

Jurisdictional Determinations

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US Army Corps
of Engineers.

PRESENTATION OVERVIEW

- AUTHORITY AND REGULATIONS
- PATH TO DETERMINATION
- SUBMITTAL GUIDANCE
- POST-ISSUANCE

WHO IS THIS GUY?

- Ball State University - Aquatic Biology & Fisheries
- Tulane University – Aquatic Ecology
- LDNR (4 years) – Wetland Protection and Creation
- Environmental Services, Inc (11 years) - Delineation, Permitting, and Mitigation Banks
- US Army Corps (6 years) – Jurisdiction and Enforcement

US ARMY CORPS REGULATORY AUTHORITY

- Section 10 Rivers and Harbors Act (1899)
- Section 404 Clean Water Act (1972)



WATERS OF THE UNITED STATES (WOTUS)

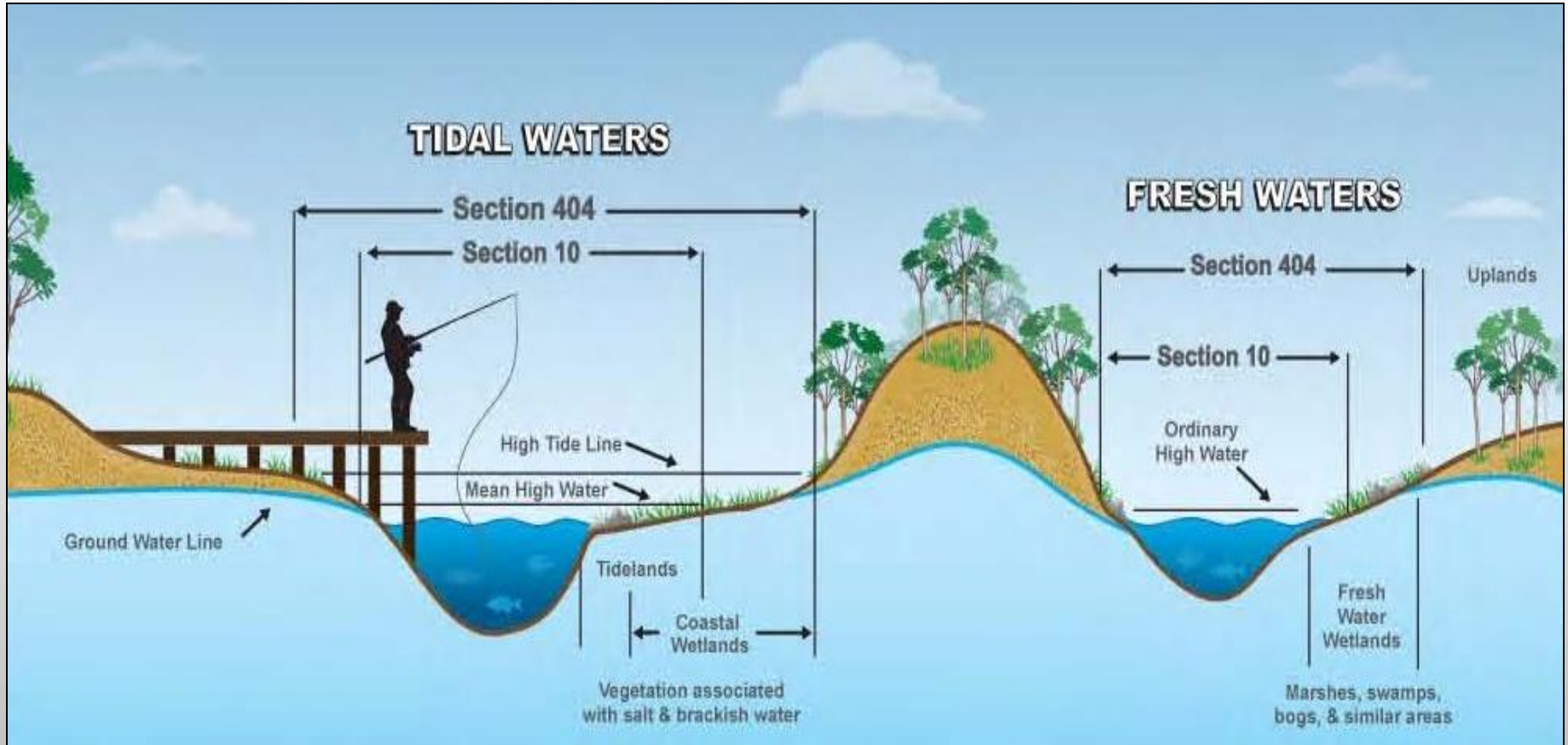
Examples:

- Navigable waters
- Ocean
- Rivers
- Streams
- Wetlands

NOTE: not all are WOTUS



BASICS OF FEDERAL JURISDICTION



TYPE OF FEDERAL JURISDICTION

- Activity Jurisdiction
 - Regulated
 - Exemptions (404f)
- Geographic Jurisdiction
 - Sec 404
 - Sec 10

PATH TO DETERMINATION

- Delineation Concurrence
 - Permit Application, Internal Review
 - Presence and Extent
- Preliminary Determination
 - Separate (non-permit) Request
 - Presence and Extent
- Approved Determination
 - Separate (non-permit) Request
 - Presence, Extent, and Jurisdiction

REGULATORY GUIDANCE LETTER 16-01

- Approved JDs
 - Default request
 - Authorizes property access
 - Valid for 5 years
 - Can be appealed
- Preliminary JDs
 - Per applicant request only
 - Presence/Extent only
 - Valid only for request
 - Can be used for permit action
 - Not Appealable (but can request AJD)

ROLES OF CORPS AND CONSULTANTS

- Requests are made to Corps
- Consultants are not required, but recommended
- Consultants must follow all rules and regulations
- Workload/Time limitations
- Consultant assistance
 - Expedite the request
 - Client advocate

JD REQUEST FORM – PART 1

U.S. Army Corps of Engineers

New Orleans District

HOW TO REQUEST A JURISDICTIONAL DETERMINATION

1. **FORM:** Please use the form on the back of this page, filling it out completely. Alternatively, you may send us a signed letter requesting a jurisdictional determination and including the same information as listed on the form.
2. **MAP:** We must be able to locate your property. Please accurately identify the property on a vicinity map (city or parish map, soil survey photo, USGS Quad map, etc.). Also, please provide property dimensions and if available, include a copy of your survey plat and a legal description.
3. **OPTIONAL DOCUMENTATION:**
 - On cleared or sparsely wooded properties, photographs can greatly assist in the review process and often make a field visit unnecessary. We must see complete coverage of the property, including the ground cover and vegetation overstory.
 - If the property is to be surveyed, we suggest waiting for the survey to be completed and including a copy with your request. This ensures that we will be able to locate the accurate boundaries of the property.
 - On agricultural fields, farm program participants can demonstrate cropping history by including copies of NRCS form CPA-026 and FSA form 578 (for the last 5 years with matching maps of field numbers for each year) from your local USDA office may help speed up your request.
 - Any other data you can include may help, such as land use or drainage improvements, etc.

JD REQUEST FORM – PART 2

4. **PROCEDURE:** We will review all available data within our office and attempt to provide a quick, accurate response to your request. Many determinations require a field site visit, which always takes more time to complete.
5. **WAYS TO SPEED UP YOUR REQUEST**
 - Fill out the request form in its entirety.
 - Be specific in marking the property location on the vicinity map.
 - Request a Preliminary Jurisdictional Determination.
 - Most of the delay on field determinations is due to problems in locating the precise property boundaries. It is important that these boundaries be clearly marked. In your request, identify adjacent landmarks such as existing structures, drainages, fences, or tree lines. If possible, provide precise distances from the nearest street corner. On densely overgrown sites we may ask that property lines be recut.
 - Some activities are exempt from permit requirements, even if they occur in a wetland. Be sure to identify your proposed activity or provide a brief description of the work.
 - Hire a private consultant to furnish us with a wetland delineation report (which contains field data concerning vegetation, soils, and hydrology), especially if time is of the essence or the property is 5 acres or larger. The New Orleans District has a high amount of jurisdictional determination requests; therefore, jurisdictional determination requests submitted with a wetland delineation report will receive higher priority than those requests that rely on us to delineate the wetlands.

JD REQUEST FORM – PART 3

REQUEST FOR A JURISDICTIONAL DETERMINATION (JD)

My file is larger than 20MBs; therefore, I am submitting through <https://safe.apps.mil>

My file is smaller than 20MBs; therefore, I am submitting my request by email to: cemvn.wetland.request@usace.army.mil

OR

My file is larger than 20MBs; therefore, I am mailing a hard copy CD.

