



Federal Subsistence Board

1011 East Tudor Road, MS 121
Anchorage, Alaska 99503 - 6199



FISH and WILDLIFE SERVICE
BUREAU of LAND MANAGEMENT
NATIONAL PARK SERVICE
BUREAU of INDIAN AFFAIRS

FOREST SERVICE

OSM 20073.KW

AUG 05 2020

Jack Reakoff, Chair
Western Interior Alaska Subsistence
Regional Advisory Council
c/o Office of Subsistence Management
1101 East Tudor Road, MS 121
Anchorage, Alaska 99503-6199

Dear Chairman Reakoff:

This letter responds to the Western Interior Alaska Subsistence Regional Advisory Council's (Council) fiscal year 2019 Annual Report. The Secretaries of the Interior and Agriculture have delegated to the Federal Subsistence Board (Board) the responsibility to respond to these reports. The Board appreciates your effort in developing the Annual Report. Annual Reports allow the Board to become aware of the issues outside of the regulatory process that affect subsistence users in your region. We value this opportunity to review the issues concerning your region.

1. Mean High Water Mark Definition

At its March 26-27, 2019 meeting held in Fairbanks, the Council submitted a Federal subsistence wildlife proposal to the Board requesting a definition for the mean high water mark. The Council discussed incidents where hunters were confused about how the high water mark was determined. One Council member cited an instance where law enforcement confiscated a moose during the subsistence winter hunt due to a misinterpreted boundary. The Council's proposal was rejected because "the Board does not have regulatory authority to define mean high water mark." The Board further explained that Federal land managers were responsible for area descriptors of public lands.

At its meeting held October 8-9, 2019, the Council was informed of Federal regulation at 33 CFR 328, which reads, "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 area." The Council believes that this definition is ambiguous and cumbersome and that several of these characteristics would be difficult for subsistence users to identify. This is particularly true during the winter months when hunting areas along the rivers can have several feet of snow.

Recommendation:

The Council is requesting that Federal managers develop a definition of the mean or ordinary high water mark that reduces confusion and provides a physical attribute, such as willows, for easier identification. Simplifying the definition would also reduce conflicts with law enforcement officials and minimize the confiscation of important subsistence resources for local hunters because of interpretation errors.

Response:

The definition of “ordinary high water mark” can be found in Federal regulation at 33 CFR 328.3(8), which defines the term “waters of the United States” as it applies to the jurisdictional limits of the authority of the Army Corps of Engineers under the Clean Water Act (see enclosed Regulatory Guidance Letter). It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction concerning “waters of the United States.”

Modifying the definition for ordinary high water mark is outside of the Board’s purview, as was stated in the Office of Subsistence Management (OSM) letter to your Council dated March 28, 2019 (see enclosure). At your request, OSM will send an informational package request to the Federal land management agencies in Alaska through their Interagency Staff Committee representatives. The package will contain the original proposal and all correspondence related to this subject. OSM will encourage each agency to develop and provide educational materials for the Federal Subsistence Management Program and to the Councils to help aid in the determination of ordinary high water mark while in the field.

2. Mulchatna Caribou Herd Harvest Management

The Togiak National Wildlife Refuge and Yukon Delta National Wildlife Refuge (NWR) recently submitted Temporary Wildlife Special Action WSA19-07, requesting that the Board reduce the harvest limit from two caribou by State registration permit to one caribou by State registration permit throughout the range of the Mulchatna Caribou Herd.

The Council discussed the Mulchatna Caribou Herd on the record during its fall 2019 public meeting held October 8-9 in McGrath. At this meeting, Federal and State managers shared increasing biological concerns about the Mulchatna Caribou Herd, which dropped from historic highs of 200,000 animals to an estimated 13,500 caribou in 2019, a decrease of 50% since 2016. The Council was alarmed to hear the discrepancies between the Federal and State harvest records for this critically imperiled herd. The State’s records were vastly lower than Federal harvest numbers and appear to only capture sport hunting harvest. Federal managers from the Yukon Kuskokwim Delta NWR reported higher harvest numbers, particularly by hunters from the Bethel area. It was evident during the discussion that there is a lack of reliable harvest information available and that harvest could be grossly underreported, negatively affecting the adult cohort of this herd. Overall, the biological information for the Mulchatna Caribou Herd presented to the Council was incomplete.

