

CORPS REGULATORY PROGRAM

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Nashville District

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Temporary Stream Crossing near
19th century bridge



Mill Creek HDD Hydraulic Fracture Clean-up

Topics

- Corps Regulatory Overview
- Waters of the United States
- Current Initiatives
- Nationwide Permit Reissuance



National Regulatory Initiatives

Investments In...

Regulatory Mission:
To protect the Nation's aquatic resources and navigation, while allowing reasonable development through fair and balanced decisions.

Science & Technology Initiatives

Technical & Leadership Training

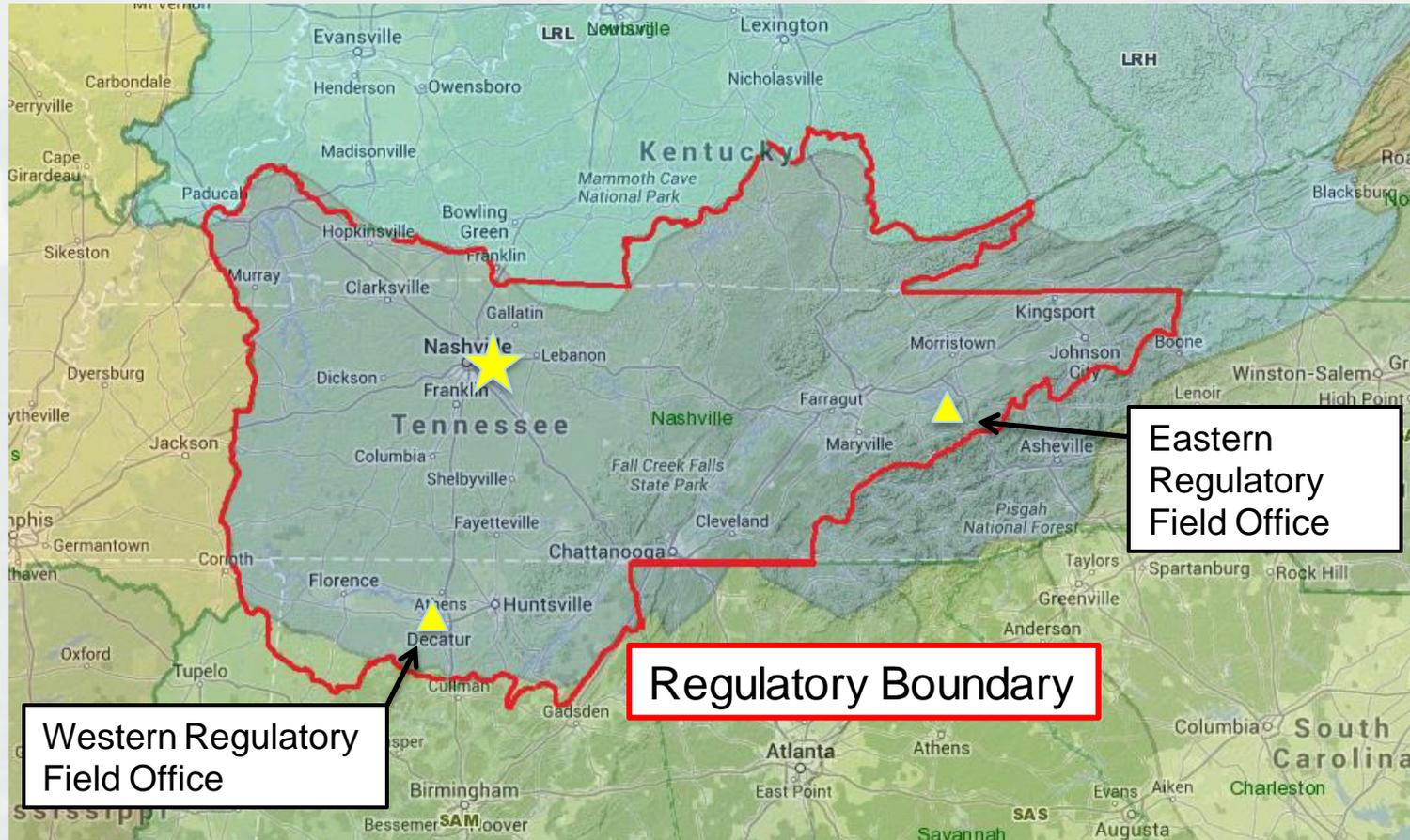
Program Efficiencies

Transparency (ORM & Public Website)

