

MEMORANDUM

August 19, 1987

TO: Regional Supervisors of Natural Resources

FROM: Kenneth F. Wich

RE: Policy Memorandum FW 87-1:
CONFIRMATION OF FRESHWATER WETLANDS DETERMINATIONS AND DELINEATIONS

Purpose

There is a need for enough stability in freshwater wetland determinations and boundary delineations made pursuant to §24-0301 to allow property owners to use their property with some degree of confidence while preserving our ability to protect the wetlands resource.

Background

Delineations

The Freshwater Wetlands Act (Article 24) requires that jurisdictional wetlands be mapped as accurately as possible and show the approximate location of the actual boundaries of the wetlands (§24-0301.3). In practice, wetlands are mapped at the scale of 1:24000. At this scale, it is difficult to determine where wetland boundaries are on the ground. The law makes provision for more precise delineations of wetland boundaries (§24-0301.3 and §24-0301.7) upon showing of good cause.

For the purposes of this policy memorandum, "delineations" will mean those efforts to identify more precisely on the ground, and in some situations on a larger scale map, where the boundary of a wetland occurs.

Determinations

Determinations are done to ascertain whether a particular area is a jurisdictional wetland. With the existence of final maps, some of these can be done in the office. They usually are performed by the Division of Regulatory Affairs, pursuant to the joint divisional delegation memorandum.

Field determinations are done when final maps do not exist or when the maps are not precise enough to determine whether an area is in or out of a wetland (§24-0703.5). In addition, as mapping is completed, field determinations may be done most frequently to determine whether:

1. a wetland is over 12.4 acres and is not on the map because it was inadvertantly missed and should be added to the map;
2. an area on the map no longer meets jurisdictional thresholds and should be removed from the map; or

3. a wetland that is less than 12.4 acres is of unusual local importance and warrants being added to the map.

For the purposes of this policy memorandum, "determinations" will mean those field investigations performed to ascertain whether an area is a jurisdictional wetland.

Reliability

When the agency renders a decision on a determination or delineation, the landowner expects to be able to rely on that decision for the purposes of some intended land use or acquisition. However, wetlands are a dynamic resource and are subject to change; boundaries may move; size may vary enough to alter its jurisdictional status. We need to identify the conditions under which decisions will be made and honored. It is unreasonable to flag a boundary which the landowner incorporates into a costly development plan and then, after a year, change that boundary such that major project revisions are required. However, it is also unreasonable to flag a boundary, have no action for a number of years, and then allow an action to negatively impact on a wetland that has changed boundaries. A reasonable compromise is provided in this memorandum.

In the past some landowners made multiple, uncoordinated requests for delineations. Different staff responded and in situations where a boundary was not precise, have given different decisions. This creates confusion for some landowners and an opportunity for legal confrontation to others. As mapping is completed and with revision to the joint divisional delegation memorandum, this problem should be minimized. This memorandum provides additional guidance to ensure against multiple, uncoordinated responses.

This memorandum addresses delineations that encompass fine-tuning of wetland boundaries. Where determinations/delineations indicate that significant changes have occurred, a map amendment may be necessary. Guidance on map amendments will be provided in other memoranda or regulations.

Policy

1. Requests for delineations and determinations will be handled as follows:
 - a. Requests will be submitted to the Division of Regulatory Affairs (DRA).
 - b. If DRA can make an office determination from the regulatory maps, it will do so and respond to the requester (with a copy to the Division of Fish and Wildlife). All delineations and field determinations (as defined above) will be referred to the Division of Fish and Wildlife (DFW).
 - c. DFW will perform the field visit, make the decision and, by mutual agreement between regional DFW and DRA, either respond directly to the requester (with a copy to DRA) or route it back through DRA for transmittal.

2. Requests for delineations and determinations must be specifically recorded in writing and include:
 - a. name, address and telephone number of requesting party;
 - b. name, address and telephone number of landowner, if different;
 - c. general map showing location of area to be investigated;
 - d. whether the requester wishes to be present for the field visit or for a field review of flagged boundary; and
 - e. good cause justification for why the request is being made (e.g. add a wetland of unusual local importance or proposing project).

In addition, for delineations, the request should include the identification number of the wetland being delineated. For determinations, the requester must provide an indication of why the wetland determination is needed. Did we miss it when we mapped? Is it of unusual local importance?