Recommendation:

The Council has been sharing concerns about the Mulchatna Caribou Herd’s declining population for many years and believes that management is going in the wrong direction. Any harvestable surplus now and in the future needs to include a component for under or non-reported harvest mortality, particularly given the level of hunting competition for caribou in this region. Incidental harvest mortalities are generally high in aggregate ungulate species like caribou, and this needs to be captured in a comprehensive hunting mortality report. The Council requests that Federal and State managers

implement measures immediately that will accurately quantify the harvest of caribou from the Mulchatna Caribou Herd.

Response:

The Board recognizes the importance of accurate harvest information for wildlife conservation and management. Unfortunately, incidental mortality or wounding loss is impossible to quantify precisely. The Board addressed this topic in our response to your Council's 2017 fiscal year annual report:

Incidental mortality is very difficult to measure. A wounding loss study would entail deploying a significant number of radio collars, monitoring them continuously, and, when a mortality signal was detected, responding immediately to do a necropsy. ADF&G accounts for wounding loss when calculating the harvestable surplus of some caribou herds through subjective estimates. Estimates are derived from flights over and walks through hunting areas and reports from hunters and the general public recounting experiences. While this is a very imperfect method, it is what's feasible given current staff and monetary resources. Therefore, caribou herds are often managed conservatively.

Unreported harvest can be estimated using data from community household harvest surveys. These surveys are conducted periodically throughout Alaska. While these survey data are only available for some communities in some years, they are the best data available for estimating unreported harvests. OSM incorporates these data whenever available in analyses of proposed regulatory changes and presents them to the Board to use in our deliberations.

Additionally, the U.S. Fish and Wildlife Service (USFWS) committed to increasing law enforcement presence within the range of the Mulchatna Caribou Herd. During the 2019/20 season, the USFWS routinely conducted surveillance flights out of Bethel to check on hunting activity and caribou locations. The Togiak National Wildlife Refuge Manager testified at your winter 2020 meeting that they put together a law enforcement plan in cooperation with the Bureau of Land Management. They found 15 kill sites with minimal effort during the closure, indicating that unreported harvest may be substantial, but were not able to quantify the activities precisely.

3. Maximum Sustained Yield Fisheries Management

The Council wishes to alert the Board that member Timothy Gervais will be sending a letter to the National Oceanic and Atmospheric Administration (NOAA) to share his concerns with the current management of Federal fisheries in marine waters. The Council concurs with Mr. Gervais' concerns and strongly believes that operating Federal fisheries at "maximum sustained yield" with changing ocean conditions is detrimental to fish stocks in Alaska marine environments and negatively impacts coastal and interior Alaska rural communities that rely on migrating fish for subsistence. The Council will implore NOAA and others to institute more conservative harvest strategies in response to the rapidly changing marine environment conditions, including warming waters and depleted fish and shellfish stocks.

Response:

The fisheries in marine waters within 200 nautical miles of the State's shorelines (Exclusive economic zone or EEZ) are managed primarily by NOAA through the National Marine Fisheries Service. The Council's concern regarding Federal fisheries being managed for maximum sustained yield (MSY) during times of changing environmental conditions may be addressed through the Magnuson-Stevens Act (Act)

(revised in 2016). The Act provides direction to fisheries managers and scientists to evaluate information and criteria when managing fisheries with an MSY goal. When conditions require more cautious management related to certain criteria, fisheries may be managed for lower harvest goals targeting optimum yield levels (OY) instead of MSY (less than and never to exceed MSY). These criteria include evaluation of changing economic, ecological, social, and cultural values when setting management objectives for established fisheries management plans. Magnuson-Stevens Act provisions were updated in 2016 (<https://www.federalregister.gov/documents/2016/10/18/2016-24500/magnuson-stevens-act-provisions-national-standard-guidelines>).

