

Clean Water Act Jurisdiction: Submitting Requests for Jurisdictional Determinations and Wetland Delineation Approvals/Verification

Tim Smith

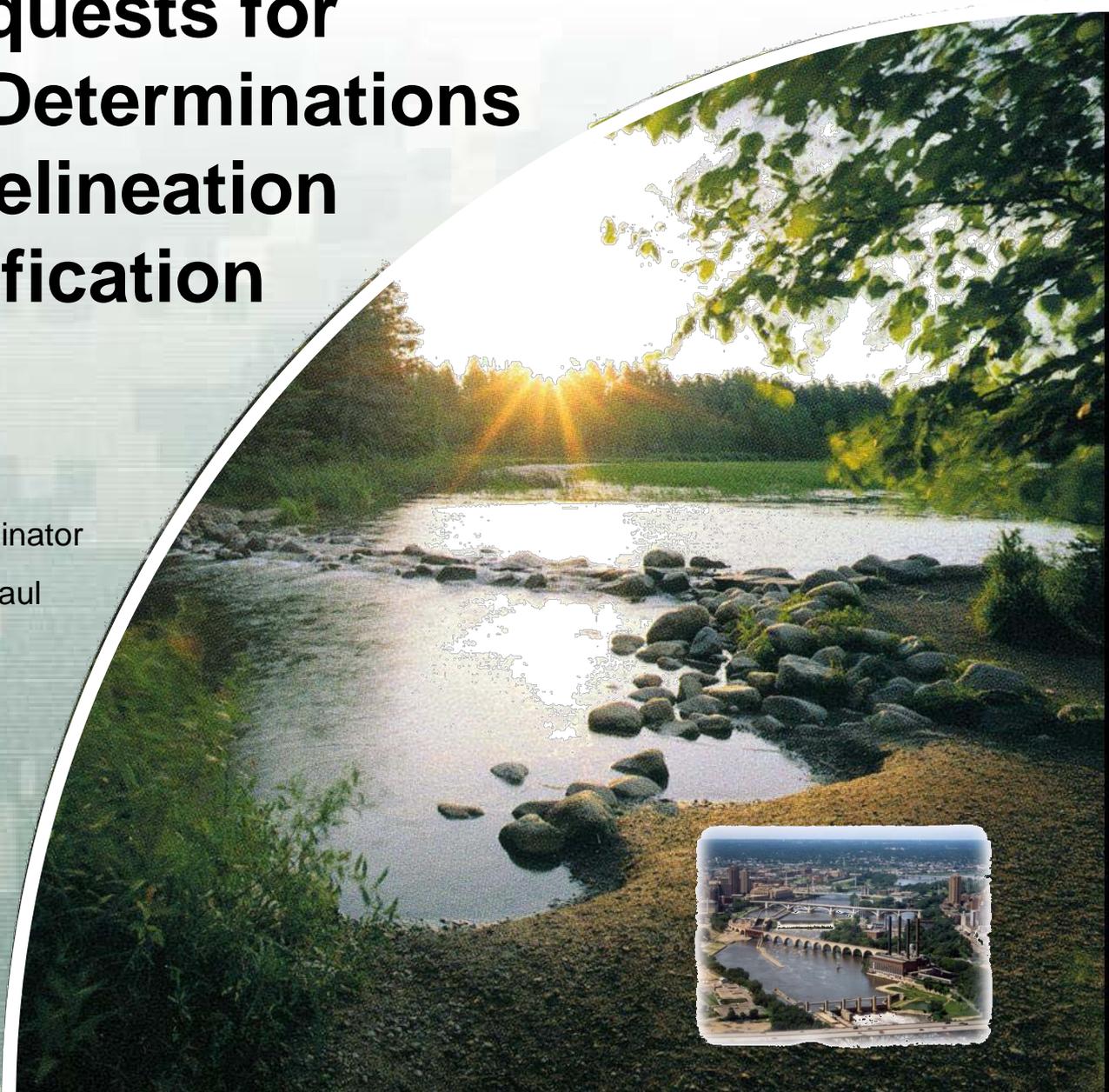
Enforcement and Compliance Coordinator

U.S. Army Corps of Engineers, St. Paul
District

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DoD Joint Ethics Regulation, ¶ 2-207



Presentation Outline

- Clean Water Act Jurisdiction
- Jurisdictional Determinations
- The Jurisdictional Determination Process



