicago, and Galveston, assert jurisdiction over wetlands separated from other waters of the United States by no more than one barrier. In contrast, officials from other districts said they assert jurisdiction over wetlands separated from other waters of the United States by more than one barrier. For example, officials from the Rock Island and Omaha districts said they would regulate wetlands separated from other waters of the United States by as many as two barriers. Also, officials from

the Jacksonville District said they would generally regulate all wetlands within 200 feet of other waters of the United States, regardless of the number of barriers separating the waters from the wetlands. Officials from the Baltimore District said they have not established a maximum number of barriers that may separate a water of the United States from a jurisdictional wetland because the regulations leave room for interpretation.

Districts Generally Use a Common Approach to Identify the Jurisdictional Limits of Tributaries but May Apply It Differently

The Corps districts that we contacted generally used a similar approach to identify jurisdictional tributaries. However, beneath this similarity, we found that districts in different regions of the United States—and even individual Corps staff—could differ significantly in how they applied this approach when delineating tributary waters.

The districts that we contacted rarely used a quantitative standard of the volume or frequency of flow for assessing jurisdiction. Instead, most of them used the concept of an ordinary high water mark to identify both the outer limits of a tributary, as well as the upstream limits of a tributary. Corps staff said that they generally assert jurisdiction, as long as they can identify the characteristics of an ordinary high water mark, regardless of the volume or frequency of flow in the channel. In some arid regions, this means that channels that might have little water flow in a given year, and at times may be completely dry, could be jurisdictional, as long as the characteristics of an ordinary high water mark were visible to the Corps staff.[18] Districts would also assert jurisdiction over a tributary in the absence of an ordinary high water mark if there were evidence that construction or other activities had obliterated its signature. For example, officials from the Chicago District said that because their district was heavily urbanized many channels had been manipulated and contained, often in ways that obscured the ordinary high water mark.

Districts in arid regions identified unique difficulties they face when identifying the limits of an ordinary high water mark. For example, in the

[18]According to the Corps, in arid and semi-arid regions, an ephemeral stream may convey flow seasonally under normal and local climatic conditions. During a drought, an ephemeral stream may not flow at all. Even though the flow may be unpredictable in these regions, the creek develops a signature and channel over time that exhibits physical evidence supporting an ordinary high water mark. In some cases, these channels originate from erosion features. As these erosion features generally do not provide the same function that an ephemeral stream system may provide, many districts do not demarcate erosion features as waters of the United States. However, other districts do so on a case-by-case basis.

arid West, the intermittency of the water flow and the occasional massive flood surges that affect many rivers and streams can make identifying the ordinary high water mark a difficult exercise. According to Corps district officials, large periodic floods in the arid West create complex tributary basins that feature a network of channels, many of which are remnants of a time when the water flowed along a different course and which rarely, if ever, experience water flow. Corps officials said that identifying the ordinary high water mark in such basins can be very difficult because there may be physical evidence of water flow that is little more than a historic artifact. Additionally, large flood surges can wash away normal banks, debris, vegetation, and other evidence of the ordinary high water mark, making it more difficult for Corps staff to identify the outer limits of the tributary.

Because of the difficulties in identifying the ordinary high water mark in some arid regions, the Corps has determined that there can be considerable variations among Corps staff in identifying the outer limits of the ordinary high water mark in arid regions resulting in considerable differences in their assessments of the width of tributary channels. To address the difficulties, the Corps and EPA have taken several actions to help ensure better consistency for jurisdictional determinations. For example, the Corps' South Pacific Division—which includes district offices encompassing a large portion of the arid West—has issued a jurisdictional determination tool that staff can use to identify the limits of tributaries in the region. It specifically guides the user to identify the water features present—including water features indigenous to the arid West, such as arroyos, coulees, and washes[19]—and includes implicit practices for assessing the jurisdictional status of a water feature in that region. In addition, the Corps and EPA are developing a manual to guide field staff in identifying the ordinary high water mark in arid regions.

Moreover, the difficulty and ambiguity associated with identifying the ordinary high water mark can affect jurisdictional determinations beyond arid regions. For example, an official of the Portland District said that the definition of the ordinary high water mark is among the most ambiguous terms in the regulatory definition of waters of the United States and that the lateral limits of the ordinary high water mark can be difficult to identify,

[19]An arroyo is an ephemeral stream with a sand substrate, sometimes within a larger eroded channel; a coulee is a small stream, dry streambed, or small ravine; a wash is a steep sided depression from which bottom sediments have been removed by water.

even for major bodies of water such as the Columbia River. The official said that if he asked three different district staff to make a jurisdictional determination, he would probably get three different assessments of the ordinary high water mark from them. Similarly, an official from the Philadelphia District stated that identifying the upper reaches of an ordinary high water mark is one of the most difficult challenges the district staff face. The official explained that, as one progresses upstream, the depth of the bed and bank diminish, and the key indicators of an ordinary high water mark gradually disappear, thus identifying precisely where the ordinary high water mark ends is very much a judgment call.