Public Feedback

Regulatory End State:
Balanced decisions that are timely, predictable, transparent, consistent, rooted in sound science and compliant with applicable laws

Nashville District Boundaries



Regulatory Authorities

- **Section 10 Rivers & Harbors Act of 1899**
 - ▶ Regulate **all structures or work** in, over or under **navigable waters of the U.S.**
- **Section 9 Rivers and Harbors Act of 1899**
 - ▶ Regulate dams and dikes across navigable waters (Corps authority for permits); bridges over navigable waters (USCG authority for permits)
- **Section 404 Clean Water Act**
 - ▶ Regulate **discharge** of dredged or fill material in **waters of the U.S.**, including wetlands
- **Section 103 of the Marine Protection, Research and Sanctuaries Act**
 - ▶ Regulate transport of dredged material for the purpose dumping in the ocean
- **Outer Continental Shelf Lands Act– Section 4(e)**
 - ▶ Prevent artificial islands, installations, and other devices from obstructing navigation on the outer Continental Shelf.



Morrison Bridge – Portland, OR – 1888: SCOTUS case led to passage of RHA of 1890



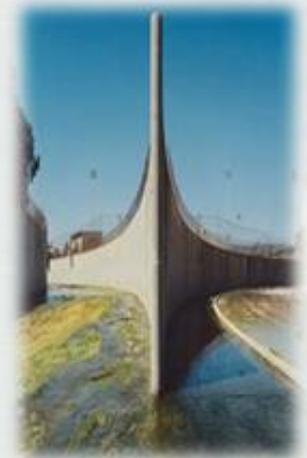
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Navigable Waters of the U.S. for Section 10 RHA Authority

