

## OBTAINING A JURISDICTIONAL DETERMINATION

### Purpose

The purpose of this document is to provide the Wilmington District Regulatory Division customers additional information on the U.S. Army Corps of Engineers jurisdictional determinations. Specifically, this document identifies the relevant federal laws, defines regulatory terms and explains the process for obtaining a Corps jurisdictional determination.

### General Information

The United States Army Corps of Engineers (Corps), Wilmington District's Regulatory Program manages and protects North Carolina's aquatic resources through fair, flexible, and balanced permit decisions. Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA) (33 U.S.C. 401 & 403) impart, to the Corps, the statutory authority to regulate the use of our Nation's navigable waters; specifically, the construction, excavation, or deposition of materials in, over<sup>1</sup>, or under navigable waters or any work which would affect the course, location, condition, or capacity of those waters requires Department of the Army (DA) authorization in the form of a Corps permit. Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) imparts, to the Corps, the statutory authority to regulate, which includes permitting, the discharges of dredged or fill material into waters of the United States. These authorities also extend, to the Corps, the responsibility of determining the geographic limits of navigable waters (Sections 10 and 404) and other waters of the U.S. (Section 404).<sup>2</sup> This determination is commonly referred to as a jurisdictional determination (JD).

The Corps typically issues a jurisdictional determination as a result of one of the following processes:

- 1) The Corps receives a request from a landowner or prospective land purchaser.
- 2) The Corps receives a request for DA authorization, pursuant to the RHA and/or the CWA.
- 3) The Corps conducts an on-site inspection of a suspected unauthorized activity.

To avoid an unintentional violation of the RHA and/or CWA, the Wilmington District strongly encourages our customers, both private and public entities, to

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<sup>1</sup> Excludes bridges; authority transferred to the U.S. Coast Guard in 1966.

<sup>2</sup> District Engineers are authorized to determine the area defined by the terms 'navigable waters of the U.S. and 'waters of the U.S.' except: (a) when a determination of navigability is made pursuant to 33 CFR 329.14; or (b) when the EPA makes a §404 JD under its authority.

obtain a Corps-verified JD of their project area, prior to planning or conducting earthmoving activities (such as mechanized land clearing and grading, filling) or constructing or installing structures (such as utility lines, dams, road).

## **Definitions**

*Administrative Appeal Process:* a process that allows an affected party to pursue an administrative appeal of certain Corps of Engineers decisions (including approved jurisdictional determinations) with which they disagree (33 CFR Part 331).

*Approved (or Final) Jurisdictional Determination:* an official Corps determination that jurisdictional “waters of the United States,” or “navigable waters of the United States,” or both, are either present or absent on a particular site. An approved JD may also include a Corps written statement and map identifying the limits of waters of the U.S. on a parcel (33 CFR 331.2). An approved JD is valid for five (5) years from the date of the document.

*Delineation:* the field identification and physical demarcation of the lateral limits of waters of the U.S.<sup>3</sup>; must be approved or conducted by the Corps to be valid for the purposes of the RHA and CWA.

*Jurisdiction (RHA):* the term “navigable waters of the U.S.” is defined to include all those waters that are subject to the ebb and flow of the tide, and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

*Jurisdiction (CWA):* the term “waters of the U.S.” means:

1. All ‘navigable waters of the U.S.’, as defined in *Jurisdiction (RHA)*;
2. All interstate waters including interstate wetlands;
3. All other waters where the use, degradation or destruction of which could affect interstate or foreign commerce;
4. All impoundments of waters of the U.S.;
5. Tributaries of waters identified as 1) through 4) above;
6. The territorial seas;
7. Wetlands adjacent to waters identified in 1) through 6) above.

*Preliminary Jurisdictional Determination:* a Corps advisory determination that includes written indication that there may be waters of the U.S. on a parcel of land. A preliminary JD may also include an indication of the approximate location(s) of waters of the U.S. on the parcel. A preliminary JD presumes all waters, if present, on a property to be subject to the CWA (and RHA, if applicable) and cannot be appealed.

*Survey Plat (or Wetland Survey Map):* a waters of the U.S delineation map, produced and sealed by a licensed professional land surveyor, which accurately depicts the

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<sup>3</sup> For the purposes of this document, the term “waters of the U.S.” will include those subject to the permitting requirements of the RHA and the CWA.

boundaries of waters of the U.S within a described parcel of land. This Plat is typically submitted to the Corps for written verification and included with a Corps' Approved JD documentation. A Plat is not valid for the purposes of the RHA or CWA if it does not receive the Corps' written verification.

*WoUS*: acronym for "waters of the U.S." For the purposes of this document, WoUS includes all waters subject to the requirements of the RHA and the CWA.

### **Requesting and Obtaining a Corps JD**

As a result of a U.S. Supreme Court decision<sup>4</sup>, the Corps and EPA developed guidance and implemented additional processes<sup>5</sup> for the Corps and EPA to utilize when determining jurisdiction over waters of the U.S. under the CWA. The Wilmington District strives to provide all customers with accurate and timely jurisdictional determinations. Thus, in an effort to update and facilitate JD requests, the Wilmington District developed the attached form, "JURISDICTIONAL DETERMINATION REQUEST" (Version: December 2013). This form identifies the different categories of a JD request and includes a checklist of information items required by the Wilmington District in order to begin processing a JD request.

Please note that most approved JDs and some preliminary JDs require a site investigation by a Corps project manager. Should you wish to have your property or project area delineated for WoUS, the Corps project manager may not be able to accomplish this delineation in a timeframe suitable for your needs, due to available resources and workload. To expedite your request, the Corps recommends that you contract with an environmental consultant to perform this delineation and coordinate with the Corps to obtain an approved JD. While the Wilmington District does not maintain a list of consultants, nor can we recommend or endorse a consultant, names and contact information can be obtained from the local telephone directories, chambers of commerce, internet resources, civil engineering and land surveying companies, or similar sources.

### **Attention USDA Program Participants**

A Corps approved or preliminary JD may not be valid for the wetland conservation provisions of the Food Security Act of 1985. If you or your tenant are USDA Program participants, or anticipate participation in USDA programs, you should also request a certified wetland determination from the local office of the Natural Resources Conservation Service, prior to starting work.

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<sup>4</sup> Specifically, Carabell v. United States and Rapanos v. United States, 126 S. Ct. 2208 (2006)

<sup>5</sup> Memorandum re: CWA Jurisdiction Following U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States" dated July 19, 2007 and revised December 2, 2008; Regulatory Guidance Letter No. 08-02.