Clean Water Act Jurisdiction

- The Corps of Engineers regulates discharges of dredged or fill material into *waters of the United States*
 - ▶ Waters of the United States are defined in our regulations at 33 CFR 328 and include.....
 - Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce.....
 - All interstate waters including interstate wetlands
 - All other waters the use, degradation or destruction of which could affect interstate or foreign commerce
 - All impoundments of waters of the United States
 - Tributaries of waters (as defined above)
 - The territorial seas
 - Wetlands adjacent to waters (other than waters that are themselves wetlands)



Clean Water Act Jurisdiction

- A short history
 - ▶ 1972 Enacted
 - ▶ 1974 Regulation
 - ▶ 1975 NRDC vs. Calloway -- Interim regulations
 - ▶ 1977 Regulation & Congressional Amendments
 - ▶ 1979 Civiletti opinion on CWA authority
 - ▶ 1985 Riverside Bayview Homes
EPA's Migratory Bird Memo
 - ▶ 1986 Preamble on "Migratory Bird Rule"
 - ▶ 2001 Supreme Court decision in SWANCC v. USACE
 - ▶ 2006 Rapanos & Carabell U.S. Supreme Court cases



Clean Water Act Jurisdiction



- The 2006 Supreme Court decision in *Rapanos* introduced two new standards for establishing Clean Water Act jurisdiction over a wetland or water
- Initially either standard could be used nationwide to establish Clean Water Act jurisdiction, however, the lower courts have muddied the waters significantly since 2006
- In Minnesota, both standards can be used to establish Federal jurisdiction over a wetland or water



Clean Water Act Jurisdiction

- In *Rapanos*, the Supreme Court really tried to address two issues:
 - ▶ how far upstream does the CWA reach?
 - ▶ how “connected” does a wetland need to be in order for us to regulate it under the CWA?
- Really decided that both cases would be sent back to the lower courts to apply the correct standard, whatever that is.
- Resulted in 5 opinions – each with 4 votes or less



Clean Water Act Jurisdiction

- The Plurality (Scalia, Roberts, Thomas and Alito)
 - ▶ “waters of the U.S.” are -- “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ..., oceans, rivers, [and] lakes.’”
 - ▶ ... The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute."



Clean Water Act Jurisdiction

- The Plurality (continued)
 - ▶ Therefore, *only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "*adjacent to*" such waters and covered by the Act.
 - ▶ i.e. "*neighboring*" is insufficient to show adjacency.



Clean Water Act Jurisdiction

- The Plurality (continued)
 - ▶ Thus, establishing that wetlands ... are covered by the Act requires two findings: **First**, that the adjacent channel contains a "wate[r] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and **second**, that the wetland has a continuous surface connection with that water, making it difficult to determine where **the "water" ends and the "wetland" begins.**



Clean Water Act Jurisdiction

- Kennedy
 - ▶ In the decision to send the case back to the lower courts, Kennedy agreed with Justice Scalia and the plurality – he agreed that the lower courts had applied an incorrect standard
 - ▶ After that, Justice Kennedy agreed with neither the plurality nor the dissent, at least not completely



Clean Water Act Jurisdiction

- Kennedy

- ▶ On wetlands covered under the Clean Water Act...

- “When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”



Clean Water Act Jurisdiction

- Kennedy
 - ▶ On flowing waters covered under the Clean Water Act...
 - The 'significant nexus' standard applies to tributaries too
 - Justice Kennedy is not too bothered by 'intermittent' waters -- LA River
 - But "ephemeral" waters are a potential issue – look for the OHWM
 - With the Kennedy standard, showing 'significant nexus' gets harder as you go farther up into the watershed