Districts Vary in Treatment of Ditches and Other Man-Made Conveyances

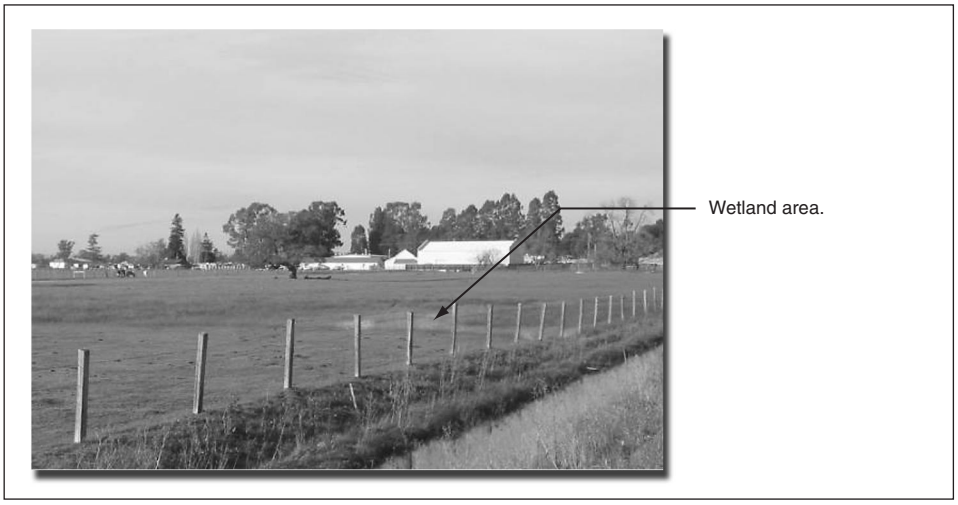
All of the district office officials that we contacted consider and use links created by man-made conveyances to assert jurisdiction over wetlands. However, the district officials described different circumstances under which they consider a man-made conveyance sufficient to establish jurisdiction for a wetland that is connected by the conveyance to a water of the United States. The officials also differed with regard to the circumstances under which they consider the conveyance itself to be jurisdictional and with regard to their treatment of subsurface closed conveyances such as pipes and drain tiles. According to Corps headquarters officials, man-made conveyances are the most difficult and complex jurisdictional issue faced by Corps districts.

Ditches and Other Man-Made Surface Conveyances

Officials in all the districts we contacted said they consider and use connections made by man-made surface conveyances— such as ditches— when assessing the jurisdictional status of a wetland (see figure 2). If, for example, a ditch carries water between a wetland and a water of the United States, then a wetland could be considered jurisdictional. However, districts differed in their practices to test the sufficiency of such a connection. For example, some districts, such as the St. Paul, Rock Island, and Wilmington districts, were fairly inclusive and said that they would find a wetland jurisdictional if water flowed in a man-made surface conveyance between the wetland and a water of the United States. Other districts consider hydrologic connections through a man-made surface conveyance under more limited circumstances. For example, officials from the Portland and Philadelphia districts said that a ditch would also need to have an ordinary high water mark or display wetland characteristics in order to establish jurisdictional status for a wetland. Officials of the Omaha and Fort Worth districts consider different factors when using man-made surface conveyances to assert jurisdiction over a wetland. Omaha District officials require, in addition to water being present at least once

per year, that the water flow from the wetland through the ditch and into a water of the United States. If the flow of water went from the water of the United States through the ditch and into the wetland, they would not consider the wetland to be jurisdictional. Omaha District officials told us that officials from Corps headquarters had endorsed this view. Officials of the Fort Worth District said that a ditch would establish a tributary connection for a wetland only if the ditch was a modification of or replacement for a natural stream.

Figure 2: Ditch Conveying Water from a Wetland



Source: U.S. Army Corps of Engineers.

