'How to Calculate Project Impacts and an Update on the 2019 Clean Water Rule'

North Dakota Regulatory Office

NDDOT Lunch and Learn
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US Army Corps of Engineers
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The USACE Regulatory Program

- **Section 10** of the Rivers and Harbors Act of 1899
  - Regulates activities that affect the course, location, condition or navigable capacity of a navigable water
  - All work over, under or through (in or affecting) requires a permit.

- Section 10 Waters in North Dakota
  - Missouri River (including Lake Sakakawea and Lake Oahe)
  - Yellowstone River
  - James River (S of the railroad bridge in Jamestown
  - Bois de Sioux
  - Red River of the North
  - Upper Des Lacs Lake
  - Includes any impoundments of; or any bays, marinas or other water features connected to Section 10 waters.

The USACE Regulatory Program (Continued)

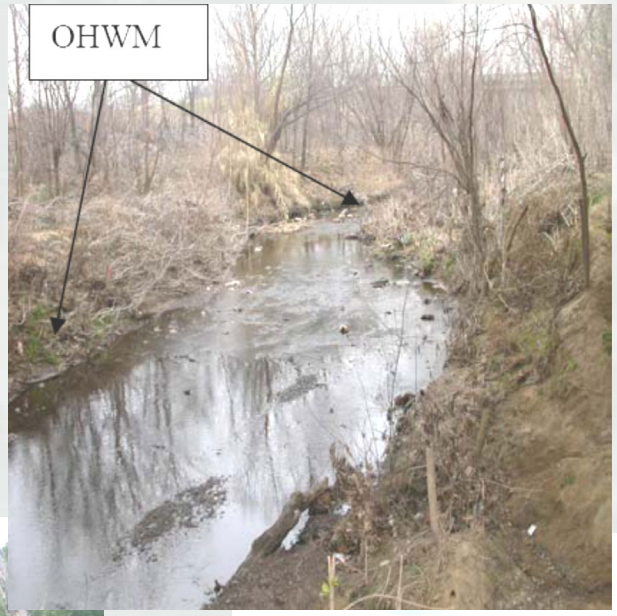
- **Section 404** of the Clean Water Act (1972)
  - Projects are regulated under Section 404 IF there is a discharge of dredged or fill material into WOUS
  - Permanent and/or temporary discharges trigger Section 404
  - Once Section 404 is triggered, all impacts associated with a project are considered, not just fill.

-Current News-

2019 Clean Water Rule

- https://www.epa.gov/wotus-rule/step-two-revise
- Published in the Federal Register on February 14, 2019.
- Comment period closed April 15, 2019
- NO IDEA IF, OR WHEN, THE RULE, OR SOME VERSION OF THE RULE, WILL GO INTO EFFECT.

The Corps Regulates:



- Rivers, creeks, channels up to the OHWM.
- Adjacent wetlands.
- Lakes

Waters of the United States (WOUS) in Relation to Transportation Projects

- Linear projects typically have many types of WOUS, including wetlands, in the road corridor.
- Boundaries of all waters must be delineated and included in drawings early in the planning process so that impacts can be calculated.
- Remember that the Corps does not recognize the term ‘artificial’ when addressing wetlands. Manmade and/or man-induced wetlands or expansion of natural waters, once determined to be jurisdictional, are treated as any other jurisdictional water.

Potential Types of Impact

- Fill
- Cut
- Temporary
- Conversion
- Lateral Effect
- Change in Use

Fill Impact

- Quantify impacts by calculating the area (in acres), including linear feet as well for stream impacts, for all areas where the final grade would be raised.
  - Note: The final grade does not have to convert the WOUS to upland to be included in this calculation.

Cut Impact

- Quantify impacts by calculating the area (in acres), including linear feet as well for stream impacts, for all areas where the final grade would be lowered.
  - Note: Cut impacts may not result in a permanent loss of WOUS, but is considered a permanent impact.