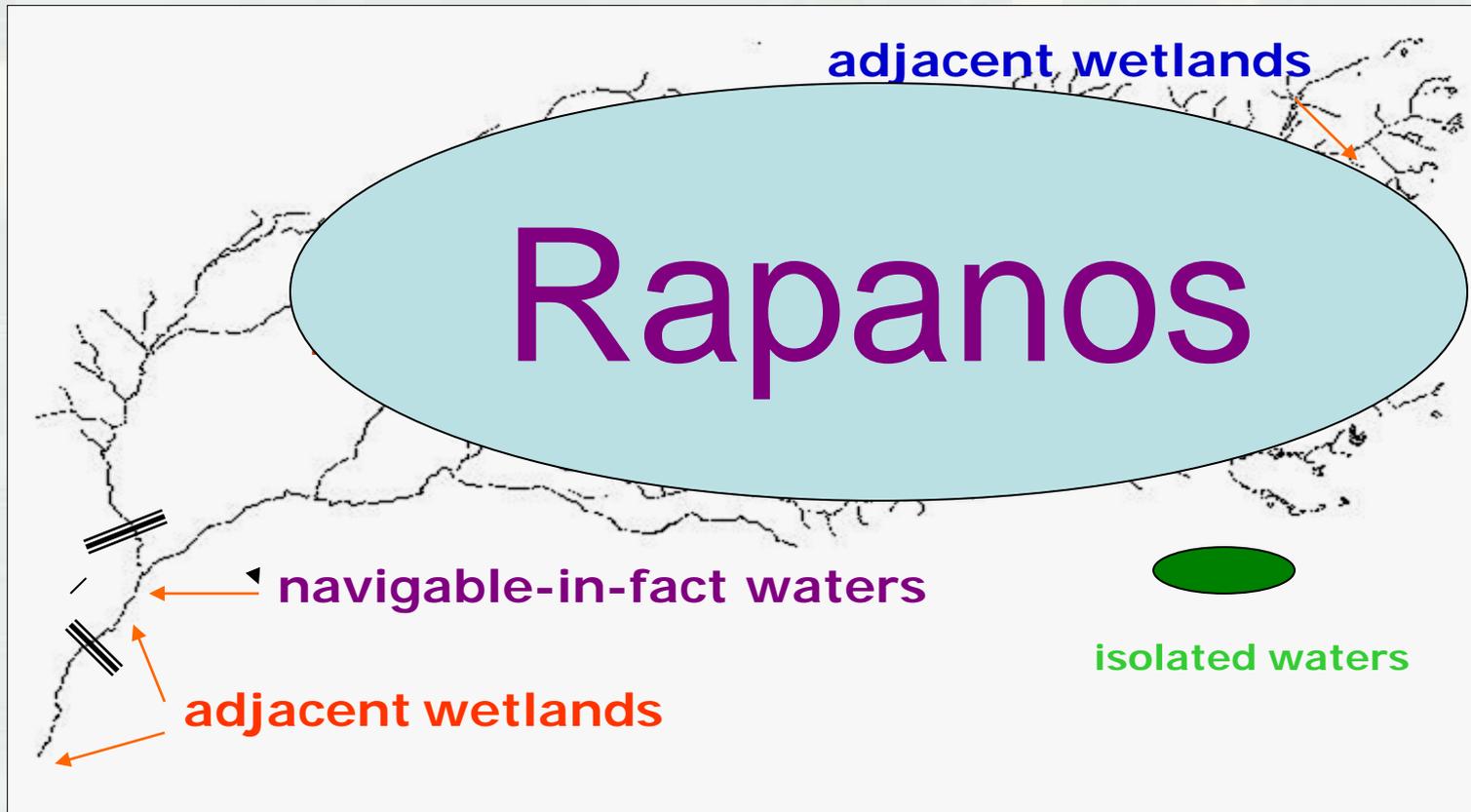


Clean Water Act Jurisdiction

- The long and short of the *Rapanos* decision
 - ▶ New standards for establishing jurisdiction
 - Scalia standard (Plurality)
 - Kennedy standard
 - ▶ New terminology
 - Relative permanent waters
 - Seasonal flow
 - Abutting (as a form of adjacency)
 - Significant nexus



CWA Geographic Jurisdiction: The Regulations in Graphic Form



Clean Water Act Jurisdiction

- Implementing the Supreme Court Decision
 - ▶ Guidance issued jointly by USEPA and USACE on June 5, 2007
 - ▶ “Guidance” consists of an Instructional Guidebook and 8 Appendices
 - ▶ Revised on December 2, 2008 following public comment period and agencies experiences
 - ▶ Available at:

http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm



TNWs and their Adjacent Wetlands

Pacific Ocean, OR



Yellowstone River, MT



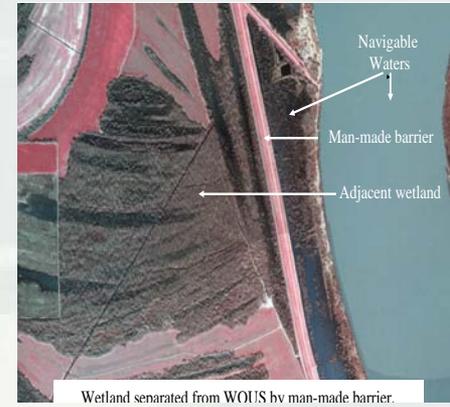
Pacific Ocean, HI



Mississippi River, MN



Mississippi River, LA



Traditional Navigable Waters (TNWs) and their adjacent wetlands are jurisdictional under the CWA.



RPWs & Wetlands Directly Abutting RPWs

Wolf Trap Creek, Vienna, VA



Grindstone Creek, MO



Un-named water & wetlands, AK



Un-named water & wetlands, ND



**RPWs and wetlands directly abutting RPWs are jurisdictional
under the CWA.**



Wetlands Not-Directly Abutting RPWs



Un-named water & wetlands, IL

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW.



