



SECTION 404 OF THE CLEAN WATER ACT

TxDOT Environmental Affairs Division
2018 Environmental Conference

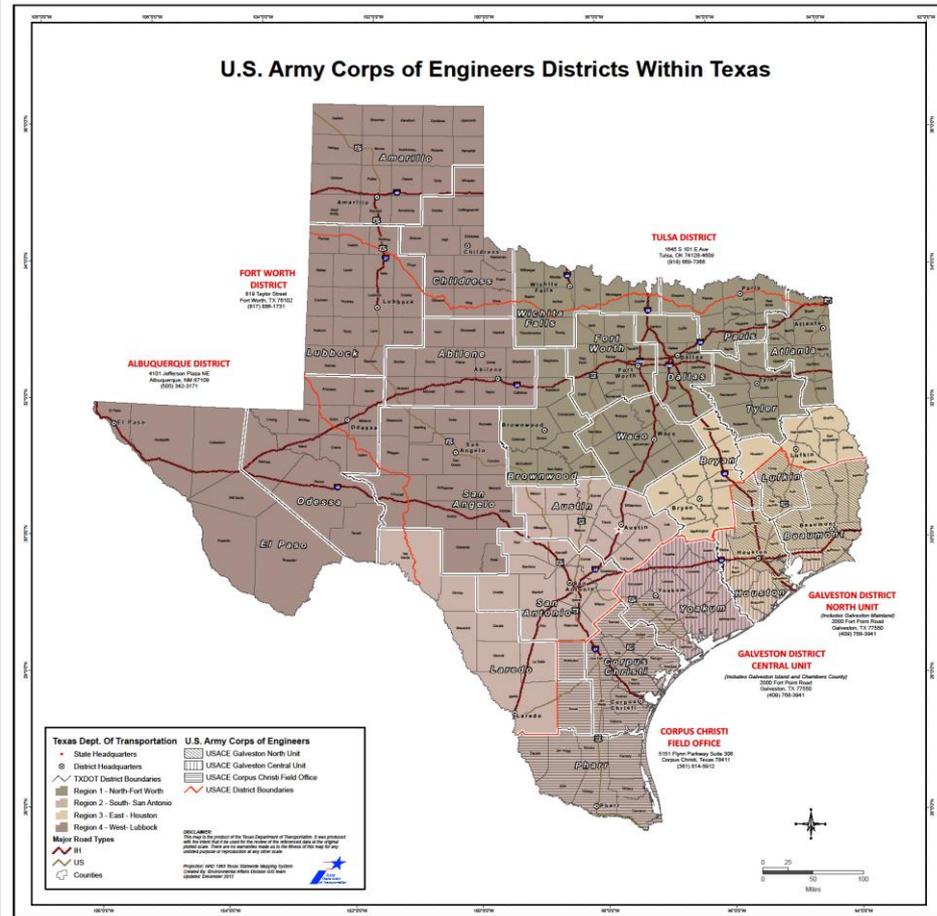


Presentation Agenda

- Overview of 404 in Texas
- Brief History of the Clean Water Act
- What is Section 404, and Why Do We Care?
- What is a Jurisdictional Water of the U.S.?
- Jurisdictional Determinations
- What is a Regulated Activity?
- What are my Permitting Options?
- Mitigation Requirements and Options
- Conclusion / Contact Information

Overview of 404 in Texas

- There are 4 U.S. Army Corps of Engineers (USACE) Districts in Texas:
 - Galveston (lead district)
 - Fort Worth
 - Tulsa
 - Albuquerque
- Southwest Division:
 - Galveston
 - Fort Worth
 - Tulsa
- South Pacific Division:
 - Albuquerque



Overview of 404 in Texas

- TxDOT has 25 districts that are ultimately responsible for coordinating their own 404 efforts with the appropriate USACE district.
 - May be handled in-house or with the help of consultants
- ENV provides project support as requested/needed:
 - There is a Natural Resources Management Section (NRM) representative assigned to each TxDOT district who is available to assist with 404 questions, contracting needs, and permitting.
 - As a second line of defense, the USACE Liaison is also available.