Temporary Impact

- Temporary impacts occur when fill and/or cut impacts occur in WOUS that are restored to preconstruction contours when construction is complete. (e.g. stockpile, temporary access)
  - These impacts must be minimized to the greatest extent possible.
- Quantify impacts by calculating the area (in acres), including linear feet as well for stream impacts, for all areas where the final grade would not be returned to pre-construction contours.
  - Note: Identification of impacts as temporary is not appropriate if the bottom elevation is changed, regardless of whether or not the WOUS will re-establish or will remain a WOUS after construction.

Conversion Impact

- Quantify impacts by calculating the area (in acres), including linear feet as well for stream impacts, for all areas where the WOUS is changed to a different type permanently.
  - Example: Forested wetland to a shallow marsh or change in hydrology that would permanently impact the frequency or duration of flow or inundation.

Lateral Impact

- The general definition of a lateral impact is the distance on each side of a ditch where the ditch has an influence on hydrology.
- Considerations:
  - The intent of creating road ditches is to manage water. But not all road ditches drain wetlands.
  - Many ditches serve as a channel or as a storage area for water.
  - Do impacts in the ROW cause unintentional consequences outside the ROW?
  - Is the outlet being altered or lowered?

Change in Use

- Example: Wetland was drained or modified prior to the 1985 Farm Bill and has a PC (prior converted) designation by the Natural Resources Conservation Service. As long as the wetland remains as part of an active farming operation, this designation stands. If the project causes the wetland and its use to change from agriculture to a wetland mitigation site or development for non-ag purposes, there would be a change in use.
  - This may not come into play in most linear transportation projects, but it is something everyone should be aware of.

Other Impacts That Could Require Additional Review

- Borrow Sites.
- Disposal Sites
- Soil that leaves the job site must not be disposed of in WOUS without a permit.

Single and Complete Linear Project

- Definition in simple terms: Any crossing of a WOUS or group of WOUS in a specific location that is distant from other crossings is considered a single and complete project.
  - Crossings of the same WOUS that are in close proximity cannot be considered separately.

- All impacts associated with the project must be identified and impacts of a single and complete project where multiple WOUS are involved are considered cumulatively.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; **it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.** Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Other Helpful Information Regarding Impacts/Mitigation/NWPs

- All impacts associated with a single and complete project are added together to determine whether or not a project meets the impact threshold of a given nationwide permit and to determine whether or not mitigation is required.
  - Mitigation cannot be used to reduce impacts to meet NWP thresholds. The threshold is not based on 'net effects'.
  - Mitigation can and should be used to satisfy the minimal impact requirement of the NWP.
- The use of more than one NWP for a project is prohibited, except if the total impact is less than the NWP with the highest threshold.
- Thresholds for NWPs are cumulative. All impacts of a proposal must be added to impacts from past projects.
  - This is true for impact thresholds and mitigation thresholds.