Non-RPWs

Desert intermittent tributary, CA



Unnamed ephemeral tributary, ID



Non-RPWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW.



Wetlands Adjacent to Non-RPWs

Adjacent wetland, AR



Adjacent wetland, SAD



Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a “significant nexus” with a TNW.



Isolated Waters & Wetlands



Isolated wetland, IA



For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource.



Questions on Clean Water Act Jurisdiction?????

If there are not then you are doing better than many Federal
judges across the Country



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Clean Water Act Jurisdictional Determinations

- What is a *Jurisdictional Determination*?

A *written Corps determination* that a *wetland and/or waterbody* is subject to regulatory jurisdiction under *Section 404 of the Clean Water Act*, *Section 9 of the Rivers and Harbors Act*, or *Section 10 of the Rivers and Harbors Act*. (33 CFR 331.2)

- Jurisdictional Determinations focus on the regulatory status of the resource and do not address whether or not a particular activity requires a permit



Clean Water Act Jurisdictional Determinations

- The Corps authority to issue jurisdictional determinations is explicit in our regulations at 33 CFR 325.9 but more fully described in our administrative appeal regulations at 33 CFR 331
- Requirements
 - ▶ All Jurisdictional Determinations must be in writing
 - ▶ The Jurisdictional Determination must identify whether it is preliminary or approved



Clean Water Act Jurisdictional Determinations

- Types of Jurisdictional Determinations
 - ▶ Approved Jurisdictional Determinations
 - ▶ Preliminary Jurisdictional Determinations
- Other Types of Concurrences/Verifications
 - ▶ Wetland Delineation Approvals



Clean Water Act Jurisdictional Determinations

- Approved Jurisdictional Determinations

*A Corps document stating **the presence or absence** of waters of the United States on a parcel or a **written statement and map identifying the limits** of waters of the United States on a parcel (33 CFR 331.2)*

- Approved JDs are clearly designated appealable actions and will include a **basis of JD** with the document.
- Approved JDs are valid for a period of five years from the issuance date unless new information warrants revision of the determination before the expiration date. (RGL 05-02)



Clean Water Act Jurisdictional Determinations

- Preliminary Jurisdictional Determinations

Written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. (33 CFR 331.2)

- Preliminary Jurisdictional Determinations are advisory in nature and may not be appealed



Clean Water Act Jurisdictional Determinations

- Other Types of Concurrences/Verifications
 - ▶ Many Corps Districts across the Country have been providing delineation approvals/verifications outside of the JD process outlined in the regulations
 - ▶ While this is a useful and efficient approach to managing workload, there is no explicit acknowledgement of this process or function in the Corps Regulatory program
 - ▶ The St. Paul District has, and, continues to provide wetland delineation concurrence/verifications upon request