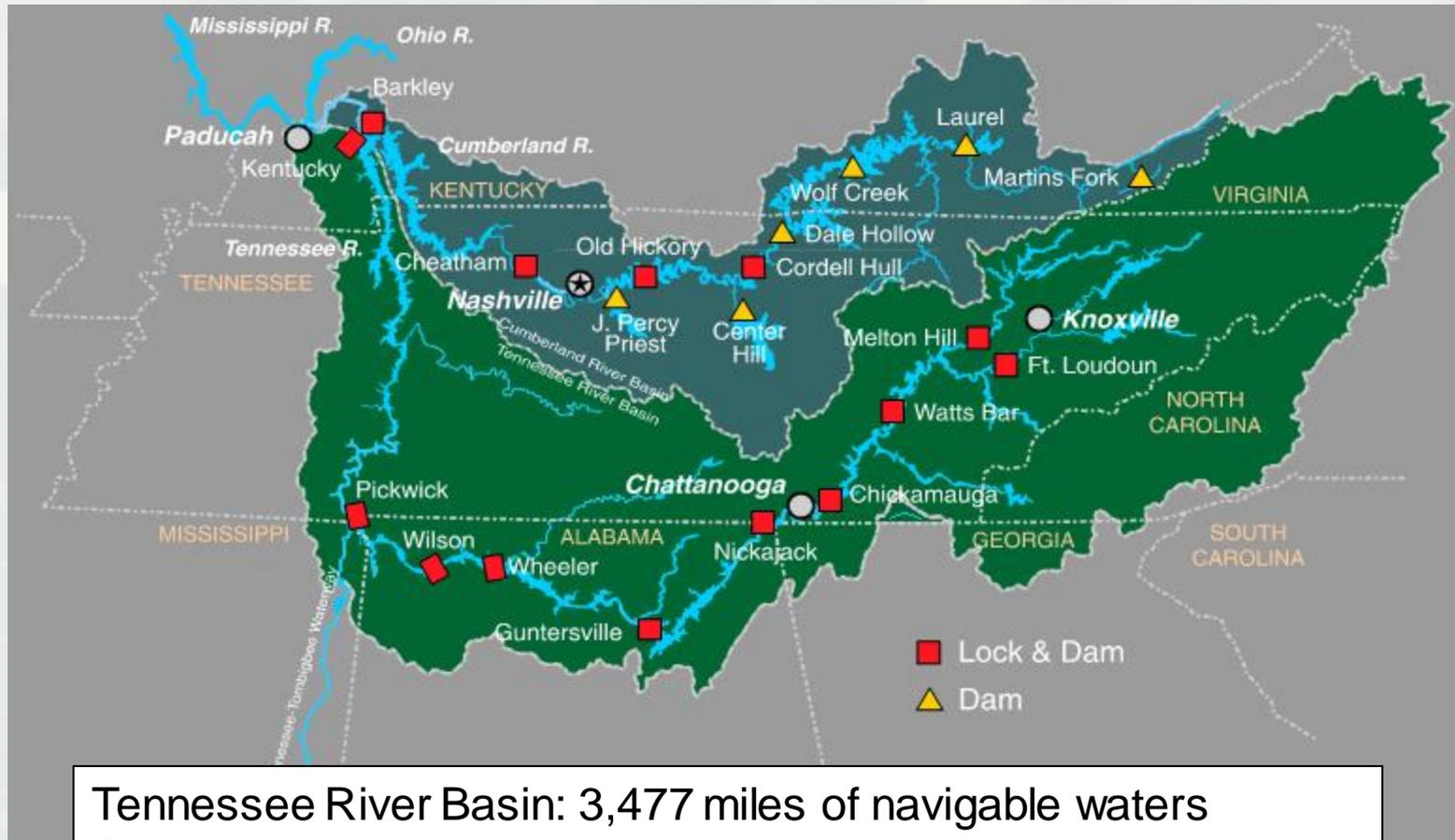
Definitions - 33 CFR 329

Navigable waters: waters subject to the ebb and flow of the tide; connection to transportation of interstate commerce

Interstate commerce: have had, presently have, or have potential for interstate commerce



Navigable Waters (RHA)



Tennessee River Basin: 3,477 miles of navigable waters
Cumberland River Basin: 2,106 miles of navigable waters
Conasauga River Basin: ~ 11 miles of navigable waters



Waters of the U.S.

Jurisdiction Under Clean Water Act (33 CFR 328.3(a)) (1986 Regulations)

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and wetlands
3. Intrastate waters where destruction or degradation could affect interstate or foreign commerce (HQ approval required)
 - ▶ Waters used for recreation or other purposes
 - ▶ Waters with fish or shellfish sold in interstate or foreign commerce
 - ▶ Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. Wetlands adjacent to waters of the U.S.