3. Determinations and delineations will be done in a timely manner, consistent with §24-0703.5 and depending upon:
 - a. field conditions;
 - b. urgency of request (e.g. pending sale of land);
 - c. availability of requester if requester desires to be present;
 - d. competing agency priorities.
4. Freshwater wetlands determinations and delineations will be done only by qualified regional fish and wildlife staff that have been assigned that function by the Regional Supervisor of Natural Resources.
5. Determinations and boundary delineations will be made according to established division policies and appropriate rules and regulations. Staff will employ appropriate scientific and professional standards when rendering a decision.
6. If the person designated to render a decision has a question about that decision, the staff person should consult with another qualified fish and wildlife staff person, if necessary, to ensure a sound, defensible decision. However, only one final decision will be issued.
7. The 100-foot adjacent area of a wetland is measured horizontally from the edge of the wetland. In relatively flat terrain, this can be measured with little problem. However, if the terrain is steep enough to cause potential problems for the landowner in identifying the outer (landward) edge of the 100 feet, as measured horizontally, the staff person delineating the wetland boundary may help to identify the edge of the adjacent area as well. Alternatively, if a survey is being performed, the surveyor may survey or stake the edge of the adjacent area, as measured horizontally from the edge of the staked wetland.
8. All decisions regarding determinations and delineations will be recorded in writing, with the date, name of staff person rendering the decision, any appropriate field notes, and any other supporting rationale that may help support the decision. A copy of any maps produced also will be kept in the file.

The requester (and landowner, if different) will be notified in writing of the decision rendered, regardless of whether the requester was present in the field and received a verbal answer. The letter will include the nature, date and location of the request; the date of the field visit; name, title and telephone number of responsible staff person; and the nature of the decision. Any explanation that would help the requester understand the decision is also appropriate (e.g. wetland is not jurisdictional because it is less than 12.4 acres in size). A copy of the letter sent to the requester will be kept in the wetland file.

9. Delineated boundaries may be sketched onto large-scale maps (e.g. tax map or plat) and be of "sufficient clarity to permit the ready identification of individual buildings and of other major man-made structures or facilities or significant geographical features" with respect to the wetland boundary (§24-0301.7). The map will be provided by the requester and a copy put in the file. The requester will be notified both verbally, if possible, and in writing that the sketched boundary is only approximate and is subject to change in subsequent years.

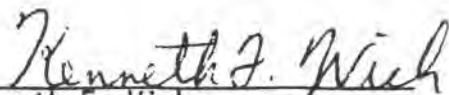
If the landowner wants a precise map (e.g. for the purposes of a development plan), it will be the responsibility of the requester to perform a professional survey of the delineated boundary. It is strongly urged that the survey be performed while the biologist is in the field or at least the same day. If the biologist is not present for the survey, flagging should be done with permanent marking (e.g. spray paint on trees or boulders), if possible, to preclude movement of markers.

Only boundaries that have been professionally surveyed will be honored pursuant to number 10 below. All other boundaries will be considered approximate and subject to change in following years. If a requester wishes the surveyed map to be honored pursuant to number 10 below, the map must include a warrant of accuracy that the surveyed boundary reflects the boundary flagged by the Department. The surveyor must then apply his/her seal over the signed warranty. The delineator then will verify, to the best of her or his abilities, whether the map accurately reflects the boundary delineated. If so, the map will be signed by the biologist, dated and a copy put in the file.

10. Unless otherwise ordered by the Commissioner or the courts, determinations and surveyed delineations will be considered fixed if within three years the landowner has:
- a. begun on the ground work;
 - b. filed a complete Article 24 permit application;
 - c. obtained local approval for a project, which must include complete and detailed architectural and/or engineering designs and specifications; or
 - d. invested any other irreversible or irretrievable resources in the project that the Natural Resource Supervisor, after consulting with the Regional Permit Administrator, deems appropriate for the purposes of this provision.

Otherwise, the site is subject to a new determination or delineation based on existing wetland conditions. At the time the initial decision is rendered, the landowner will be informed in writing of the time limitations for any determinations or delineations.

11. Notwithstanding the fixed nature of any determination or delineation as stated in number 10, above, staff should make fair and reasonable attempts to alter projects, seek alternatives and mitigation and otherwise minimize negative wetland impacts at the time any applicable permit applications are being reviewed. However, the original decision will be respected, as appropriate.



Kenneth F. Wich
Director
Division of Fish and Wildlife