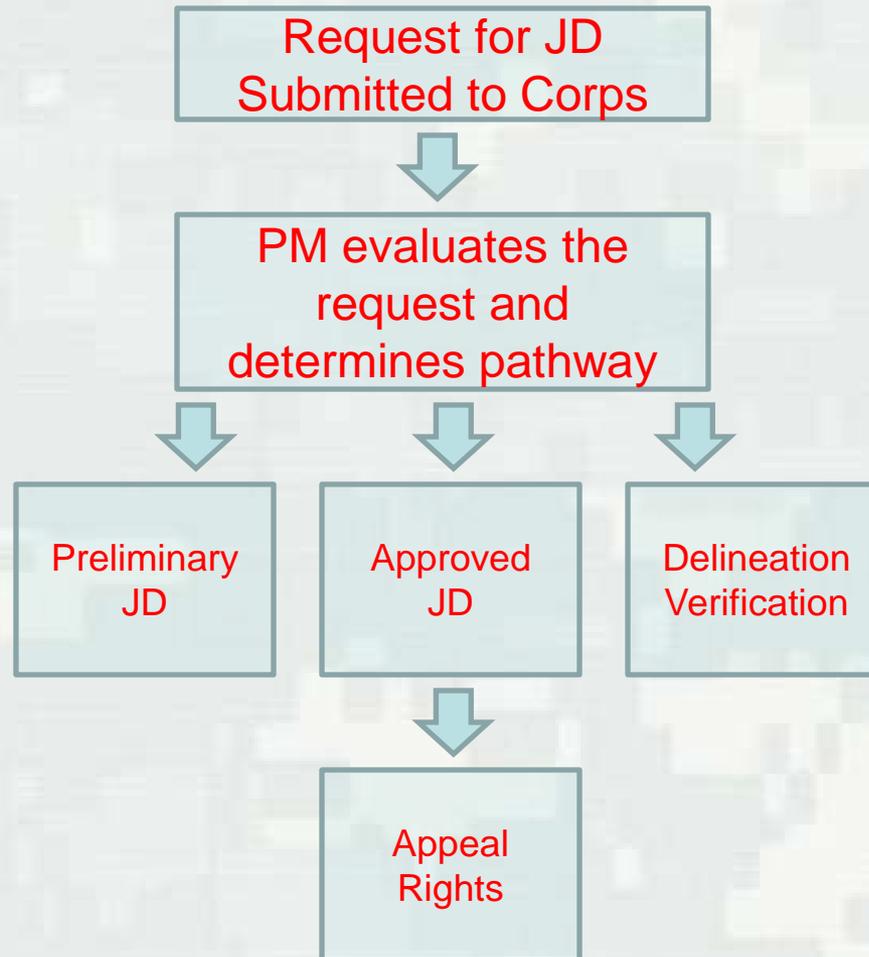


The Jurisdictional Determination Process

- Prior to *Rapanos* the process was very straightforward and efficient, even with *SWANCC* factored in
 - ▶ Primary emphasis was on establishing a surface hydrologic connection to a navigable water
 - ▶ Isolated calls were made by the respective Corps District based on an evaluation of their connection to a navigable water and potential use in interstate commerce
 - ▶ Most JDs were documented on a 2-page form and were completed in under 30 days
 - ▶ Other than the regulations and one or two RGLs there wasn't much direction regarding the process



The Jurisdictional Determination Process



The Jurisdictional Determination Process

- After *Rapanos* USEPA and the Corps jointly issued “Guidance” consisting of an Instructional Guidebook and 8 Appendices
 - ▶ Appendix B: Approved Jurisdictional Determination Form
 - ▶ Appendix C: Memorandum for the Field: Coordination on JDs under CWA Section 404 in light of *SWANCC* and *Rapanos* Supreme Court decisions
 - ▶ Appendix E: RGL 07-01 Practices for Documenting Jurisdiction under Section 404 of the CWA and Sections 9&10 of the Rivers and Harbors Act of 1899