When submitting a hard copy, you should do so by placing files onto a CD to be mailed in. This will ensure that your request is in-processed in a timely manner.

- I am requesting a JD on property described as: _____

_____ (lot or tract #, subdivision name, street, highway, etc)

- Parish: _____ Section: _____ Township: _____ Range: _____

- Tract size: _____ Acres, Latitude: _____ Longitude: _____

- The subject property is: (check as many as applicable)

cleared

wooded

pasture

agricultural field

- I have attached a survey/plat map of the property and a vicinity map identifying the precise property location.

I currently own this property.

I plan to purchase this property (owner must consent)

I am an agent/consultant acting on behalf of the requestor, and:

I have enclosed a wetland delineation report.

I have NOT enclosed a wetland delineation report.

- Reason for the request: (check as many as applicable)

I intend to construct/develop a project on the property for personal use.

I intend to construct/develop a project on the property for commercial use.

I intend to sell the property and would like a JD

The property is to be used for agricultural purposes.

If agricultural, are you a USDA Farm Participant? Yes No

The last commodity crop was harvested approximately _____ years ago.

The property is timberland. The last harvest was approximately _____ years ago. The next harvest will be in approximately _____ years.

JD REQUEST FORM – PART 4

- A Corps JD is required in order to obtain my local/state authorization.
- This JD accompanies a permit application and is to be used in the permitting process.
- Other: _____

• Type of determination being requested (explanation attached):

- I am requesting an approved JD.
- I am requesting a preliminary JD.

*Signature: _____ Date: _____

***THIS SIGNATURE INDICATES YOU HAVE THE AUTHORITY AND/OR LANDOWNER'S PERMISSION TO SUBMIT THIS REQUEST AND AUTHORIZES A PHYSICAL INSPECTION OF THE SITE.**

- Typed or printed name: _____
Company name: _____
Address: _____

Daytime phone: _____
Email address: _____

If different from above, provide the following:

Name of property owner: _____

Owner's Full Mailing Address: _____

Phone: _____ Email address: _____

DELINEATION REPORT GUIDANCE - MVN (PART 1)

- Site Specific Data and Data Forms (completed)
- Current Data (<12 months)
- Sufficient Number of Data Points
- Data Point Pairs
- Questionable Areas

DELINEATION REPORT GUIDANCE - MVN (PART 2)

- Location Map
- Flagging Key Map
- Boundary Maps: TrueColor, Color Infrared, USGS Topographic, NRCS Soils, LiDAR/Elevation
- Site Photo/Data Point Map

DELINEATION REPORT GUIDANCE - MVN (PART 3)

- Depict ALL Aquatic Features
- Preliminary JD: Review Boundary, Wetlands, Non-Wetland Waters
- Approved JD: Review Boundary, Jurisdictional Wetlands, Jurisdictional Non-Wetland Waters, Non-Jurisdictional Features
- If Approved JD – Optionally propose jurisdictional status

DELINEATION REPORT GUIDANCE - MVN (PART 4)

- Size of each aquatic feature
 - Acres or linear feet
- Digital Copies of data (shapefiles, etc)
- Confirmation/Signature of field staff
- Narrative description of site, methodology, observations, and conclusions

PATH TO DETERMINATION - REVISITED

Delineation Concurrence (Permit Action)

Pros:

- Single Package Submittal
- Site Design Tied to Features
- Concurrent Review

Cons:

- Possible Site Redesign
- Overinvestment in Difficult Property
- Not Useful for Multi-Site Investigation/Research

PATH TO DETERMINATION - REVISITED

Preliminary Jurisdictional Determination

Pros:

- Faster Process
- Regulation Independent
- Utilize for Permit or Non-Permit Construction

Cons:

- Does Not Exclude Features
- Can Not Be Appealed
- Only Applicable to Initial Request

PATH TO DETERMINATION - REVISITED

Approved Jurisdictional Determination

Pros:

- Can Exclude Features from Permitting
- Valid for 5 Years, Tied to the Affected Party
- Utilize for Permit or Non-Permit Construction
- Can Be Appealed

Cons:

- Can Take More Time
- Valid for 5 Years, Not Tied to the Property
- Affected by Current Regulations

[PAUSE] – CHANGING REGULATIONS

How to Handle Regulations Changing During Submittal Review

- Stay Connected with your Corps Reviewer
- Keep good records of field work and report writing
- Be prepared to submit additional information (if necessary)
- Specific regulation changes will specify grandfathering (determined by legal procedure)
- Revised JDs will be re-issued as time allows
- Trust me, your reviewer is probably as stressed about this as you are

PRE-2015 CWA – SWANCC/RAPANOS

Brief Summary of Current Regulatory Authority (March 2022)

- (a)(1): Traditional Navigable Waters
 - all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide
- (a)(2): Interstate Waters
 - Can be non-navigable and/or isolated
- (a)(3): Other Waters
 - the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters
- (a)(4): Impoundments of jurisdictional waters

PRE-2015 CWA – SWANCC/RAPANOS

Brief Summary of Current Regulatory Authority (March 2022)

- (a)(5): Tributaries
 - natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a TNW
 - non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally
 - non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water

- (a)(6): The Territorial Seas
 - all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline

PRE-2015 CWA – SWANCC/RAPANOS

Brief Summary of Current Regulatory Authority (March 2022)

- (a)(7): Adjacent Wetlands
 - bordering, contiguous, or neighboring
 - Abutting with a continuous surface connection
 - Unbroken surface or shallow subsurface connection
 - Physically separated from JD waters by dikes, barriers, berms, dunes, and the like
 - Proximity to JD water is reasonably close to have an ecological interconnection

- (a)(8): Excluded and Non-jurisdictional Waters

SIGNIFICANT NEXUS DETERMINATIONS

Yeah, let's get this over with...

- When to use one:
 - non-navigable tributary that is not relatively permanent (non-RPW) and any adjacent wetlands
 - wetland adjacent to, but that does not directly abut an RPW
 - seasonal RPW and any adjacent wetlands

SIGNIFICANT NEXUS DETERMINATIONS

In More Detail

- **Hydrology**
 - Volume, duration, and frequency of flow
 - Proximity of TNW
 - Size of watershed
 - Annual Rainfall
- **Ecology**
 - Pollutant pathway to TNW
 - Aquatic Habitat that supports TNW
 - Water Quality of TNW
- **Similarly Situated Wetlands**

ISSUANCE OF JURISDICTIONAL DETERMINATION

- Delineation Concurrence
 - Valid only for permit
 - Valid only for life of permit
- Preliminary JD
 - Valid only for request
 - Valid only for life of request
- Approved JD
 - Valid for the applicant
 - Valid for 5 years

DISAGREEMENT/APPEAL

- The Corps issues the JD, not the consultant
- Approved JDs can be appealed
- Appeals process can be lengthy
- Appeal determines if the JD determination is supported by the record, not arbitrary and capricious, and follows all applicable regulations, policy, and guidance.

UPDATE/REVISE/REISSUE

- Please update delineation info during the review time if necessary
- Any JD can be revised if new information is presented (from any source)
- JDs can be reissued during or after expiration date but may be reviewed
- All revisions or re-issues will be based on current regulations

RULE REVISION DURING LIFE OF JD

- If federal regulations change during the life of your issued JD...
- CONTACT YOUR CORPS REVIEWER
- Depending on the rule revision, your JD may or may not be valid (new rule vs vacatur)
- Everyone wants to avoid Violations

CLOSING

- Sec 10/Sec 404 Authority
- Delineation Concurrence, Preliminary, Approved
- Submit appropriate and current information
- Stay up-to-date on Regulatory Rules
- Review your issued JD
- Be mindful of Corps Reviewer workload

THANK YOU FOR LISTENING

Requesting a JD:

<https://www.mvn.usace.army.mil/Missions/Regulatory/Jurisdiction-Wetlands/>

RGL 16-01

<https://usace.contentdm.oclc.org/digital/collection/p16021coll9/id/1262/>

JD Request Form

https://www.mvn.usace.army.mil/Portals/56/docs/regulatory/BasisForms/REQUEST_FORM_210921.pdf

Delineation Requirements

https://www.mvn.usace.army.mil/Portals/56/docs/regulatory/MVN_Wetland-Delineation-Rpt-Reqs.pdf?ver=2018-12-04-153131-973