Brief History of the Clean Water Act – Prior to 1972

- 1948 Federal Water Pollution Control Act – Established to “enhance the quality and value of water resources and to establish a national policy for the prevention, control and abatement of water pollution”
 - Established a legal basis for federal regulation of water quality
- 1956 Amendment – Strengthened enforcement provisions
- 1965 Amendment – Established enforceable water quality standards for surface waters
- Continuing revisions through 1970 increased reporting requirements, further strengthened enforcement provisions, and added an anti-degradation component



Brief History of the Clean Water Act – 1972 and 1977

- 1972 Amendments – Consolidated authority for water pollution control in the Environmental Protection Agency
- 1977 Adjustments – Addressed long-term funding for wetland protection, among other things
 - Commonly referred to as the “Clean Water Act”
 - Became the cornerstone of surface water quality protection in the U.S.
 - Aimed to reduce direct pollutant discharges into waterways
 - Primary goal was to restore and maintain the chemical, physical, and biological integrity of the nation’s waters so they can support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water



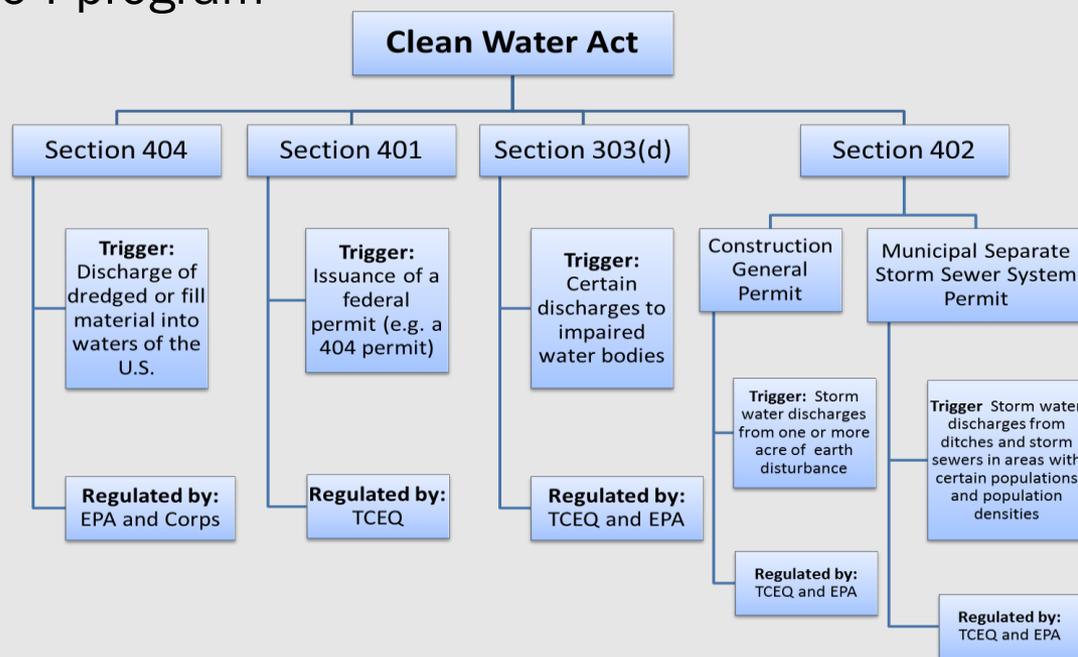
Brief History of the Clean Water Act – 1977 to Present

- 1987 Adjustments – Established a storm water permitting program, non-point source pollution control, and Great Lakes and Chesapeake Bay protection programs
- 2000 Adjustments – Support for updated water quality standards and pathogen monitoring in recreational waters
- Legal Decisions and Rule Changes Addressing Jurisdiction
 - Riverside Bayview Decision
 - 2001 SWANCC Decision (Solid Waste Agency of Northern Cook County)
 - 2006 Rapanos Decision
 - 2015 WOTUS Rule



