

## Jurisdictional Determination Tips

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Under [Section 404](#) of the Clean Water Act, the U.S. Army Corps of Engineers (Corps) is charged with regulating activities that involve a discharge of dredged or fill material into waters of the United States. In deciding whether it has jurisdiction over a proposed activity, the Corps must determine whether waters of the United States occur in the project area. As a result, most Department of the Army permit applicants provide the Corps with information about the waterbodies that occur in the project area, including a determination, subject to Corps verification, of which waterbodies area meet the definition of waters of the United States. This information is typically submitted to the Corps in the form of a report called a "Jurisdictional Determination." A "wetland delineation," which is often confused with the jurisdictional determination, is the procedure used to identify and delineate wetlands. The wetland delineation procedure, which is founded on the technical criteria of the 1987 Corps of Engineers Wetland Delineation Manual, is not used to:

- Determine whether or not a wetland is a water of the United States
- Assess the functions or values of a wetland
- Identify or delineate streams, open waters, mudflats, vegetated shallows, riffle and pool complexes, or any other non-wetland waterbody
- Determine the type of wetland (forested, scrub-shrub, emergent) being delineated

Conducting a wetland delineation simply determines the existence and physical limits of a wetland for purposes of Section 404 of the Clean Water Act and can not substitute for a jurisdictional determination. Rather, a wetland delineation is normally just an element of the jurisdictional determination. To conduct a jurisdictional determination, the applicant should normally identify each waterbody found in the area being evaluated and describe each waterbody at a reasonable level of detail, including whether it appears to meet the definition of a water of the United States. It is important to realize that not every wetland meets the definition of a water of the United States, nor does every water of the United States meet the definition of a wetland. In general, waters of the United States include those waterbodies with a nexus to interstate or foreign commerce, tidal waters, navigable waters, the tributary systems (including impoundments) of waters of the United States, most wetlands, some man-made waterbodies, and certain isolated intrastate waterbodies. The following tips apply in principle to all projects submitted to the Corps for Department of the Army authorization. However, use common sense and good judgment in determining the proper amount and format of information to submit to the Corps for a jurisdictional determination. For certain projects, such as the construction of a small private pier in an urban lake, simply drawing the OHW line on the project plans might

provide sufficient information for a jurisdictional determination, while, for more complex projects, such as a large commercial development, a relatively extensive stand-alone report that includes a detailed wetland delineation might be necessary. In general, the information submitted to the Corps for purposes of a jurisdictional determination should include, as appropriate:

- **1.** A general vicinity map that clearly identifies the area being evaluated for the jurisdictional determination ("evaluation area") and shows pertinent geographic features such as county and township boundary lines, major roads, streams, and other relevant landscape features. (Note that the "evaluation area" may be larger than the "project area." This will occur when it is necessary to examine waterbodies outside the project area to determine the jurisdictional status of certain waterbodies within the project area or when waterbodies in the project area extend outside project acre boundaries.)
- **2.** A detailed drawing or map of the evaluation area that shows pertinent geographic and landscape features, including all waterbodies.
- **3.** Other maps that provide information pertinent to the jurisdictional determination, such as a soil survey map, National Wetland Inventory (NWI) map, or USGS topographic map.
- **4.** An appropriately detailed written description of each waterbody found in the evaluation area, including a wetland delineation when there is a possibility that wetlands occur in the project area. All wetland delineations shall be conducted in accordance with the 1987 Manual and include accurate, fully completed data sheets.
- **5.** Photographs necessary to adequately document the condition of the project area and jurisdictional status of the waterbodies in the evaluation area. Photographs should portray pertinent structures and landscape features, such as waterbodies and buffer zones, and document the results of any wetland delineation conducted.
- **6.** A clear and concise discussion of the jurisdictional determination made for each waterbody, including a rationale for each determination.
- **7.** A summary drawing, or map, that clearly documents the boundary of the area evaluated for the jurisdictional determination and the location and extent of waters of the United States that occur within the evaluated area. The summary drawing should be limited to a single 8½" x 11" sheet whenever practicable and include the following elements:
  - a. A clear drawing of the area evaluated for the jurisdictional determination, including all pertinent waterbodies and landscape features. A wetland or other waterbody that extends across the project area boundary should be included in its entirety whenever

project area boundary should be included in the summary drawing, if practicable. (Note: The boundaries of the "project area" and the "evaluated area" of the jurisdictional determination are not necessarily the same.)

