US Army Corps of Engineers®

REGULATORY GUIDANCE LETTER

No. 05-05 **Date: 7 December 2005**

SUBJECT: Ordinary High Water Mark Identification

1. **Purpose and Applicability**

a. **Purpose.** To provide guidance for identifying the ordinary high water mark.

b. **Applicability.** This applies to jurisdictional determinations for non-tidal waters under Section 404 of the Clean Water Act and under Sections 9 and 10 of the Rivers and Harbors Act of 1899.

2. **General Considerations**

a. **Regulation and Policy.** Pursuant to regulations and inter-agency agreement,[1] the U.S. Army Corps of Engineers (Corps) determines, on a case-by case basis, the extent of geographic jurisdiction for the purpose of administering its regulatory program. For purposes of Section 404 of the Clean Water Act (CWA), the lateral limits of jurisdiction over non-tidal water bodies extend to the ordinary high water mark (OHWM), in the absence of adjacent wetlands. When adjacent wetlands are present, CWA jurisdiction extends beyond the OHWM to the limits of the adjacent wetlands. For purposes of Sections 9 and 10 of the Rivers and Harbors Act of 1899, the lateral extent of Federal jurisdiction, which is limited to the traditional navigable waters of the United States, extends to the OHWM, whether or not adjacent wetlands extend landward of the OHWM.

Corps regulations define the term "ordinary high water mark" for purposes of the CWA lateral jurisdiction at 33 CFR 328.3(e), which states:

> "The term *ordinary high water mark* means 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."

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1. Memorandum of Agreement between the Department of the Army and Environmental Protection Agency Concerning the Determination of the Geographical Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act, January 19, 1989

This definition is virtually identical to the definition of the term "ordinary high water mark" found at 33 CFR Section 329.11(a)(1), describing the lateral extent of Federal jurisdiction over non-tidal traditional navigable waters of the United States subject to Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). When the definition from 33 CFR Section 329.11(a)(1) was reproduced at 33 CFR 328.3(e), the semi-colons of the former definition were mistakenly changed to commas in the latter definition. Consequently, the definition of "ordinary high water mark" in Part 328 is not as clear in meaning as is the definition of the same term in Part 329, even though the two definitions were to serve the same basic purpose (i.e., establishing the lateral extent of jurisdiction, in the absence of adjacent wetlands).[2]

Both definitions of the term "ordinary high water mark" begin by discussing physical characteristics that indicate the location of the OHWM on the shore of a water body. Furthermore, both OHWM definitions conclude with the statement the OHWM can be determined using "other appropriate means that consider the characteristics of the surrounding areas".[3] Prior to this Regulatory Guidance Letter (RGL), neither the Corps nor the U.S. Environmental Protection Agency has issued any additional clarifying national guidance for use by Corps regulatory program staff in identifying the location of the OHWM for the CWA on a case-by-case basis.[4]

b. **Practice.** In making OHWM determinations, Corps districts generally rely on physical evidence to ascertain the lateral limits of jurisdiction, to whatever extent physical evidence can be found and such evidence is deemed reasonably reliable. Physical indicators include the features listed in the definitions at 33 CFR Sections 328.3(e) and 329.11(a)(1) and other appropriate means that consider the characteristics of the surrounding areas. In addition, districts use other methods for estimating the line on the shore established by the fluctuations of water, including, but not limited to, lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence. To the maximum extent practicable, districts generally use more than one physical indicator or other means for determining the OHWM.

3. **Guidance.**

a. In determining the location of the OHWM for non-tidal water bodies under the CWA or the RHA, districts should give priority to evaluating the physical characteristics of the area that are determined to be reliable indicators of the OHWM. Physical evidence to be evaluated includes those items listed in the definitions at 33 CFR Sections 328.3(e) and 329.11(a)(1). Because many types of water bodies occur with varying conditions, including topography, channel morphology and flow dynamics, districts may consider other physical characteristics indicative of the OHWM.

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2. CWA jurisdiction extends laterally landward of the OHWM to include all adjacent wetlands wherever such adjacent wetlands are present. This guidance addresses situations where no such adjacent wetlands exist.
3. Changes in the limits of waters of the U.S. are addressed in 33 CFR 328.5.
4 . On 3 June 1983 the Corps of Engineers' Chief Counsel distributed legal guidance to all Corps district and division counsel offices regarding certain legal questions relating to the geographic jurisdiction of Section 10 of the Rivers and Harbors Act of 1899, including questions relating to the OHWM.

b. The following physical characteristics should be considered when making an OHWM determination, to the extent that they can be identified and are deemed reasonably reliable:

Natural line impressed on the bank	Sediment sorting
Shelving	Leaf litter disturbed or washed away
Changes in the character of soil	Scour
Destruction of terrestrial vegetation	Deposition
Presence of litter and debris	Multiple observed flow events
Wracking	Bed and banks
Vegetation matted down, bent, or absent	Water staining
	Change in plant community

This list of OHWM characteristics is not exhaustive. Physical characteristics that correspond to the line on the shore established by the fluctuations of water may vary depending on the type of water body and conditions of the area. There are no "required" physical characteristics that must be present to make an OHWM determination. However, if physical evidence alone will be used for the determination, districts should generally try to identify two or more characteristics, unless there is particularly strong evidence of one.

c. Where the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, districts may determine the OHWM by using other appropriate means that consider the characteristics of the surrounding areas, provided those other means are reliable.[5] Such other reliable methods that may be indicative of the OHWM include, but are not limited to, lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence.

d. When making OHWM determinations, districts should be careful to look at characteristics associated with ordinary high water events, which occur on a regular or frequent basis. Evidence resulting from extraordinary events, including major flooding and storm surges, is not indicative of the OHWM. For instance, a litter or wrack line resulting from a 200-year flood event would in most cases not be considered evidence of an OHWM.

e. Districts will document in writing the physical characteristics used to establish the OHWM for CWA and/or RHA jurisdiction. If physical characteristics are inconclusive, misleading, unreliable, or not evident, the Districts' written documentation will include information about the physical characteristics (or lack thereof) <u>and</u> other appropriate means that consider the characteristics of the surrounding areas, which it used to determine the OHWM.

f. To complete an approved jurisdictional determination, districts will have complete and accurate documentation that substantiates the Corps decision. At a minimum, decisions will be documented using the standardized jurisdictional determination information sheet established by

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5. In some cases, the physical characteristics may be misleading and would not be reliable for determining the OHWM. For example, water levels or flows may be manipulated by human intervention for power generation or water supply. For such cases, districts should consider using other appropriate means to determine the OHWM.

Headquarters and provided to the districts on August 13, 2004 (or as further amended by Headquarters). Documentation will allow for a reasonably accurate replication of the determination at a future date. In this regard, documentation will normally include information such as data sheets, site visit memoranda, maps, sketches, and, in some cases, surveys and photographs documenting the OHWM.

4. **Duration.** This guidance remains in effect unless revised or rescinded.

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