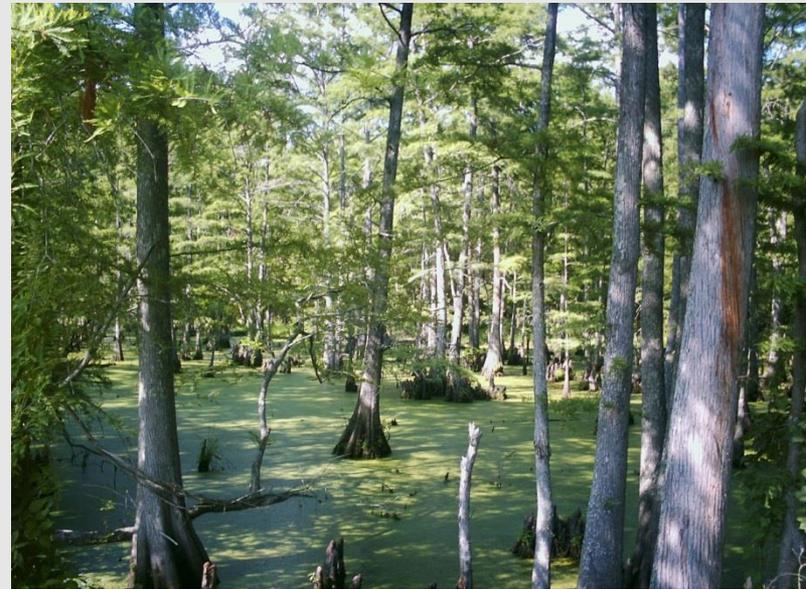
What is Section 404, and Why Do We Care?

- Section 404 of the Clean Water Act requires that a permit be obtained from the U.S. Army Corps of Engineers (USACE) in order to legally place dredged or fill material (“regulated activity”) into a jurisdictional Water of the U.S. (WOUS or WOTUS)
- Environmental Protection Agency (EPA) oversees the 404 program, and the USACE administers the 404 program
- For reference, these are the major sections of the Clean Water Act:



What is Section 404, and Why Do We Care?

- Because TxDOT's transportation projects routinely encounter WOUS, we need to understand the requirements in order to effectively comply with Section 404 and move forward with project development while minimizing risk to the Department and protecting the resource
- We will address the following questions:
 - What is a jurisdictional WOUS?
 - What is a regulated activity?
 - What are my permitting options?



What is a Jurisdictional Water of the U.S.?

- A jurisdictional WOUS is any water feature that the USACE claims jurisdictional authority over.
 - Current definition of WOUS is presented in the 2015 WOTUS Rule
 - Applicability of this rule was delayed until 2020, but that delay was lifted in August, making the rule in effect in Texas
 - Because applicability of the rule is new and controversial, it is not entirely clear what water features the USACE will determine as jurisdictional versus non-jurisdictional
 - The State of Texas filed a request for an expedited injunction, and we are awaiting the judge's decision at this time. If he rules in our favor, the 2015 WOTUS Rule will no longer be in effect in Texas.



What is a Jurisdictional Water of the U.S.?

- Jurisdictional features may include rivers, lakes, ponds, streams, wetlands, dry washes, drainages, some ditches, etc.
 - These may have water in them, or they may be dry and appear unlike a “water feature.”
- Non-jurisdictional features may include those lacking a surface connection to, or located outside a specified distance from, a jurisdictional WOUS



What is a Jurisdictional Water of the U.S.?

- Rivers



What is a Jurisdictional Water of the U.S.?

- Tributaries



What is a Jurisdictional Water of the U.S.?

- Wetlands



Jurisdictional Determinations

- In order to obtain USACE authorization for impacts on a WOUS, the feature(s) must be either 1) identified as or assumed jurisdictional, or 2) identified as or assumed non-jurisdictional.
- Only the USACE and EPA have the authority to determine a water feature as jurisdictional or non-jurisdictional, although TxDOT districts may choose to move forward with project development, at risk, if a water feature they are impacting is arguably non-jurisdictional
 - **Request a Preliminary Jurisdictional Determination (PJD)**
 - Assumes that all water features are jurisdictional
 - Saves time on permitting
 - Useful when assumed impacts do not adversely affect permitting options
 - IP threshold
 - Mitigation threshold

Jurisdictional Determinations

– Request an Approved Jurisdictional Determination (AJD)

- Requires field visit by the USACE to determine if delineated water features are jurisdictional or not, and whether or not the delineated boundary is correct
- Can take longer
- Useful when you want to designate a feature as non-jurisdictional in order to beneficially affect permitting options and/or mitigation

– Request a Joint AJD/PJD

- Provides an AJD for a portion of the project and a PJD for the other portion of the project
- Can save time on permitting
- Useful when ROE and/or final design are not available in certain areas at the time of permitting

Jurisdictional Determinations

– No JD

- Functions largely as a PJD by assuming all water features are jurisdictional, except for obviously non-jurisdictional waters (e.g., a stock pond)
- Can save time on permitting
- Useful when project timeline is not conducive to acquiring an AJD for isolated/non-jurisdictional water features within the project area

NOTE: All JDs are dependent upon what happens with the 2015 WOTUS Rule.