The Board appreciates the Council's concerns related to this matter and advises the Council to work with George Pappas, OSM State Liaison, and Jon Gerken, USFWS Liaison to the North Pacific Fisheries Management Council, to develop a request letter to NOAA. George Pappas can be reached at george_pappas@fws.gov or 907-317-2165 and Jon Gerken can be reached at jonathon_gerken@fws.gov or 907-271-2776. The Board also encourages the Council to invite marine fisheries management experts to the next meeting for a more thorough dialogue.

In closing, I want to thank you and your Council for your continued involvement and diligence in matters regarding the Federal Subsistence Management Program. I speak for the entire Board in expressing our appreciation for your efforts and am confident that the Federally qualified subsistence users of the Western Interior Region are well represented through your work.

Sincerely,



Anthony Christianson
Chair

Enclosures

cc: Western Interior Alaska Subsistence Regional Advisory Council
Federal Subsistence Board
Susan Detwiler, Assistant Regional Director, Office of Subsistence Management
Thomas Doolittle, Deputy Assistant Regional Director, Office of Subsistence Management
Lisa Maas, Acting Subsistence Policy Coordinator, Office of Subsistence Management
Tom Kron, Acting Council Coordination Division Supervisor,
Office of Subsistence Management
Acting Wildlife Division Supervisor, Office of Subsistence Management
Greg Risdahl, Fisheries Division Supervisor, Office of Subsistence Management
Acting Anthropology Division Supervisor, Office of Subsistence Management
George Pappas, State Subsistence Liaison, Office of Subsistence Management
Karen Deatherage, Council Coordinator, Office of Subsistence Management
Katerina Wessels, Council Coordinator, Office of Subsistence Management
Interagency Staff Committee
Benjamin Mulligan, Deputy Commissioner, Alaska Department of Fish and Game
Mark Burch, Special Project Coordinator, Alaska Department of Fish and Game
Administrative Record



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.”

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.

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) and 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

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.



DON T. RILEY
Major General, US Army
Director of Civil Works



IN REPLY REFER TO.

United States Department of the Interior

Office of Subsistence Management
1011 East Tudor Road MS 121
Anchorage, Alaska 99503-6199

RAC WI9022.TD

MAY 28 2019

Jack Reakoff, Chair
Western Interior Alaska Subsistence Regional Advisory Council
c/o Office of Subsistence Management
1101 East Tudor Road, M/S 121
Anchorage, Alaska 99503-6199

Dear Chairman Reakoff:

This letter responds to the wildlife proposal submitted by the Western Interior Alaska Subsistence Regional Advisory Council for the 2020-2022 Wildlife Regulatory cycle regarding the definition of "mean high water mark." The Office of Subsistence Management has reviewed this proposal and determined it to be invalid. The Federal Subsistence Board does not have regulatory authority to define mean high water mark. Each Federal land manager is responsible for the mapping and area descriptors for the public lands under their authority. Generally speaking, the Bureau of Land Management is the lead for mapping public lands and the Federal Subsistence Management Program relies on their definitions. This decision was made after consulting with the Department of the Interior, Office of the Solicitor-Alaska Region.

If you have any questions related to this matter, please contact Theo Matuskowitz, Supervisory Regulations Specialist at, 907-786-3867 or theo_matuskowitz@fws.gov.

Sincerely,

Thomas C. J. Doolittle
Acting Assistant Regional Director

cc: Federal Subsistence Board

Jennifer Hardin, Ph.D, Subsistence Policy Coordinator, Office of Subsistence Management

Chris McKee, Wildlife Division Supervisor, Office of Subsistence Management

Greg Risdahl, Fisheries Division Supervisor, Office of Subsistence Management

Robbin La Vine, Acting Anthropology Division Supervisor, Office of Subsistence Management

Karen Deatherage, Council Coordinator, Office of Subsistence Management

Katerina Wessels, Acting Council Coordination Division Supervisor, Office of Subsistence Management

Interagency Staff Committee

Administrative Record