Other Helpful Information Regarding Impacts/Mitigation/NWPs Continued

- The same nationwide permit (e.g. Nationwide Permit #14) can be used multiple times at a single crossing as long as the acreage threshold is not exceeded when impacts of the current project is added to impacts of all past projects.
  - Example: An applicant proposes to extend a culvert that replaced a bridge many years ago, resulted in 0.46-acre of impact and was authorized under NWP #14. The culvert extension would impact an additional 0.09-acre. If the project is proposed to be authorized by NWP #14, the 0.46-acre is added to the 0.09-acre, and the project exceeds the threshold of the nationwide permit.
  - Example 2: An applicant proposes to extend a culvert that replaced a bridge many years ago, resulted in 0.09-acre of impact and was authorized under NWP #14. The culvert extension would impact an additional 0.09-acre. A NWP #14 may be used to authorize the project because a total of 0.18-acre is below the threshold. In this instance, the need for mitigation may be triggered because the project exceeds the 0.1-acre mitigation requirement threshold.
- Mitigation need and acceptability of mitigation proposals is determined by the Corps.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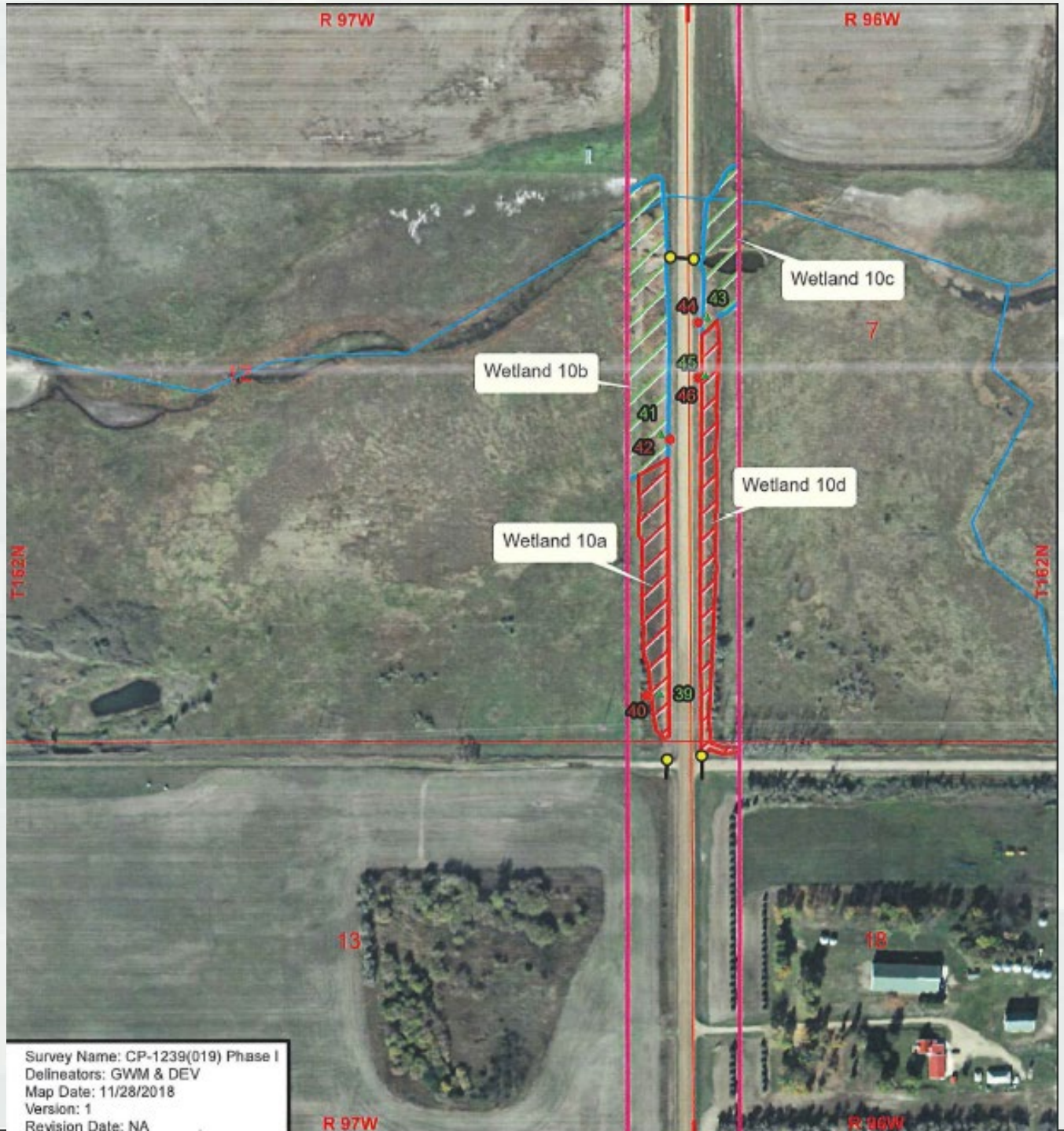
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Delineators: GWM & DEV
Map Date: 11/28/2018
Version: 1
Revision Date: NA
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Questions?


THANK YOU!
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