- If the rule is not enjoined in Texas, we will need implementation guidance from the USACE/EPA
- If the rule is enjoined in Texas, we will go back to the status quo as it stood in mid-August

What is a Regulated Activity?

- A regulated activity is any action that includes the **temporary or permanent** placement of dredged or fill material into a WOUS.
 - Includes placement of fill material for road/bridge construction or other purposes, including temporary crossings
 - Includes inadvertent placement of dredged material by driving heavy equipment into or through a WOUS
 - Does not include incidental fallback when excavating a WOUS from outside of the OHWM
 - Does not include driven piles, which are defines as structure (though some other structures may be categorized as fill)



What are my Permitting Options?

- Recap:

- 1) We know that a jurisdictional WOUS is any water feature that the USACE claims jurisdiction over, and that this is currently based on the 2015 WOTUS Rule.

- 2) We know that a regulated activity is, essentially, any mechanized work within a jurisdictional WOUS.

- 3) So what are our permitting options?



- There are general permits and standard permits.

- General permits include Nationwide Permits (NWPs) and Regional General Permits (RGPs).

- Standard permits include Individual Permits (IPs) and Letters of Permission (LOPs).

What are my Permitting Options?

- **NWP**

- TxDOT's most commonly used type of permit
- 52 NWPs
- Valid March 2017 through March 2022
- Some are non-reporting, some require reporting to the USACE via Pre-Construction Notification (PCN)
- Must comply with NWP General Conditions
 - Following NEPA Assignment, General Conditions 18 (endangered species) and 20 (historic properties) serve as PCN trigger on non-federal projects only
- Must comply with Regional Conditions
- TxDOT commonly uses NWP 14 (linear transportation projects), NWP 3a and 3b (maintenance), and NWP 12 (utility lines)

What are my Permitting Options?

■ IP

- Avoid, if possible
- Longer to processing time
- Requires USACE to prepare their own NEPA analysis, for which they require TxDOT's purpose and need, alternatives analysis, affected environment, and impacts analysis
- USACE may only permit the Least Environmentally Damaging Practicable Alternative (LEDPA)



■ RGPs and LOPs

- RGP 12 in USACE Fort Worth for projects requiring a 408 approval
- LOP available for projects not qualifying for a general permit and having no more than minimal impacts

Mitigation Requirements and Options

Per the 2017 NWP Regional Conditions for the State of Texas:

- **Mitigation thresholds in Galveston** are identified as:
 - All special aquatic site losses that exceed 1/10 acre
 - All losses to streams that exceed 200 linear feet
- **Mitigation thresholds in Fort Worth** are identified as:
 - Losses of WOUS that exceed 1/10 acre
 - All losses to streams that exceed 300 linear feet
- Under the 2017 NWPs, there is no mitigation threshold identified for the USACE Tulsa and Albuquerque Districts

Mitigation Requirements and Options

- 2008 Mitigation Rule requires that mitigation options be sought using the following hierarchy:
 - 1) **Mitigation Bank (or In-Lieu Fee Program)**
 - Just cut a check
 - Must go through district bid and ENV/ROW approval/funding process
 - TxDOT's most commonly used mitigation option (Mit Bank)
 - 2) **Permittee Responsible Mitigation (PRM)**
 - Requires land (lease or fee simple), mitigation plan, conservation easement, monitoring, and reporting for five (5) years
 - TxDOT's least commonly used mitigation option, though some districts, Like PHR, have no other option

Conclusion / Contact Information

- Section 404 of the Clean Water Act requires that a permit be obtained from the U.S. Army Corps of Engineers (USACE) in order to legally place dredged or fill material (“regulated activity”) into a jurisdictional Water of the U.S. (WOUS or WOTUS)
- Avoid and minimize jurisdictional WOUS where possible
- Use NWPs when avoidance is not possible
- Avoid IPs and mitigation
- Participate in all available 404 training
- Contact ENV with any questions!

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