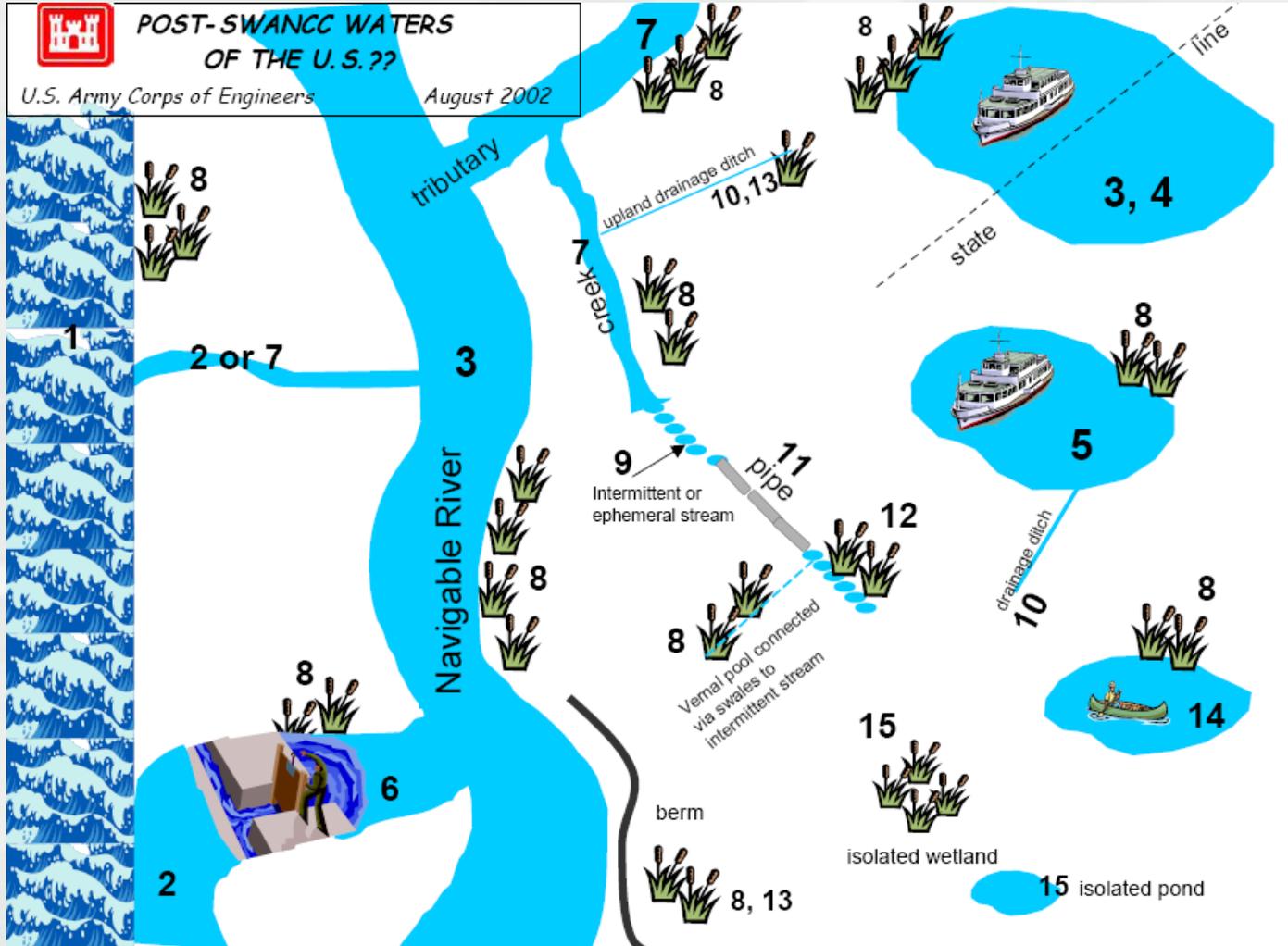


Court decisions

- **Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers**, involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds.
- **Rapanos v. U.S. & Carabell v. U.S.** – Decision provided two standards for determining whether water bodies that are not TNWs including wetlands adjacent to those non-TNWs, are subject to CWA jurisdiction:
 1. If the water body is relatively permanent, or if the water body is a wetland that directly abuts a RPW
 2. If a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs



Waters of the United States 328.3 (a)



Jurisdictional Determinations (Current Practice)

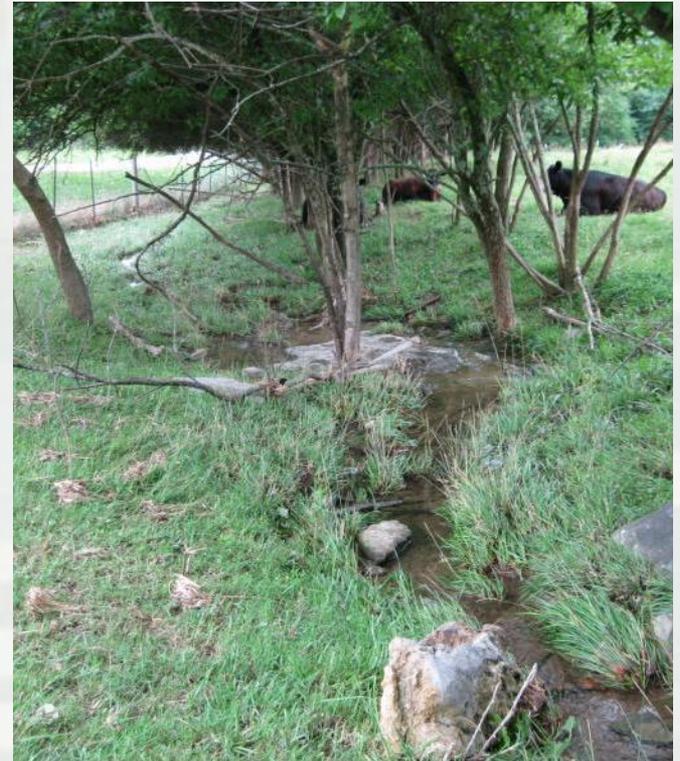
- **March 2000 Regulation (Final Rule for Appeal Process):** Definitions for JD, PJD, and AJD appear in regulation. Introduces concept of AJD determination (presence/absence) and AJD delineation (defines boundaries).
- **Rapanos Guidance; 2007/2008 Coordination Memos:** Introduced new AJD form and further standardized the JD process (including coordination).
 - ▶ Included 9 month public comment period.
 - ▶ 66,047 Comments received; revised guidance (2008).
 - ▶ DOJ, DOT, CEQ, OMB, and DOI reviewed 2007/2008 Guidance.
- **RGL 08-02:** Further defined difference between PJD and AJD and introduced PJD form.