Districts also differed regarding the circumstances under which they consider a ditch itself to be jurisdictional. For example, officials from the Omaha and Fort Worth districts said they assert jurisdiction over a ditch whenever it creates a jurisdictional connection between a wetland and a water of the United States. In contrast, officials from other districts—such as Sacramento, Rock Island, and Galveston—said that they might assert jurisdiction over a wetland without regulating the ditch connecting it to a water of the United States. In these districts, the jurisdiction of the ditch depends upon several factors, including whether or not the ditch displays an ordinary high water mark, exhibits the three parameters of a wetland, or replaces a historic stream. Officials at the Galveston District said a result of this policy is that a nonjurisdictional ditch can be filled without a section 404 permit, severing the jurisdictional connection of the wetland to the

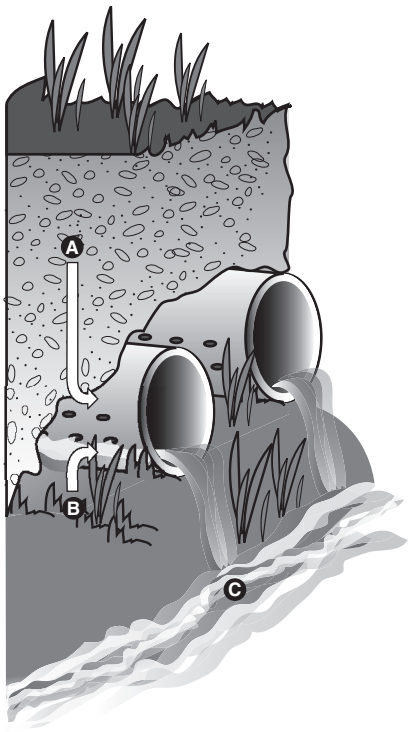
water of the United States. After the connection is severed, the previously jurisdictional wetland is rendered nonjurisdictional and can be filled without a section 404 permit.

Man-Made Subsurface Conveyances

Officials in all the districts that we visited confirmed using man-made subsurface conveyances (such as drain tiles,[20] storm drain systems, and culverts) that connect a wetland to a water of the United States as sufficient evidence to assert jurisdiction over a wetland. Nevertheless, we identified variations relating to the type of closed man-made conveyance considered sufficient to make a jurisdictional connection. Chicago District officials said they use drain tiles to establish a jurisdictional connection between a wetland and a water of the United States, but only when evidence supports that it had replaced a historic tributary. The Corps' justification is that a natural stream that is confined to a pipe, or replaced by a series of pipes in essentially the same location, still functions as a connection between upstream and downstream waters and remains a part of the surface tributary system.

[20]Drain tiles are porous clay pipes buried below the surface to provide drainage (see fig. 3).

Figure 3: Drain Tile Conveying Water from a Field



Drainage of wet soil is accomplished by layering perforated pipe (A), called a drain tile, at a prescribed depth in the soil. If the water table rises to this level (B), the excess water flows into the drain tile and flows along (within) the tile, to a drainage ditch (C), from which it exits the field.

Source: Photo and photo caption by Dr. Randy Schaetzl; illustration GAO.

In contrast, officials from the Rock Island District do not consider drain tiles to establish jurisdictional connections between wetlands and waters of the United States. Rock Island District staff said they asked Corps headquarters about the use of drain tiles to establish jurisdictional connections after the *SWANCC* decision; and they were instructed not to use drain tiles, even in situations where Corps staff could determine that water was draining from the wetland through the drain tile and into a water of the United States. Also, officials from the St. Paul district said that they do not use drain tiles to establish jurisdictional connections to wetlands, and Philadelphia District officials said they likely would not do so.

Districts also varied in their use of storm drain systems to establish jurisdictional connections for wetlands and other waters. For example,

officials from the Portland District said they considered storm drain systems as jurisdictional connections, depending on the historical situation. If a storm drain system conveyed the flow of a historic stream, then Portland District officials would consider the connection jurisdictional; however, in other situations, they would not. Officials from the St. Paul District said they had used storm drain systems to support jurisdictional connections among waters that had not been historically connected. St. Paul District officials explained that several lakes in the Minneapolis-St. Paul area had been connected to one another through underground storm water pipes to control flooding and that the system eventually empties into a water of the United States. These same officials said that this storm drain system is a jurisdictional connection because it is part of a tributary system, reasoning that if a pollutant enters the system it would eventually flow into a water of the United States.

