



## **CLEAN WATER ACT SECTION 404 DEFINITIONS**

### **DEFINITION OF "WATERS OF THE UNITED STATES"**

The terminology used by Section 404 of the Clean Water Act includes "navigable waters" which is defined at Section 502(7) of the Act as "waters of the United States including the territorial seas."

The term "waters of the United States" is defined by regulation as:

- (1) All waters which are currently used in interstate or foreign commerce, including all waters which are subject to the ebb and 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...
- (4) All impoundments of waters;
- (5) Tributaries of waters;
- (6) The territorial seas (defined at CWA Section 502(7)); and
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands).

[Taken from the Corps regulations at 33 CFR Section 328.3(a).]

*Note: The U.S. Supreme Court Ruled 5-4 On Jan. 9, 2001, that federal authority under the Clean Water Act does not extend to isolated, non-navigable, intrastate waters used as a habitat by migratory birds. (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (531 U.S. 159 (2001)). Subsection (a)(3) of the definition above is potentially affected by the Court's decision. EPA and the Corps (the two agencies that share responsibility for administering the Section 404 program) are moving forward with several actions, including guidance and a rulemaking, related to the ruling.*

### **DEFINITION OF "WETLANDS"**

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.

[Taken from the EPA regulations at 40 CFR 230.3(t).]

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."

#### **DEFINITION OF "DISCHARGE OF DREDGED MATERIAL"**

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct:

- Landclearing
- Ditching
- Channelization
- In-stream mining, or
- Other earth-moving activities

in waters of the United States as resulting in a discharge of dredged material UNLESS project-specific evidence shows that the activity results in only incidental fallback.

This does not and is not intended to shift any burden in any administrative or judicial proceeding under the Clean Water Act.

[Taken from (66 FR 4550, Jan. 17, 2001), which amended the Corps regulations at 33 CFR Section 323.3 and EPA regulations at 40 CFR 232.2.]

#### **DEFINITION OF "INCIDENTAL FALLBACK"**

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal.

Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when a small volume of soil or dirt falls into substantially the same place from which it was initially removed.

[Taken from (66 FR 4550, Jan. 17, 2001), which amended the Corps regulations at 33 CFR Section 323.3 and EPA regulations at 40 CFR 232.2.]

#### **DEFINITION OF "FILL MATERIAL"**

The term "fill material" means material placed in water of the United States where the material has the effect of:

- Replacing any portion of a water of the United States with dry land; or
- Changing the bottom elevation of any portion of a water of the United States.

Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation

activities, and materials used to create any structure or infrastructure in the water of the United States.

The term fill material does not include trash or garbage.

[Taken from (67 FR 31129, May 9, 2002), which amended the Corps regulations at 33 CFR Section 323.3 and EPA regulations at 40 CFR 232.2.]

#### **DEFINITION OF "DISCHARGE OF FILL MATERIAL"**

The term "discharge of fill material" means the addition of fill material into water of the United States. The term generally includes, without limitation, the following activities: placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure or infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as sewage treatment facilities, intake and outfall pipes associated with power plants and sub-aqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs.

[Taken from (67 FR 31129, May 9, 2002), which amended the Corps regulations at 33 CFR Section 323.3 and EPA regulations at 40 CFR 232.2.]