



Wetland Notes

A Publication of Zentner and Zentner

Summer 1994

CORPS OF ENGINEERS SECTION 404 JURISDICTIONAL DELINEATIONS

by John Zentner

Under Section 404 of the Clean Water Act (CWA), the Corps of Engineers regulates "waters of the United States". These "waters" include a broad range of wet environments from coastal bays to intermittent streams. Two of the most important examples for our Clients are "wetlands" and "tributaries".

Wetlands

Wetlands are transition zones between lands that are mostly wet and those that are mostly dry. Transition zones tend to be ecologically important; plant and wildlife diversity and species

richness are almost always greater in these areas than on adjoining habitats. Wetlands may also purify lakes, streams and other waters by trapping and transforming pollutants; they may reduce storm waves and coastal erosion by binding the soil, and they may provide nutrients for fish and shellfish in downstream coastal waters. Due to these values and the recognition that wetlands were rapidly vanishing, Congress added wetland regulation in its 1976 amendments of the CWA. The Corps was given permit authority while the US EPA was placed in a policy oversight role. Wetlands are defined by the Corps as:

Because they are transition zones, wetlands do not lend themselves to accurate boundary delineations. However, the Corps has been required to develop a readily used boundary methodology pursuant to their Section 404 responsibilities, resulting in delineation manuals published in 1987, 1989, 1991. Presently, the Corps uses the 1987 Manual.

Under the 1987 Manual, a site must have wetland plants (hydrophytes), wetland (hydric) soils, and wetland hydrology indicators, all under the "normal circumstances" for the site to be defined as a wetland (Figure 1). This determination is, accordingly, as much concerned with the historic conditions of the site as it is a physical determination of the plant, soil, and hydrology data. *(continued on page 2)*

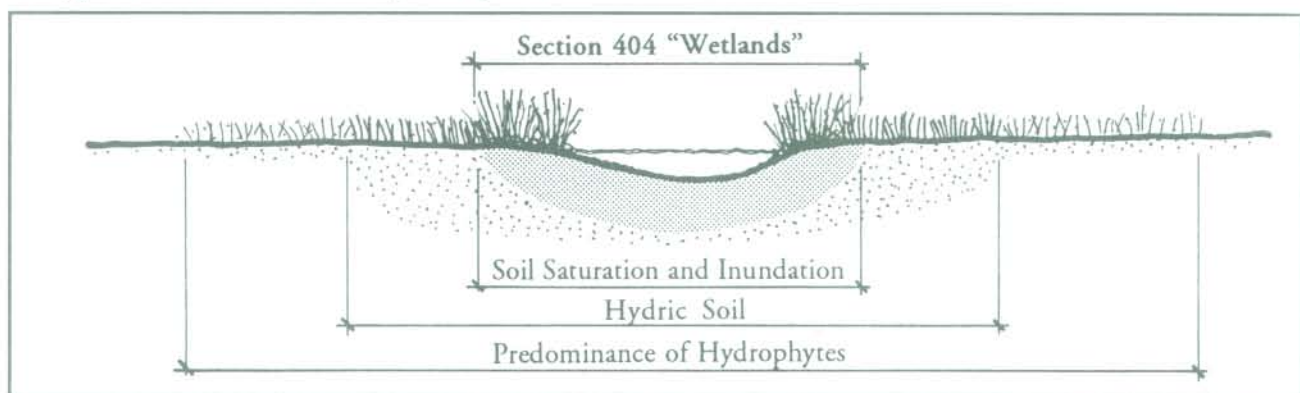


Figure 1

Idealized Wetland Cross-Section

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"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".

THE FEDERAL ENDANGERED SPECIES ACT: THEORY AND REALITY

Part 1: Section 7 Consultations

by Mara Bresnick

With the pending reauthorization of the federal Endangered Species Act of 1973, as amended (the "Act"; see 16 USC 1531 *et seq*), much of the debate on special status species has focused on the listing process and the economic impacts of listing a particular species. While these are significant issues, certain procedural aspects of the Act and its enforcement by the administering agency, the U.S. Fish and Wildlife Service (the "Service"), also deserve attention.