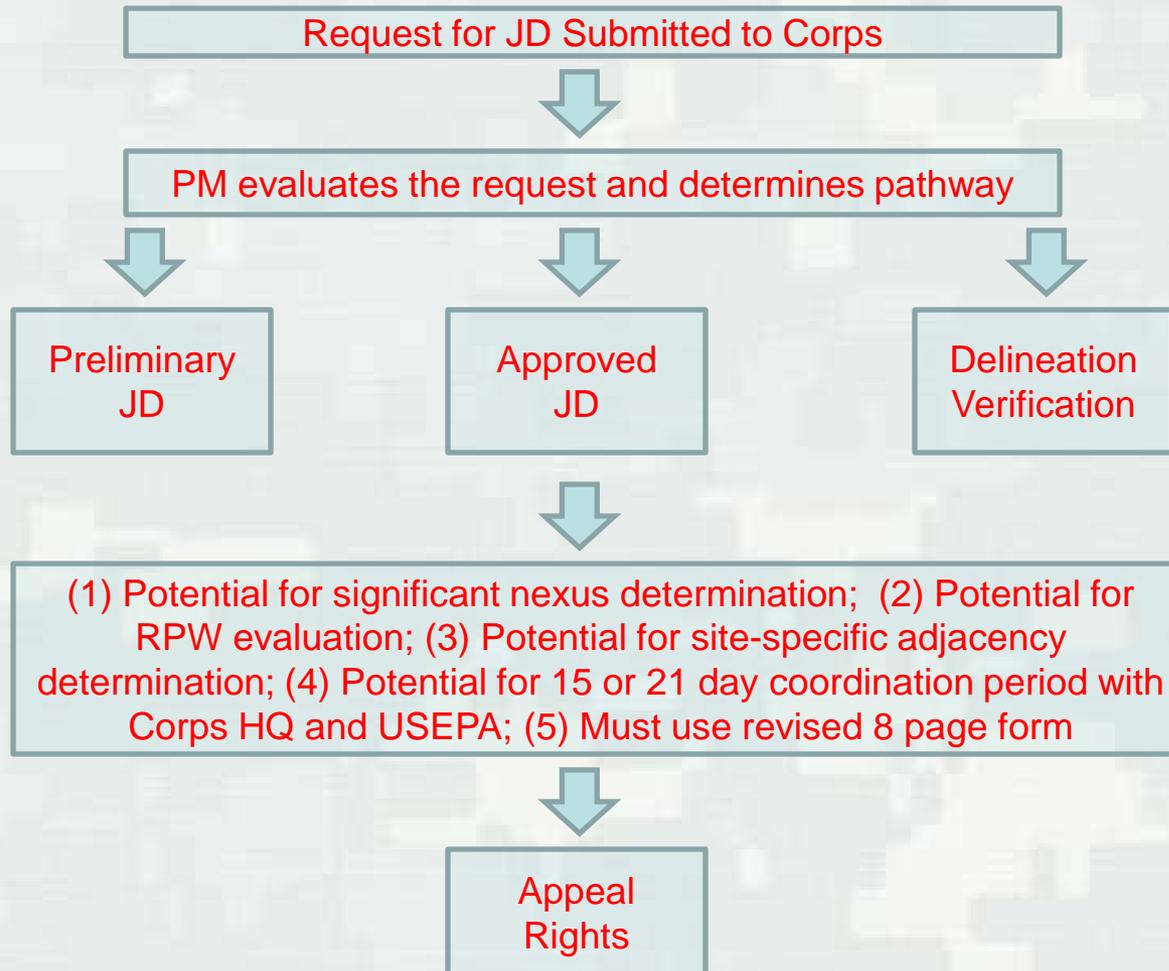


The Jurisdictional Determination Process

- The *Rapanos* effect on the jurisdictional determination process
 - ▶ JD form increased from 2 to 8 pages (in blank form)
 - ▶ Mandatory procedures for coordinating all isolated wetland and significant nexus determinations with USEPA
 - ▶ Increased documentation for identification of seasonal flow in tributaries
 - ▶ Increased documentation for significant nexus determinations
 - ▶ Increased documentation for adjacency determinations



The Jurisdictional Determination Process



The Jurisdictional Determination Process

- RGL 08-02 (Bureaucratic Drano)
 - ▶ Addresses the use and documentation of JDs (process oriented) not how to make the call
 - ▶ Supersedes any inconsistent guidance regarding JDs contained in RGL 07-01
 - ▶ Defines the use of approved and preliminary jurisdictional determinations
 - ▶ Allows affected parties to decline an approved JD and elect to use a preliminary JD
 - ▶ Introduced the Preliminary Jurisdictional Determination form



Regulatory Guidance Letter 08-02

- Approved Jurisdictional Determinations
 - ▶ An official Corps determination that jurisdictional waters of the US or navigable waters of the US or both are either *present or absent* on a particular site.
 - ▶ Required when requested by an “affected party”
 - ▶ Remain valid for a period of five years (RGL 05-02)
 - ▶ Can be immediately appealed through the Corps administrative appeal process
 - ▶ Must be documented on the JD form in Appendix B



Regulatory Guidance Letter 08-02

- Preliminary Jurisdictional Determinations
 - ▶ Assume all aquatic resources in the review area are subject to CWA jurisdiction
 - ▶ Are not appealable
 - ▶ Result in expedited reviews since the Corps does not have to evaluate each resource
 - ▶ Cannot be used for determinations that there are no jurisdictional resources in the review area
 - ▶ Can be replaced/superseded at any time at the request of the affected party or if determined necessary by the Corps



PRELIMINARY JURISDICTIONAL DETERMINATION FORM

This preliminary JD finds that there "may be" waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:

District Office: _____ File/ORM #: _____ PJD Date: _____

State: _____ City/County: _____
 Nearest Waterbody: _____
 Location: TRS, Lat/Long or UTM: _____
 Name/Address of Person Requesting PJD: _____

Identify (Estimate) Amount of Waters in the Review Area:
 Non-Wetland Waters: _____ Stream Flow: _____
 _____ linear ft _____ width _____ acres _____
 Wetlands: _____ acre(s) Cowardin Class: _____
 Name of Any Water Bodies on the Site Identified as Section 10 Waters: Tidal: _____ Non-Tidal: _____
 Office (Desk) Determination
 Field Determination: _____ Date of Field Trip: _____

SUPPORTING DATA: Data reviewed for preliminary JD (check all that apply - checked items should be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: _____
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.
- Data sheets prepared by the Corps
- Corps navigable waters' study: _____
- U.S. Geological Survey Hydrologic Atlas:
 - USGS NHD data.
 - USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite quad name: _____
- USDA Natural Resources Conservation Service Soil Survey. Citation: _____
- National wetlands inventory map(s). Cite name: _____
- State/Local wetland inventory map(s): _____
- FEMA/FIRM maps: _____
- 100-year Floodplain Elevation is: _____
- Photographs: Aerial (Name & Date): _____
 Other (Name & Date): _____
- Previous determination(s). File no. and date of response letter: _____
- Other information (please specify): _____

IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.

