



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](http://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](mailto:mittala@gao.gov).

# WATERS AND WETLANDS

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

### 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.