This article focuses on those projects requiring a federal permit or other federal approval (such as a Corps of Engineers Clean Water Act Section 404 permit) and that are determined to have an

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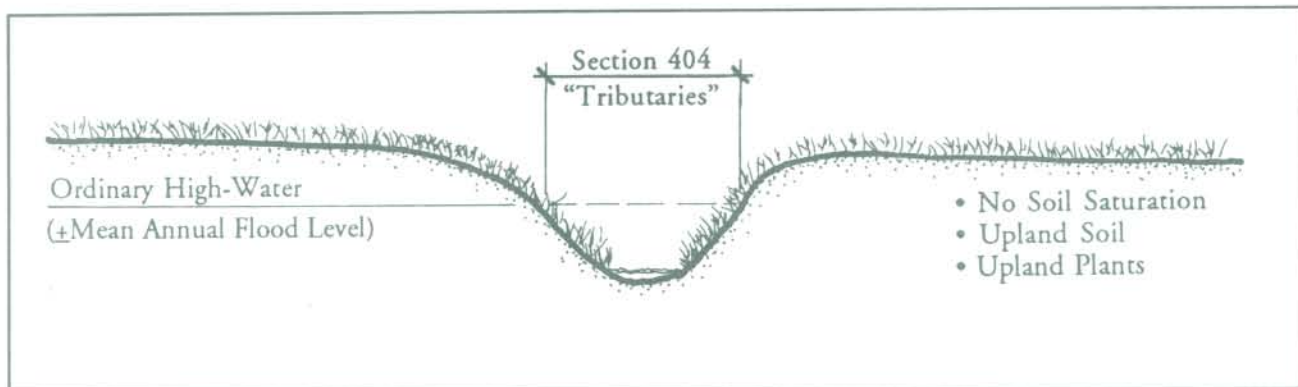


Figure 2 *Idealized Tributary Cross-Section*

Delineation (continued)

Generally, a wetland delineation begins by defining the boundaries of the plant associations of a site, often using an aerial photograph or topographic map. The delineator then samples the plants and soils at selected locations that will test the draft boundaries. For plants, the delineator must find that a preponderance of the species at the survey point are wetland species. The US Fish and Wildlife Service (FWS) publishes a list of wetland plants that is generally relied upon for this determination. The delineator also typically digs a soil pit and reviews the condition of the soil 10 to 12 inches below the surface. The US Soil Conservation Service (SCS) publishes lists of hydric soils, but soils are generally reviewed on the site as field conditions can vary from these maps.

Identifying the hydrology indicators is often the most difficult step. The 1987 Manual established criteria of as little as 18 days of saturation within the root zone as the primary hydrologic criteria defining wetlands. However, finding field evidence of this level of saturation is very difficult, especially during the dry season. Delineators may look for dry algal matting on the surface or "matted detritus", a thin layer of partially decomposed organic matter. One of the best means of defining site hydrology is to place shallow observation wells in strategic locations and review these over the wet portion of the growing period. While expensive, this step can definitively establish what portion of the site actually has wetland hydrology.

While completing these steps, the delineator also determines if any of these indicators have changed in the recent past and modified the normal circumstances. These findings are then recorded for each survey point on a standard data sheet and the map is submitted for the Client's review.

Tributary Waters

Tributary waters (also called "other waters") are channels or other waterways with identifiable beds and banks that drain to navigable waters (Figure 2). The Corps takes jurisdiction over that part of the channel below the "ordinary high water" mark, an ill-defined line roughly equivalent to the level of the mean annual storm event. In the Western US, this means that seemingly dry arroyos or gullies that may not be wetlands may be regulated by the Corps. These tributaries will also be mapped by the delineator on the jurisdictional map.

Corps Review and Approval

Although not required for all applications (local environmental documents, for example), the delineator usually submits the jurisdictional map and data sheets with a summary report to the Corps for their review and approval. Generally, the Corps then schedules a site visit to review the delineation, followed by a formal confirmation letter to the delineator. Approved delineations are generally valid for 3 years, although the Corps can shorten this time period if they feel conditions have changed. These delineations can also be extended under certain circumstances. §

WETLAND CLASSES

Zentner and Zentner offers free classes in wetland delineation and regulation to professional groups of 15 or more. Please call Susan Collopy at (510) 947-6888 or Andrew Enberg at (916) 442-5620 for further information.