Rivers and Streams



Tennessee River



Unnamed ephemeral stream



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Definitions – OHWM 33 CFR 328.3(e)

Ordinary High Water Mark (OHWM)

the shoreward limit of jurisdiction for all non-tidal waters. The OHWM is a line on the shore established by the normal fluctuations in the water level and is determined in the field through observance of a clear, natural line impressed on the bank, changes in the character of soil, destruction of terrestrial vegetation, etc.



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Physical characteristics : ***Regulatory Guidance Letter (RGL)*** ***05-05***

- Natural line on bank
- Shelving
- Changes in soil
- Destruction of terr. veg.
- Presence of litter, debris
- Wracking
- Veg. matted down, bent, absent
- Sediment sorting
- Leaf litter disturbed or washed away
- Scour
- Deposition
- Multiple observed flows
- Bed and banks
- Water staining
- Change in plant comm.



RGL 05-05

“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**.”



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OHWM Indicators

- Natural line on bank
- Changes in soil
- Presence of litter, debris
- Veg. matted down, bent, absent
- Sediment sorting
- Leaf litter disturbed or washed away
- Multiple observed flows
- Bed and banks



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Science and Technology support

- Institute for Water Resources (IWR) – Provides Regulatory policy support (Alexandria, VA)
 - Cumulative Effects Tool, Scope of Analysis Guidance
 - Hydrologic Engineering Center (HEC) – Expertise in surface and groundwater hydrology, river hydraulics and sediment transport, hydrologic statistics, etc. (Davis, CA)
- Engineering Research and Development Center (ERDC) – science to support decision making
 - Training courses in wetland delineation (reg supplements), wetland plant ID, hydric soils, and functional assessments
 - Cold Regions Research and Engineering Laboratory (CRREL) - Contract oversight for geospatial database development, **OHWM** (Hanover, NH)



OHWM Research, Development, and Training

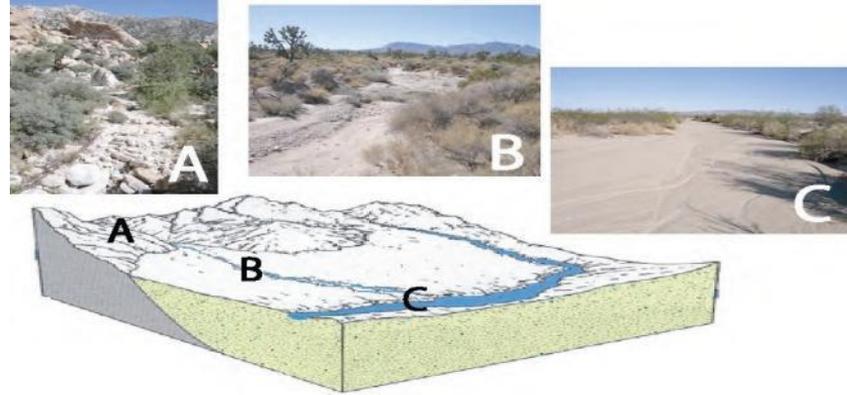
- Delineation in rivers, streams, and lakes is essential to the Corps Regulatory Program
- Research aimed at improving OHWM delineation practices since 2004
 - ▶ Test and validate the field indicators and methods
 - ▶ Develop regional and national OHWM delineation standards and procedures
 - ▶ Increase the accuracy and consistency of OHWM delineation
- 2 regional manuals and 12 tech reports

<http://www.erdc.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/9254/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training.aspx>





US Army Corps of Engineers
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Engineer Research and Development Center



A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States

A Delineation Manual

Robert W. Lichvar and Shawn M. McColley

August 2008





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Wetlands Regulatory Assistance Program (WRAP)