Signature and Date of Regulatory Project Manager (REQUIRED) _____
 Signature and Date of Person Requesting Preliminary JD (REQUIRED, unless obtaining the signature is impracticable) _____

EXPLANATION OF PRELIMINARY AND APPROVED JURISDICTIONAL DETERMINATIONS:

1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to request an approved JD in this instance and at this time.

2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "preconstruction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less controversial mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court, and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable.

Preliminary JD Form introduced with RGL 08-02

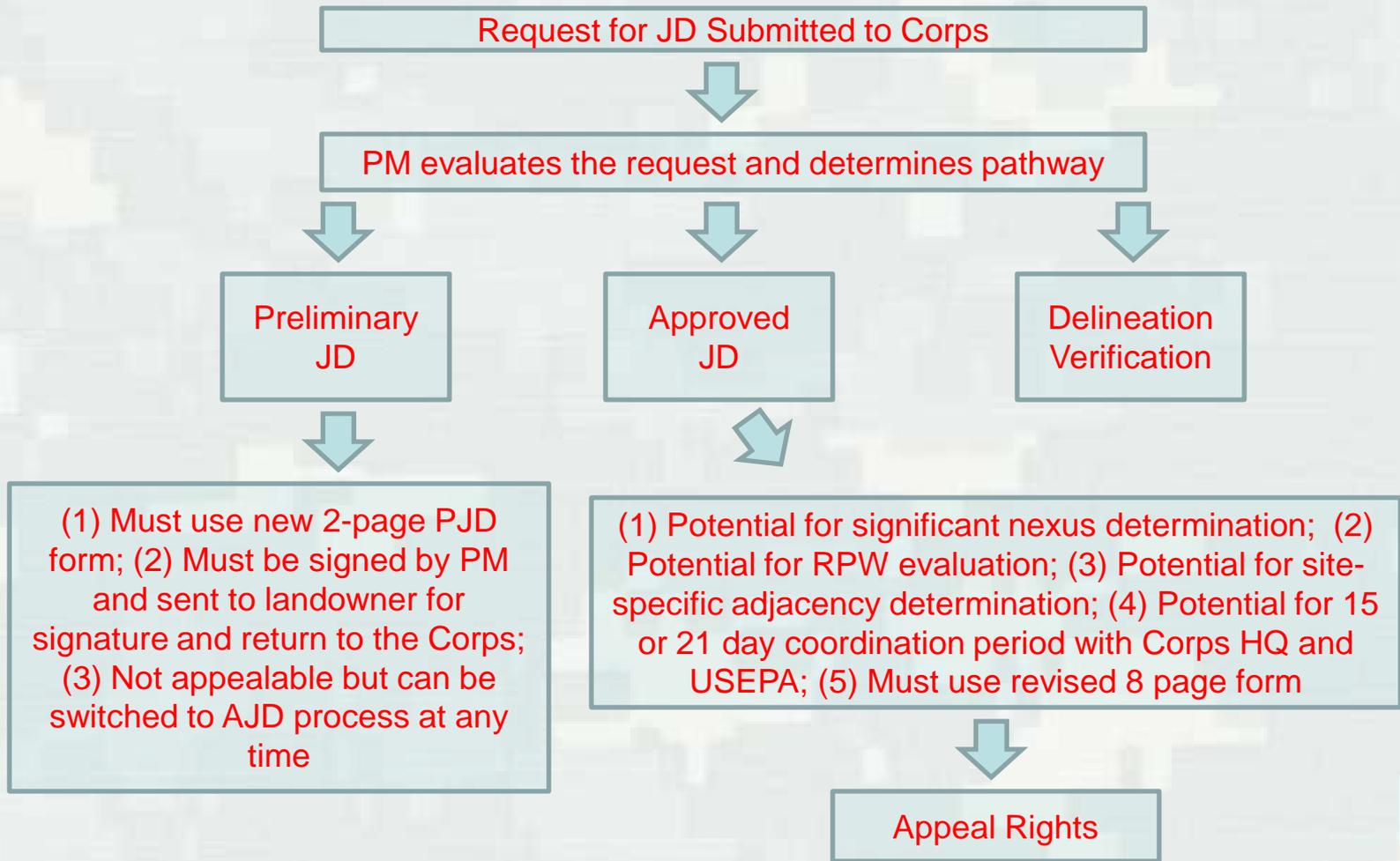
← Identification of waters in the review area. Can be augmented with Appendix A (table)