Corps Headquarters Officials Recognize That There Are Differences among Corps District Offices

We discussed the differences that we observed among district offices' practices for making jurisdictional determinations with Corps headquarters officials. The officials explained that there are two primary reasons for the differences among Corps district offices. First, a variety of waterways and wetlands across the country are continuously shaped by local climate, topographic features, geological and soil characteristics, fauna and flora, as well as other environmental factors. As a result, in their opinion, the definitions used to make jurisdictional determinations had to be vague. This vagueness has led to the development of local district practices and guidance concerning jurisdictional determinations. Second, because nearly all waters were jurisdictional under the migratory bird rule, questions regarding the imprecise definition of adjacent wetlands and isolated waters were previously moot. When the Supreme Court struck down the migratory bird rule in 2001, districts had to rely on the key terms in the regulatory definition of waters of the United States, which had not been well defined. This led to some confusion in the districts, and Corps headquarters subsequently instructed the districts to use locally developed practices, regardless of their clarity. As a result of these two factors, Corps headquarters officials told us that the existence of differences in jurisdictional determination practices among Corps districts is not surprising.

Corps headquarters officials also noted that, given the complexity of nature and the need for some degree of flexibility within and among districts, it is not possible to achieve absolute nationwide consistency in making jurisdictional determinations. Nevertheless, these officials stated that we

documented enough differences in the district office practices to warrant a more comprehensive survey, which would include the Corps districts not surveyed in this report. This type of additional review and analysis would help ensure that the Corps is achieving the highest level of consistency possible under the current circumstances.

Few Districts Make Documentation of Their Practices Public

Few Corps districts that we reviewed made documentation of their practices for making jurisdictional determinations available to the public. Many of the 16 districts that we contacted generally relied on oral communication to convey their practices to interested parties and only 3 had developed documentation of their practices that they made available to the public.

Three districts—Jacksonville, Portland, and Galveston—had documented their practices and made this documentation available to the general public. These districts stated that their written materials documented practices that predated the 2001 *SWANCC* decision. The Jacksonville District developed a comprehensive document in July 2003 describing its practices for asserting jurisdiction over adjacent wetlands, tributary streams, man-made conveyances, and isolated waters and posted this guidance to its Web site. The Portland District also posted descriptions of district practices to its Web site, but its documentation addressed issues such as the regulation of storm water ponds and culvert maintenance activities. Finally, the Galveston District's documentation, which addresses identifying wetlands adjacent to waters of the United States, is available upon request—but is not posted on its Web site.

The other 13 districts that we reviewed have not made documentation of their practices publicly available. When asked about the written materials available to the public, Corps district officials sometimes referred to the Code of Federal Regulations and the Corps' 1987 Wetlands Delineation Manual as publicly available sources of information.

In lieu of documentation, some districts communicate their practices to the public informally, by talking with land planning consultants who help property owners navigate the section 404 program at workshops, in the office, and in the field. For example, the Baltimore District regularly makes its wetland delineations with land planning consultants present, explaining that this allows the consultants to better understand the district's practices.

Conclusions

After the Supreme Court's 2001 *SWANCC* decision that struck down the migratory bird rule, Corps districts have needed to rely on criteria other than use of the water as habitat for migratory birds to assert jurisdiction over certain waters and wetlands. In doing so, the Corps has based its determinations on criteria within the regulatory definition of "waters of the United States," including determining whether a wetland or water body is adjacent to or a tributary of a navigable or interstate water or whether the water has a connection with interstate commerce. In making these determinations, the Corps districts and staff have used different practices and have applied different factors. Some flexibility and variation in district practices may well be appropriate to address differences in climatic, hydrologic, or other factors. However, it is unclear whether or to what degree these differences in Corps district office practices would result in different jurisdictional determinations in similar situations, in part, because Corps staff consider many factors when making these determinations. Also, because few Corps districts make documentation of their practices for making jurisdictional determinations available to the public, project proponents may not have clarity as to their responsibilities under section 404 of the Clean Water Act.

Recommendations for Executive Action

In light of the uncertainty of the impact of differences in district offices' interpretation and application of the regulations, we recommend that the Secretary of the Army in consultation with the Administrator of EPA:

- survey the district offices to determine how they are interpreting and applying the regulations and whether significant differences exist among the Corps' 38 districts;
- evaluate whether and how the differences in the interpretation and application of the regulations among the Corps district offices need to be resolved, recognizing that some level of flexibility may be needed because of differing climatic, hydrologic, and other relevant circumstances among the districts; and
- require districts to prepare and make publicly available documentation specifying the interpretation and application of the regulations they use to determine whether a water or wetland is jurisdictional.