Endangered Species Act (continued)

impact on federally-listed species. If impacts are unavoidable, a "Section 7 consultation" with the Service is initiated by the federal agency involved to determine whether the project will jeopardize the continued existence of the species. (If a federal agency does not have jurisdiction over the project, the applicant must apply directly to the Service for a Section 10(a) permit, a case reviewed in the next newsletter). Service regulations require that a Section 7 consultation must be concluded by the Service within 90 days after its initiation, although no penalties are imposed on the Service if this deadline is missed. If a private project applicant is involved, the Service and federal agency may mutually agree to an extension provided the Service submits to the applicant a written statement containing the reasons the extension is necessary, the information required to complete the consultation, and the estimated completion date. Theoretically, a consultation involving a private applicant cannot be extended for more than 60 days without the applicant's consent.

Within 45 days after consultation has concluded, the Service is required to deliver a biological opinion (the "jeopardy" or "no jeopardy" opinion) on the proposed project to the federal agency and private applicant. This 45-day period may only be extended with the written consent of the applicant. The federal agency and the applicant may also request a copy of the draft opinion, and both may submit comments to the Service, although this will then give the Service an additional 10 days to deliver the final opinion.

In practice, these deadlines are often ignored. Section 7 consultations routinely require months and even years to complete. The case history presented below describes one project that may be typical of the process.

The Valley Elderberry Longhorn Beetle (VELB)

The VELB is federally-listed as a threatened species and impacts to the VELB are defined by, and regulated through, impacts to its host plant, the blue elderberry (*Sambucus mexicana*). Elderberry shrubs with VELB populations occur in a variety of habitats but most often in riparian areas of the Central Valley of California. The Sacramento Field Office of the Service publishes specific guidelines for mitigating impacts to the beetle (*General Compensation Guidelines for the Valley Elderberry Longhorn Beetle* [February 26, 1993] ["Guidelines"]).

Zentner and Zentner recently permitted a project in which the applicant proposed to fill less than 1 acre of isolated wetlands under the jurisdiction of the Corps under Section 404. Elderberry shrubs occurred near but not in the wetlands. In applying for a Nationwide Permit 26 authorization to fill the wetlands, the applicant prepared a VELB mitigation program that was consistent with the Guidelines. Theoretically, use of these Guidelines by an applicant should expedite the consultation and review process. The Corps initiated a Section 7 consultation with the Service but the Service did not complete the consultation within the 90-day period, and no extension was agreed upon between the Service and the Corps; nor did the Service submit to the applicant a written statement explaining the reasons for extension of the consultation. Approximately 100 days after it initiated consultation, the Corps re-evaluated its position and informed the Service it was withdrawing from the consultation because the impacted elderberry shrubs were not within the "area of impact" (the wetlands) of the permit authorization. This decision by the Corps meant the applicant was required to begin the process again by filing an application with the Service for a Section 10(a) permit (a more rigorous and time-consuming process).

Faced with the prospect of additional significant delays, Zentner and Zentner successfully argued that the Corps could not withdraw from the consultation since under the applicable regulations the consultation had formally concluded and the Service was required to issue its biological opinion. Based upon the mitigation proposed by the applicant, and other conditions imposed by the Service, the Service issued a "no jeopardy" biological opinion for the project (although the Service took approximately 6 months to issue the opinion).

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ZENTNER AND ZENTNER

Zentner and Zentner is a California Corporation and professional consulting firm specializing in wetland analyses, environmental assessments, Federal, State and local permitting, and the design and construction of natural landscapes. Contact us in Walnut Creek at (510)947-6888 or Sacramento at (916)442-5620 for more information or a Statement of Qualifications.



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Endangered Species Act (continued)

Species conservation is an essential part of development. However, as with all permitting processes, reasonable standards must be applied in a consistent and fair manner. The Act must be strengthened by clarifying the obligations of the Service and other federal agencies in Section 7 consultations, mandating compliance with prescribed time limits, and promulgating realistic mitigation guidelines. For example, where the Service chooses not to adhere to these time limits, the project applicant should be allowed to either request an extension as may occur now or to proceed with the proposed project so long as mitigation in accordance with Service guidelines is implemented and monitored for a reasonable period of time with specific performance standards and annual monitoring reports. The applicant would still be required to mitigate impacts and the

Service would be able to focus its resources on those projects that require lengthier review. These changes will better serve species conservation and remove from the process the arbitrariness which appears to prevail today. §

STATEMENT OF PURPOSE

This newsletter is a way of fostering communication among local, State and Federal agency staff, consultants, and others with an interest in wetlands. Submission of articles, letters, or anecdotes is encouraged. Please try to make these submissions timely, informative and thought-provoking. All submissions must include your name, address and phone number.

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