← Signature Blocks for Corps and Affected Party

← Incredibly lengthy explanation of options in very small font



The Jurisdictional Determination Process



The MVP Jurisdictional Determination Process

- All requests for an Approved Jurisdictional Determination must be fulfilled with an Approved Jurisdictional Determination (non-discretionary)
- Information submitted for which there is no clear indication what is being requested are responded to in a form determined at the Corps PM's discretion
 - ▶ May take the form of an approved jurisdictional determination, a preliminary jurisdictional determination, or a delineation verification
- To manage expectations, the St. Paul District has created a request cover sheet that affected parties should fill out when submitting wetland delineations



The MVP Jurisdictional Determination Process

- Wetland Delineation Reviews
 - ▶ How delineation reviews are handled is a gray area
 - Strict reading of the regulations leads you to believe they are requests for a jurisdictional determination – but which type?
 - The more practical position is that we can respond to these requests with a letter verifying the wetland boundary
 - ▶ Wetland delineation reviews without a clear request for action tend to get set aside until a permit application arrives
 - ▶ Recent guidance (RGL 08-02, 07-01, and the *Rapanos* guidance) directs Corps Districts to act on all requests for JDs within 60 days.





US Army Corps
of Engineers
St. Paul District

Request for Corps of Engineers Wetland Delineation Review

Please enter the following general information about the property under review:

Name of property owner			
Property Address (No. & Street, City, State, Zip Code)			
Lat. °	Long. °	(decimal degrees)	
County			
Location:	1/4 Section	Township	Range
Size of review area		acre(s)	

By submission of this wetland delineation report I am requesting that the U.S. Army Corps of Engineers, St. Paul District provide me with the following (check only one box):

Wetland Delineation Concurrence. Concurrence with a wetland delineation is a written notification from the Corps concurring, not concurring, or commenting on the wetland boundaries delineated on a property. Under this request, the Corps will not address the jurisdictional status of the wetlands on the property, only the boundaries of the resources within the review area.

Preliminary Jurisdictional Determination. Preliminary Jurisdictional Determination. A preliminary jurisdictional determination is a nonbinding written indication that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel. For purposes of computation of impacts and compensatory mitigation requirements a permit decision made on the basis of a preliminary jurisdictional determination will treat all waters and wetlands in the review area as if they are jurisdictional waters of the U.S. Preliminary jurisdictional determinations are advisory in nature and may not be appealed.

Approved Jurisdictional Determination. An approved jurisdictional determination is 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 the property. An approved jurisdictional determination precisely identifies the limits of those waters on the project site determined to be jurisdictional under the Clean Water Act or Rivers and Harbors Act. Approved jurisdictional determinations can be relied upon by the affected party for a period of five years. An approved jurisdictional determination may be appealed through the Corps' administrative appeal process.

In order for the Corps to process your request, the wetland delineation must be prepared in accordance with the 1987 Corps of Engineers Wetland Delineation Manual, any approved Regional Supplements to the 1987 Manual, and the Guidelines for Submitting Wetland Delineations in Minnesota and Wisconsin (<http://www.mvp.usace.army.mil/regulatory/>).

Requestor _____ Date _____

Name (typed) _____

Wetland Delineation Review Request Form

← Identification of type of review requested

← Signature Blocks for Requestor



The Bottom Line

- What you should (need) to know
 - ▶ The Corps is responsible for making the determination but USEPA remains the ultimate authority on CWA jurisdiction
 - ▶ There is a marked difference between approved and preliminary JDs
 - ▶ Approved JDs take time, sometimes a significant amount of time
 - ▶ You can be of great assistance to the Corps (and your client) by providing information necessary to make JD calls



The Bottom Line

- How You Could Help Keep Things Moving
 - ▶ Approved Jurisdictional Determinations have become very complicated and information intensive. Submitting only a wetland boundary doesn't get us far into the process.
 - ▶ Delineations should also identify any drainages on the site (streams, ditches, swales, etc.), the direction of flow, the location of any tile lines or culverts, storm sewer drains, and any other relevant information about the site.
 - ▶ St. Paul District Guidelines for Submitting JD requests
 - <http://www.mvp.usace.army.mil/docs/regulatory/special%20notices/publicJDguidanceSN.pdf>



The Bottom Line

- What you should think about before submitting information to the Corps
 - ▶ Do I need an approved JD?
 - Consider timeframes, reason for submission, compensatory mitigation, amount/degree of impact etc.
 - ▶ Have I clearly stated what I am requesting from the Corps?
 - ▶ Have I provided everything needed to expedite the process?
 - Wetland boundaries, tributaries, culverts, air photos, functional assessments, etc.



Questions?????



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