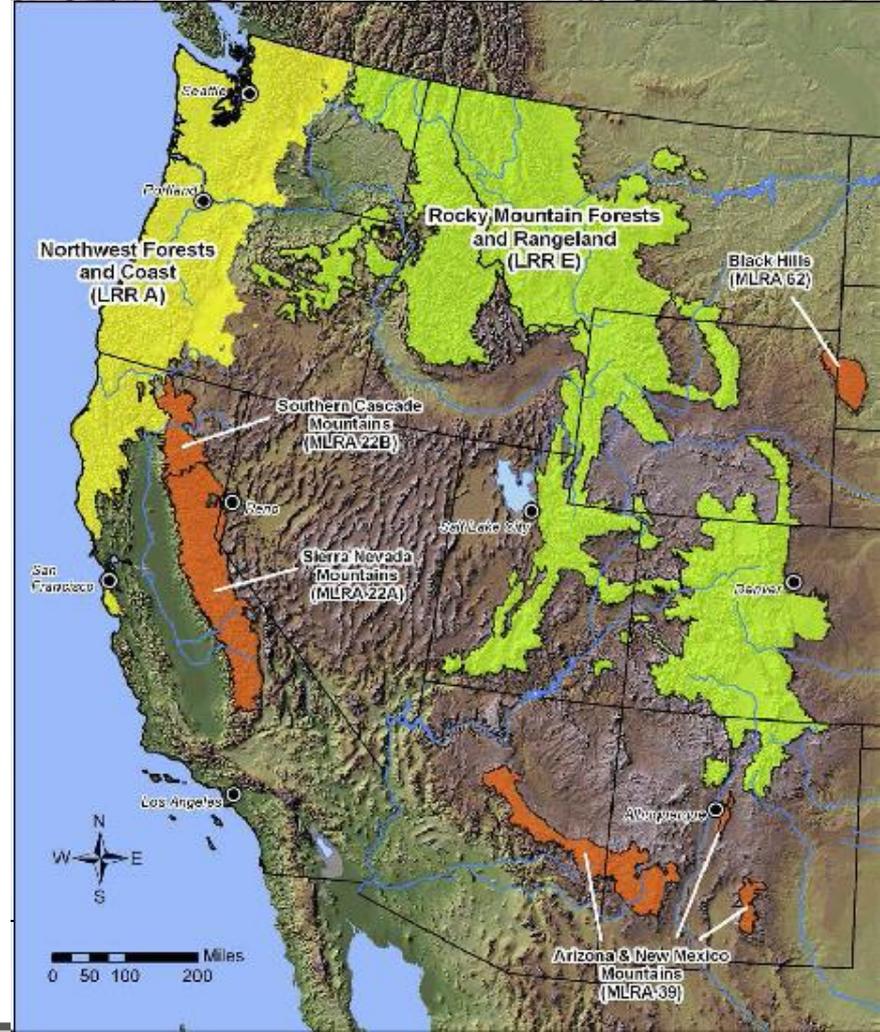
A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States

Matthew K. Mersel and Robert W. Lichvar

August 2014



Approved for public release; distribution is unlimited.



Supporting Research and Technical Reports

- [The Benefits and Limitations of Hydraulic Modeling for Ordinary High Water Mark Delineation](#) (Gartner et al. 2016)
- [Hydrologic Modeling and Flood Frequency Analysis for Ordinary High Water Mark Delineation](#) (Gartner et al. 2016)
- [Integrating Hydrologic Modeling, Hydraulic Modeling, and Field Data for Ordinary High Water Mark Delineation](#) (Gartner et al. 2016)
- [Occurrence and Distribution of Ordinary High Water Mark \(OHWM\) Indicators in Non-perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States](#) (Mersel et al. 2014)
- [A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark Classification](#) (Mersel et al. 2014)
- [Channel Classification across Arid West Landscapes in Support of OHW Delineation](#) (Lefebvre et al. 2013)
- [Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes](#) (Lefebvre et al. 2013)
- [Ordinary High Flows and the Stage-Discharge Relationship in the Arid West Region](#) (Curtis et al. 2011)
- [Vegetation and Channel Morphology Responses to Ordinary High Water Mark Discharge Events in Arid West Stream Channels](#) (Lichvar et al. 2009)
- [Review and Synopsis of Natural and Human Controls on Fluvial Channel Processes in the Arid West](#) (Field and Lichvar 2007)
- [Distribution of Ordinary High Water Mark \(OHWM\) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels](#) (Lichvar et al. 2006)
- [Regulatory Guidance Letter: Ordinary High Water Mark Identification](#) (USACE 2005)
- [Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States](#) (Lichvar and Wakeley 2004)



Ordinary High Water Mark (OHWM) work ongoing....



- Focus on identifying and delineating the OHWM in ephemeral and intermittent channels in the Arid West and Western Mountains
- Evaluating applicability of current stream classification systems in the Eastern US in association to identifying and delineating OHWM
- Organized a National Technical Committee to guide development of a national manual for OHWM delineation in rivers and streams



Stream Types

Definitions: 2012 NWP permit FR 10184

1. **Ephemeral** – flows during and for short duration after precipitation events, located above the water table year –round
2. **Intermittent** – flows during certain times of the year, surface and ground water contribution
3. **Perennial** – flows year-round during a normal precipitation year, groundwater is primary source of hydrology with some surface water contribution

