



Highlights of [GAO-05-870](#), a report to the Ranking Minority Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill material into federally regulated waters without first obtaining a U.S. Army Corps of Engineers (Corps) permit. Before 2001, the Corps asserted jurisdiction over most waters, including isolated, intrastate, nonnavigable waters, if migratory birds could use them. However, in January 2001, the U.S. Supreme Court concluded that the Corps exceeded its authority in asserting jurisdiction over such waters based solely on their use by birds. GAO was asked to examine, among other things, the (1) processes and data the Corps uses for making jurisdictional determinations; (2) extent to which the Corps documents decisions that it does not have jurisdiction; (3) extent to which the Corps is using its remaining authority to assert jurisdiction over isolated, intrastate, nonnavigable waters; and (4) extent to which the Corps and the Environmental Protection Agency (EPA) are collecting data to assess the impact of the court's January 2001 ruling.

What GAO Recommends

GAO is recommending that the Corps require detailed rationales for nonjurisdictional decisions and finalize with EPA the additional guidance to help the districts make certain jurisdictional decisions.

In commenting on the report, the Corps and EPA generally agreed with GAO's recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-05-870.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Anu K. Mittal at (202) 512-3641 or mittala@gao.gov.

WATERS AND WETLANDS

Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction

What GAO Found

The five Corps districts included in GAO's review generally used similar processes and data sources for making jurisdictional determinations. After the districts receive a request for a determination, a project manager will review the submitted data for completeness, request additional data from the applicant, as necessary, and analyze the data to decide whether any waters are jurisdictional under the act. Data reviewed by project managers include photographs and topographic, soils, and wetland inventory maps that show, among other things, where the proposed project is located, whether other agencies have identified waters on the property, and whether there appears to be a basis for waters to be considered federally regulated under the act. Site visits are generally conducted when maps and photographs are not sufficiently detailed to make determinations.

While GAO found that the Corps generally documents its rationale for asserting jurisdiction over waters or wetlands, it does not prepare similar documentation for nonjurisdictional determinations. Such rationales are important because determinations can be challenged by property owners and the public. GAO found that only 5 percent or less of the files in four of the five districts contained a detailed rationale, while 31 percent of the files in the fifth district contained such a rationale. The percentage of files that contained no rationale whatsoever as to why the Corps did not assert jurisdiction ranged from a low of 12 percent to a high of 49 percent in the five districts. The remaining files contained partial rationales.

Following the Supreme Court's January 2001 ruling, the Corps is generally not asserting jurisdiction over isolated, intrastate, nonnavigable waters using its remaining authority. Since January 2003, EPA and the Corps have required field staff to obtain headquarters approval to assert jurisdiction over waters based solely on links to interstate commerce. Only eight cases have been submitted, and none of these cases have resulted in a decision to assert jurisdiction. According to project managers, they are reluctant to assert jurisdiction over these kinds of waters because of the lack of guidance from headquarters and perceptions that they should not be doing so. Although the Corps has drafted a memorandum that contains guidance for the districts, EPA and the Corps have not yet reached agreement on the content of the document.

At EPA's request, over the last year, the Corps has collected data on field staffs' nonjurisdictional determinations, including limited data on wetlands impacted by the court's ruling. However, officials acknowledge that these data will be inadequate to assess the impacts of the ruling on wetlands jurisdiction. As a result, neither agency has conducted or plans to conduct an in-depth analysis of data already collected and they are re-examining their data collection efforts. Moreover, neither agency believes that an effective approach to fully assess the impacts of the ruling can be easily implemented because it would be resource intensive to do so and would require a vast array of data, some of which are not readily available.