Agency Comments and Our Evaluation

We provided a draft of this report to the Secretary of the Department of Defense and the Administrator of EPA for review and comment. Both the Department of Defense and EPA concurred with the report's findings and recommendations. The Department of Defense said that, on the basis of our recommendations, it will (1) conduct a more comprehensive survey to further assess the Corps district office practices in determining jurisdiction; (2) develop a strategic approach to ensure the Corps is achieving the highest level of consistency and predictability possible for making jurisdictional determinations; and (3) ask the Corps districts and divisions to prepare documentation describing specific local practices used in making jurisdictional determinations and make this information available to the public. EPA agreed that a more complete survey of approaches to geographic jurisdictional determinations would be helpful and that it is important to document jurisdictional determinations and ensure such information is publicly available. Both the Department of Defense and EPA also provided several technical changes that we have incorporated into this report, as appropriate. The full text of the Department of Defense's response is included in appendix III, and EPA's response is included in appendix IV.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days after the date of this letter. At that time, we will send copies to interested congressional committees and Members; the Secretary of Defense; the Administrator, EPA; and the Chief of Engineers and Commander, U.S. Army Corps of Engineers. We will also make copies available to others upon request. In addition, this report will be available at no charge on GAO's home page at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-3841. Key contributors to this report are listed in appendix V.

Sincerely yours,

Anu K. Mittal
Director, Natural Resources
and Environment

Scope and Methodology

To identify the national criteria for making jurisdictional determinations, and administrative and judicial developments affecting this process since *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), we reviewed federal regulations and related guidance that define "waters of the United States." We also interviewed officials of both the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) headquarters in Washington D.C. Further, we reviewed the Supreme Court's *SWANCC* decision, as well as various subsequent and related lower court decisions. In addition, we analyzed administrative guidance issued by the Corps and EPA, as well as the Advance Notice of Proposed Rulemaking (ANPRM) issued by the Corps and EPA in January 2003. Finally, we reviewed several major public comments addressing the ANPRM and discussed the full range of comments submitted by the public with EPA officials.

To determine the extent to which Corps district offices vary in their interpretation and application of the regulations and guidance, we interviewed Corps headquarters officials, as well as national environmental groups and representatives of industry and real estate development organizations. We then selected 16 of the Corps' 38 district offices for an in-depth examination of their jurisdictional determination practices. Selected to obtain geographic representation across the United States as well as climatic, geologic, and topographic diversity, we contacted at least one district in each of the Corps' seven Divisions located in the contiguous United States. Specifically we contacted the Baltimore, Buffalo, Chicago, Fort Worth, Galveston, Jacksonville, Los Angeles, New Orleans, Omaha, Philadelphia, Portland, Rock Island, Sacramento, St. Paul, San Francisco, and Wilmington Corps district offices (see fig. 1). For each district office, we conducted a series of preliminary interviews, including interviews with officials representing the Corps Divisional Office responsible for the district office, a state wetland protection agency with jurisdiction overlapping that of the district office, a corresponding EPA

regional office,[1] and at least one firm representing the perspective of section 404 permit applicants.[2]

The primary purpose of these interviews was to obtain preliminary information on the Corps district's jurisdictional determination practices and, in particular, information on any significant differences among the districts. Following these discussions, we interviewed officials from 16 Corps district offices, using detailed questionnaires.[3] In these interviews, we discussed a wide range of topics pertaining to jurisdictional determinations, including the practices used by districts to determine whether to assert jurisdiction over adjacent wetlands, tributary waters, man-made conveyances, and isolated, intrastate waters. We also discussed other issues related to jurisdictional determinations, such as the overall impact of the *SWANCC* decision on districts' jurisdictional practices, and particular difficulties the districts face in conducting jurisdictional determinations. At the 11 district offices that we visited, we supplemented office discussions with field visits to sites of recent jurisdictional determinations, as well as sites that typified difficult jurisdictional issues. During these site visits, we observed and discussed hydrologic linkages between wetlands and waters of the United States, the difficulty in identifying the outer extent of tributaries in both arid and wet regions, and the role of ditches and other man-made conveyances in establishing jurisdictional connections for wetlands. We did not attempt to determine whether individual differences in district practices resulted in different jurisdictional determinations in similar situations, in part, because Corps staff consider many factors when making these determinations. Also, we did not attempt to compare districts' practices before and after the *SWANCC* decision.

To determine the extent to which the Corps districts document and make their practices for conducting jurisdictional determinations available to the

[1]In the course of our work, we spoke with 8 of the 10 EPA regional offices. We did not speak with officials of EPA Region 1 or Region 7.

[2]Typically, these firms were consulting firms that conduct initial jurisdictional determinations for property owners and other entities that might require a section 404 permit. Such firms have an ongoing working relationship with the Corps and are generally in a good position to know about the jurisdictional determination practices in one or more Corps districts.