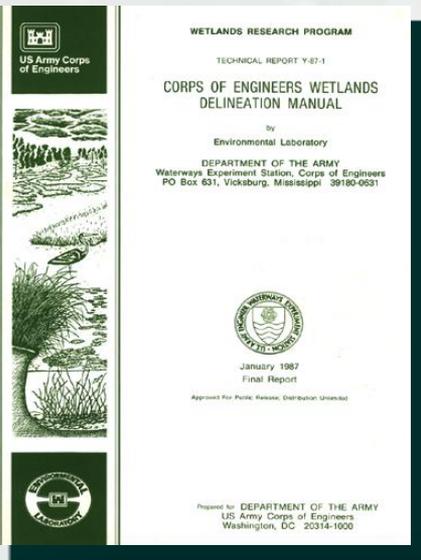


Wetlands

- **Hydrology**
- **Hydrophytic Vegetation**
- **Hydric Soils**

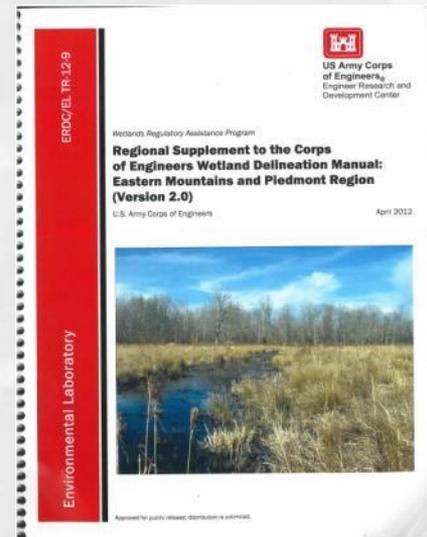
“Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”





Wetlands

- 1987 Wetland Delineation Manual
- Regional Supplements



Jurisdictional Determinations:

PJD vs. AJD

Preliminary JD	Approved JD
<ul style="list-style-type: none">• Indication that a feature may be jurisdictional (404 or 404/10)	<ul style="list-style-type: none">• Definitive determination that a feature is, or is not jurisdictional
<ul style="list-style-type: none">• Used by applicant to expedite JD process	<ul style="list-style-type: none">• Used to resolve jurisdiction issues
<ul style="list-style-type: none">• All features, including those that would otherwise not be jurisdictional, are treated as jurisdictional.	<ul style="list-style-type: none">• Jurisdiction asserted only on features identified as WoUS/Navigable WoUS
<ul style="list-style-type: none">• No EPA coordination	<ul style="list-style-type: none">• EPA coordination in certain circumstances
<ul style="list-style-type: none">• Are not posted on district web site	<ul style="list-style-type: none">• Must be posted on web site for life of AJD
<ul style="list-style-type: none">• Do not expire (but applicant/project specific)	<ul style="list-style-type: none">• Typically expire after 5 years
<ul style="list-style-type: none">• Are not appealable	<ul style="list-style-type: none">• Are immediately appealable



Request for a Jurisdictional Determination Worksheet

Appendix I
Nashville District Request for a Jurisdictional Determination Worksheet

February 2016

This format can be used when you want to determine if areas on your property fall under regulatory requirements of the U.S. Army Corps of Engineers (USACE). Please supply the following information and supporting documents described below. This worksheet can be filled out online and then printed. **It must be signed by the property owner** to be considered a formal request. We require original signatures; faxes are not acceptable. Submitting this request authorizes the USACE to field inspect the property site, if necessary, to help in the determination process. The USACE may also request a delineation of water resources on a property to be submitted. The printed worksheet and supporting documents should be mailed to:

U.S. Army Corps of Engineers
Nashville District 3701 Bell Road
Nashville, TN 37214
Phone: (615) 369-7500

1. Property Owner Contact Information:

Name:			
Mailing address:			
Work phone:	Home phone:	Email:	Fax:

2. Owner Representative Contact Information:

Name:			
Mailing address:			
Work phone:	Home phone:	Email:	Fax:

3. Subject Property Information
Address (street address, city, county):

Waterbody(s):

1/4 Section:	Section:	Township:	Range:
Latitude & Longitude in decimal degrees (NAD83):			

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

cleared (if checked, how long?) wooded pasture agricultural field

The water resources on the subject property include: (check as many as applicable)

<input type="checkbox"/> Streams	How many?	Estimated lengths
<input type="checkbox"/> Ponds	How many?	Estimated acres
<input type="checkbox"/> Wetlands	How many?	Estimated acres
<input type="checkbox"/> Other Water Resources (ditches, swales, etc.)		How many?