- b. A title that includes the wording "Preliminary Jurisdictional Determination." The Corps reference number, if known, should also be included somewhere in the drawing.
- c. A clear and accurate delineation of all waters of the United States that occur in the evaluation area, even if these waterbodies would not be impacted by the proposed activity.
- d. A clear and accurate delineation of those waterbodies outside the project area that are relevant to determining whether a particular waterbody in the project area is "adjacent to" or "isolated from" the surface water tributary system.
- e. Any other pertinent structures and landscape features, such as non-jurisdictional waterbodies, levees, dams, roads, culverts, outfall structures, buildings, forested areas, and buffer zones.
- f. A legend that includes the following elements:
  - North arrow
  - Graphical scale, such as a bar scale, that changes (and remains accurate) as the size of the drawing is changed. Do not use a non-graphic scale such as "1 inch = 200 feet."
  - The symbol (e.g., dashed line) that identifies the boundary of the area evaluated for the jurisdictional determination. (Another symbol may be used to identify the boundary of the project area, if it is different than the evaluation area.)
  - The symbol (e.g., cross-hatching) that identifies the location and extent of "Waters of the United States" in the evaluation area. (Alternatively, the legend include that set of symbols that identifies each basic category of waters of the United States present in the evaluation area. These symbols might have titles such as "Waters of the United States: Stream" or "Waters of the United States: Forested Wetland").
  - The symbol that indicates the location where photographs were taken and the direction that the photographer faced (if not included in other drawings/maps).
  - The symbol that identifies the wetland delineation data sheet locations (if not included elsewhere in the jurisdictional determination).
  - Symbols needed to identify other pertinent structures and landscape features included in the summary drawing.

## **ADVICE AND REMINDERS ON COMPLETING WETLAND**

## DATA SHEETS

- **1.** The 1987 manual specifies that only the dominant species in each vegetative layer be counted in determining whether hydrophytic vegetation is present. Non-dominant species may be listed (but not counted) with the dominant species or, preferably, discussed in the remarks section of the vegetation section of the data sheet. In subsequent guidance dated 6 March 1992, the Corps recommended using the "50/20 Rule" to select the dominant species in the plant community. The 50/20 Rule states that, for each vegetative stratum, the dominant plant species are those that, when ranked in descending order of abundance and then added in descending order, immediately exceed 50% of the total abundance measure for the stratum. In addition, any species that individually comprises 20% or more of the total abundance measure for the stratum is also a dominant species. The dominant species for each vegetative stratum present are then used to determine the presence of hydrophytic vegetation. A particular species may be counted more than once if it is a dominant species in more than one stratum.
- **2.** In unusual situations or when a delineator use best professional judgment or other evidence to "override" the determination that would normally be made based on the information typically included on the wetland data sheet, the delineator must provide a clear rationale in the appropriate remarks section (or addendum to the wetland data sheet).
- **3.** The soil profile descriptions should support the determination of whether or not the mapped soil type is confirmed by what the delineator observes in the field. Discuss rationale in remarks, as needed.
- **4.** Generally, wetland data sheets should be done in pairs;

one data sheet representing conditions just inside the wetland boundary and the paired data sheet representing conditions just outside the wetland boundary. This method allows the delineator to clearly demonstrate what factor (vegetation, soils, and/or hydrology) changes between the two plots and explains the location of the wetland boundary.

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