[3]Of the 16 Corps district offices included in our review, we visited 11 and conducted telephone interviews with 5.

public, we interviewed Corps officials in each of the 16 district offices we contacted. When available, we obtained and reviewed districts' written guidance. We also perused district office's Web sites to determine if they made information about their practices readily available to the public. Additionally, we discussed other means of keeping the public informed of district practices and the methods districts used to maintain some degree of consistency among different jurisdictional determinations.

We conducted our work between April 2003 and January 2004 in accordance with generally accepted government auditing standards. Because we reviewed 16 of the Corps' 38 districts, our findings may not apply to those districts we did not review.

Text of 33 C.F.R. § 328.3

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means:

(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 or 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:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) 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 (a)(1) - (4) of this section;

(6) The territorial seas;

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

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

(8) Waters of the United States do not include prior converted cropland. Nothwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(b) The term *wetlands* means 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.

(c) The term *adjacent* means 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."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuation 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.

(f) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a

predictable rhythm due to masking by hydrologic, wind, or other effects.

Comments from the Department of the Army

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

REPLY TO
ATTENTION OF

2 FEB 2004

Ms. Anu Mittal
Director
Natural Resources and Environment
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548 -1000

Dear Ms. Mittal:

This is the Department of Defense (DoD) response to the GAO draft report, "WATERS AND WETLANDS: Corps of Engineers Needs To Evaluate its District Office Practices in Determining Jurisdiction," dated January 12, 2004, (GAO Code 360323/GAO-04-297).

The GAO report was prepared to describe the: (1) regulations and guidance used to determine jurisdictional waters and related developments since SWANCC; (2) extent to which Corps district offices vary in their interpretation of these regulations and guidance; and, (3) extent to which Corps district offices document their practices and make this information publicly available. The report concludes that: (1) the Corps' Clean Water Act jurisdictional regulations leave room for interpretation by Corps districts; (2) the Corps districts often differ from one another as to how they interpret and apply the regulations when determining which waters and wetlands are subject to Federal jurisdiction; and (3) only a few of the districts surveyed made their rationale for definitions of waters and jurisdictional determinations available to the public. On behalf of the Department of Defense, Army Civil Works comments on the report follow.

In general, the GAO report concludes that Corps districts often employ different practices to determine what waters are subject to Clean Water Act Jurisdiction and that these practices are producing different results among the districts. We believe that these inconsistencies may be attributed to a variety of factors. First, following the SWANCC decision, it may generally be said that a water (and associated aquatic resources) will be subject to Clean Water Act jurisdiction if the water is either a territorial sea, a traditional navigable water, a tributary to a traditional navigable water, or an adjacent wetland. As the GAO report observes, the existing regulations do not contain a definition of the term "tributaries", nor do they explain how "adjacency" is to be established for purposes of Clean Water Act jurisdiction. This absence of clarity has led field personnel to draw different conclusions about the meaning of these terms and whether or not they cover certain manmade conveyances, such as certain ditches and pipes.

Second, even when field personnel in the districts generally agree that a type of water is jurisdictional, such as an ephemeral stream, they may reach different conclusions about what is an ephemeral stream, or how one jurisdictional ephemeral stream may differ from a non-jurisdictional erosion feature. This can cause field regulators to place the same types of waters in different categories, which produces different results as regards Clean Water Act jurisdiction.

Third, existing regulations and practices concerning Clean Water Act jurisdiction do not always take into account the variations in water resources that occur in different regions of the country. For example, the nature and characteristics of wetlands in Florida are almost always very different from wetlands in Alaska or the arid southwest. Of course, this leads to correspondingly differing assessments of features under consideration as to whether they are jurisdictional or not.

Army Civil Works and the Army Corps of Engineers concur with your findings. The Corps will conduct a more comprehensive survey to further assess District practices in determining jurisdiction. We believe we can build on data presented in the report and by using that data and supplement it with further data collection efforts in districts not surveyed by the GAO. The Corps will build a knowledge base that will allow it to undertake a series of future actions to promote greater consistency in Clean Water Act jurisdictional determinations. It is anticipated that this effort will utilize a similar analysis as that presented in the GAO report. Our goal is to develop a strategy with adaptive management to ensure the Corps achieves the highest level of consistency and predictability possible given inherently different characteristics of aquatic resources in different locations, while providing the public with the greatest opportunity for understanding the basis for jurisdictional determinations so that full compliance with the Clean Water Act Is encouraged, with the goal of increasing the effectiveness, efficiency and responsiveness of the Army's regulatory program.