Components of a Complete Waters of the U.S. Delineation Report – Appendix I - Nashville District Request for a Jurisdictional Determination Worksheet

-2-

Is the property in an incorporated area? Yes or No
If it is in an incorporated area, please provide the name of the city/town

Is the property subject to a conservation easement or deed restriction? Yes or No

Was the property used as mitigation for a previously permitted project by the USACE? Yes or No

Is the property adjacent a project previously permitted by the USACE? Yes or No or Unknown

For the previous 3 questions, where answered Yes, please explain and provide the name of the project, permit number, permit name, or permitted property address, if available:

MAPS: Please provide a map or plat (aerial photo, city or county map, soil survey photo, USGS Quad map, etc.) that accurately identifies the physical boundaries of the property. If the property is farmland, it may be necessary for you to contact the Natural Resources Conservation Service for a wetland delineation before you can request a jurisdictional determination.

If you are considering doing work on the property, please identify on a map or in a separate drawing the footprint, location, type of potential work, and water resources. This information will assist us in the determination process and reduce unnecessary delays of processing subsequent permits, if required.

OPTIONAL DOCUMENTATION: Photographs can greatly assist in the review process and often make a field visit unnecessary. We must see complete coverage of the property and/or the water resource in question, including the grass and trees.

If the property and/or the water resource in question are to be surveyed or delineated, we suggest waiting for the survey or delineation to be completed and include a copy with your request. Any other data you can include may help, such as land use or cropping history for the past five years, drainage improvements, etc.

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.

Signature of Owner _____ Date _____

Disclaimer: The information requirement for a jurisdictional determination as presented in this worksheet is not an exhaustive list. The U.S. Army Corps of Engineers may request additional information not described in this request worksheet.

Components of a Complete Waters of the U.S. Delineation Report – Appendix I - Nashville District Request for a Jurisdictional Determination Worksheet

*Soon to be published on Regulatory webpage.



2017 Nationwide Permit Reauthorization



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What are Nationwide Permits?

- General permits issued by Corps Headquarters to authorize activities across the country
 - ▶ Categories of activities with no more than minimal individual and cumulative adverse environmental effects
 - ▶ Reissuance process every 5 years
 - ▶ Rulemaking activity, with interagency review under EO 12866
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- Current nationwide permits issued on February 13, 2012
 - ▶ 50 nationwide permits
 - 31 general conditions



Regional Tailoring of Nationwide Permit Program

- Division engineers have the authority to modify, suspend, or revoke Nationwide Permits within a region
 - ▶ Corps district, state, county, or other geographic area
 - ▶ Regional conditions to further restrict use of Nationwide Permits
 - ▶ Prohibit use of one or more Nationwide Permits in a region
- District engineers have the authority to modify, suspend or revoke Nationwide Permits on a activity-specific basis
 - ▶ Regional conditions restricting use of Nationwide Permit
 - ▶ Prohibit the use of a Nationwide Permit to authorize a specific activity



Examples of Regional Conditions

- Restricting the types of waters of the United States in which the NWP's may be used (e.g., fens, bogs)
- Revoking certain NWP's in a watershed or other type of geographic area (e.g., a state or county).
- Modify pre-construction notification (PCN) requirements to NWP's to require notification for all activities or lowering PCN thresholds.
- Reducing NWP acreage limits in certain types of waters, or in specific geographic regions.
- Restricting activities authorized by NWP's to certain times of the year in a particular waterbody, to minimize the adverse effects of those activities on fish or shellfish spawning, or other ecologically cyclical events



2017 NWP Reauthorization Schedule

- December 2015 – Draft proposed NWPs submitted to OMB for interagency review
- June 2016 – Publish proposed NWPs in Federal Register
 - ▶ 60-day public comment period
 - ▶ 45-day district public notices to solicit comments on regional conditions for 2017 NWPs
 - Districts make initial request for water quality certification
- June to August 2016 – Corps reviews comments and prepares draft final NWPs
 - ▶ Districts continue consulting on regional conditions
- September 2016 – Corps submits draft final NWPs to OMB for interagency review



2017 NWP Reauthorization Schedule

- December 2016 – Corps publishes final NWPs in Federal Register, to begin:
 - ▶ Final water quality certification
 - ▶ Final Coastal Zone Management Act consistency determinations
 - ▶ Districts and divisions finalizing their regional conditions
- March 18, 2017 – 2012 NWPs expire
- March 19, 2017 – NWPs go into effect