John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)

Enclosure

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GAO DRAFT REPORT - DATED JANUARY 12, 2004
GAO CODE 360323/GAO-04-297

"WATERS AND WETLANDS: Corps of Engineers Needs To Evaluate its District Office Practices in Determining Jurisdiction"

DEPARTMENT OF DEFENSE COMMENTS TO THE RECOMMENDATIONS

RECOMMENDATION 1: The GAO recommended that the Secretary of the Army in consultation with the Administrator of EPA survey the district offices to determine how they are interpreting and applying the regulations and whether significant differences exist among the Corps' 38 districts. (p. 30/GAO Draft Report)

DOD RESPONSE: We concur with your findings and will be conducting a more comprehensive survey to further assess District office practices in determining jurisdiction. We believe that we can build on data presented in the report and by using that data and by supplementing it with further data collection efforts in non-surveyed districts, we can build a knowledge base that will allow us to undertake a series of future actions to promote greater consistency in Clean Water act jurisdictional determinations. It is anticipated that we will conduct a similar analysis to that presented in the report. Our goal is to develop a strategy with adaptive management to ensure the Corps is achieving the highest level of consistency and predictability possible, while providing the public with the greatest opportunity for understanding the basis for jurisdictional determinations so that full compliance with the Clean Water Act Is encouraged.

RECOMMENDATION 2: The GAO recommended that the Secretary of the Army in consultation with the Administrator of EPA evaluate whether and how the differences in the interpretation and application of the regulations among the Corps district offices need to be resolved, recognizing that some level of flexibility may be needed on account of differing climatic, hydrologic, and other relevant circumstances among the districts.
(p. 30-31/GAO Draft Report)

DOD RESPONSE: We concur with your recommendation and will be developing a strategic approach to ensure the Corps is achieving the highest level of consistency and predictability possible, recognizing that some level of flexibility is needed to account for different climatic, hydrologic, and other environmental conditions within the districts and divisions, for making jurisdictional determinations. To further increase our ability in making consistent and predictable determinations, we will:

- Use district level case studies to further evaluate and clarify standard operating procedures for making jurisdictional determinations;
- As appropriate, develop and provide internal policy guidance to promote consistency in problem areas;
- Develop a monitoring program at the division level to ensure consistency is occurring to the maximum extent possible;
- Continue to conduct inter-agency meetings;
- Continue to monitor cases in litigation; and
- Develop an adaptive management plan that allows for adjustments based on division and inter-agency meetings and applicable legal precedents.

RECOMMENDATION 3: The GAO recommended that the Secretary of the Army in consultation with the Administrator of EPA require districts to prepare and make publicly available documentation specifying the interpretation and application of the regulations used to determine whether or not a water or wetland is jurisdictional. (p. 31/GAO Draft Report)

DOD RESPONSE: We concur with your findings. To provide greater clarity to the regulated community and public at large, Corps districts and divisions will be asked to prepare documentation describing specific local practices used in making jurisdictional determinations and to make this information available to the public. Our goal is to develop a strategy with adaptive management to ensure the Corps is achieving the highest level of consistency and predictability possible while providing the public with the greatest opportunity for understanding the basis for jurisdictional determinations in order to encourage full compliance with the Clean Water Act. In addition, we will be encouraging the states to assume a more active Clean Water Act role by developing more regional general permits in concert with the states and by assisting them in communicating their regulatory responsibilities to the public.

2

CF:
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Comments from the Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB - 4 2004

OFFICE OF
WATER

Ms. Anu Mittal
Director
Natural Resources and Environment
U.S. General Accounting Office
Washington, D. C. 20548

Dear Ms. Mittal:

Thank you for the opportunity to review and comment on the draft General Accounting Office (GAO) report entitled "Waters and Wetlands: Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction." The draft report focuses on implementation by the Corps of Engineers of the Clean Water Act (CWA) section 404 program and geographic jurisdiction issues after the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC)*, which held that the CWA does not authorize regulation of isolated, intrastate, non-navigable waters based solely on the presence of migratory birds. Environmental Protection Agency (EPA) appreciates the information, analyses, and recommendations provided by the GAO, and welcomes this opportunity to comment on the report and to provide the broader CWA perspective for its discussion.

The CWA section 404 program is one of several established under the Act to protect the Nation's aquatic resources, and requires permits for discharges of dredged or fill material into "waters of the United States." Although *SWANCC* involved a section 404 permitting action, the decision has implications for other programs because the term "waters of the United States" defines the jurisdictional scope of all CWA programs. Additional programs include section 402 NPDES pollutant discharge permits, section 401 state water quality certification, section 303 water quality standards, and section 311 oil spill prevention and cleanup. Interpretation and clarification of the scope of "waters of the US" after *SWANCC* therefore requires consideration of Congressional intent and impacts on all CWA programs, not just section 404. In addition, because many States administer CWA programs and often rely on Federal definitions for jurisdiction, State regulatory agencies are also affected by these issues. As the draft report notes, EPA has final administrative authority for determining the scope of "waters of the US" protected by CWA programs.

As part of efforts to address the *SWANCC* decision, EPA and the Corps issued an Advance Notice of Proposed Rulemaking (ANPRM) on January 15, 2003, on the scope of "waters of the United States." We received approximately 130,000 public comments, with over 99% of those comments opposed to any changes to the regulations that would reduce aquatic resource protection. An overwhelming majority of comments from States expressed strong

opposition to rulemaking that could change the Federal-State-Tribal partnership under the CWA that protects our Nation's aquatic resources. Based in part on the public comments submitted in response to the ANPRM, EPA and the Corps decided that a rulemaking is not necessary. The agencies are continuing to monitor implementation of CWA programs to ensure their effectiveness.

Also on January 15, 2003, EPA and the Corps issued joint legal guidance to our field offices addressing the effects of *SWANCC*. The guidance called for field staff to continue to assert CWA jurisdiction over traditional navigable waters, their tributaries, and adjacent wetlands. The guidance also indicated that, in light of *SWANCC*, the factors in the "Migratory Bird Rule" were no longer an appropriate sole basis for jurisdiction. Field staff were asked to obtain formal EPA and Corps Headquarters approval before asserting jurisdiction based on links to interstate commerce, as a means of helping ensure that jurisdictional calls were consistent and predictable.

The draft GAO report emphasizes some of the challenges faced by Corps Districts since the *SWANCC* decision. The draft GAO report notes that conditions that could affect jurisdiction vary geographically and that it is unclear if variation among Districts would result in different jurisdictional determinations in similar situations. We note further that all regulations, by their nature, set out a framework which is then interpreted and applied to various factual circumstances. This is particularly the case with regulations such as those defining "waters of the US," which the CWA recognizes would be applied to a wide variety of geographic and climactic situations. In our view, the current regulations establish a framework that provides useful detail and consistency for applying best professional judgment on a case-by-case basis and avoids one-size-fits-all results.

The section 404 program is designed to help protect wetlands and other aquatic resources, and maintain the environmental and economic benefits provided by these valuable natural resources. Wetlands provide important water quality functions, by trapping nutrients and sediments that would otherwise enter streams and lakes. The severity and frequency of flooding is lessened by wetlands, which are capable of storing large volumes of snowmelt or runoff. Wetlands also provide essential wildlife habitat; for example, over half of North American waterfowl originate from the prairie pothole wetlands of the upper Midwest. These functions are important not only to the environment, but also the economy. For example, non-consumptive recreational uses and fisheries value amount to billions of dollars every year.

The continental United States has lost over half its wetlands since European settlement, with approximately 100 million wetland acres remaining. Of those, some 20% may be wetlands that are less obviously connected to the broader aquatic ecosystem. On December 16, 2003, EPA and the Corps reiterated the Administration's commitment to the goal of "no net loss" of wetlands in the United States. In determining that a rulemaking is not necessary to achieve this goal, the decision also recognizes that there are regulatory and incentive-based approaches to continue to improve the programs that protect our Nation's waters.

In closing, EPA appreciates the information provided in the draft report, and agrees that a more complete survey of approaches to geographic jurisdictional determinations would be helpful. As mentioned earlier, EPA and the Corps are monitoring section 404 implementation, and are working together to analyze whether and how any differences among field offices should be addressed. In particular, we agree that it is very important to document jurisdictional determinations and ensure such information is publicly available. While EPA and the Corps have determined that we will not pursue rulemaking, we are discussing ways that we can further advance openness, predictability, and consistency, grounded in good science. We are committed to evaluating field-level practices, providing more information to the public, and improving agency coordination.

Thank you again for the opportunity to comment on your draft report.

Sincerely,

Benjamin H. Grumbles
Acting Assistant Administrator

GAO Contacts and Staff Acknowledgments

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Staff Acknowledgments

In addition, Charles Barchok, Doreen Feldman, Glenn Fischer, Michael Hartnett, Richard Johnson, Kate Kousser, Stephanie Luehr, Jonathan McMurray, and Adam Shapiro made key contributions to this report.

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