

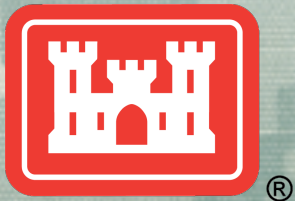
USACE Permitting Program Wetlands vs Other Waters

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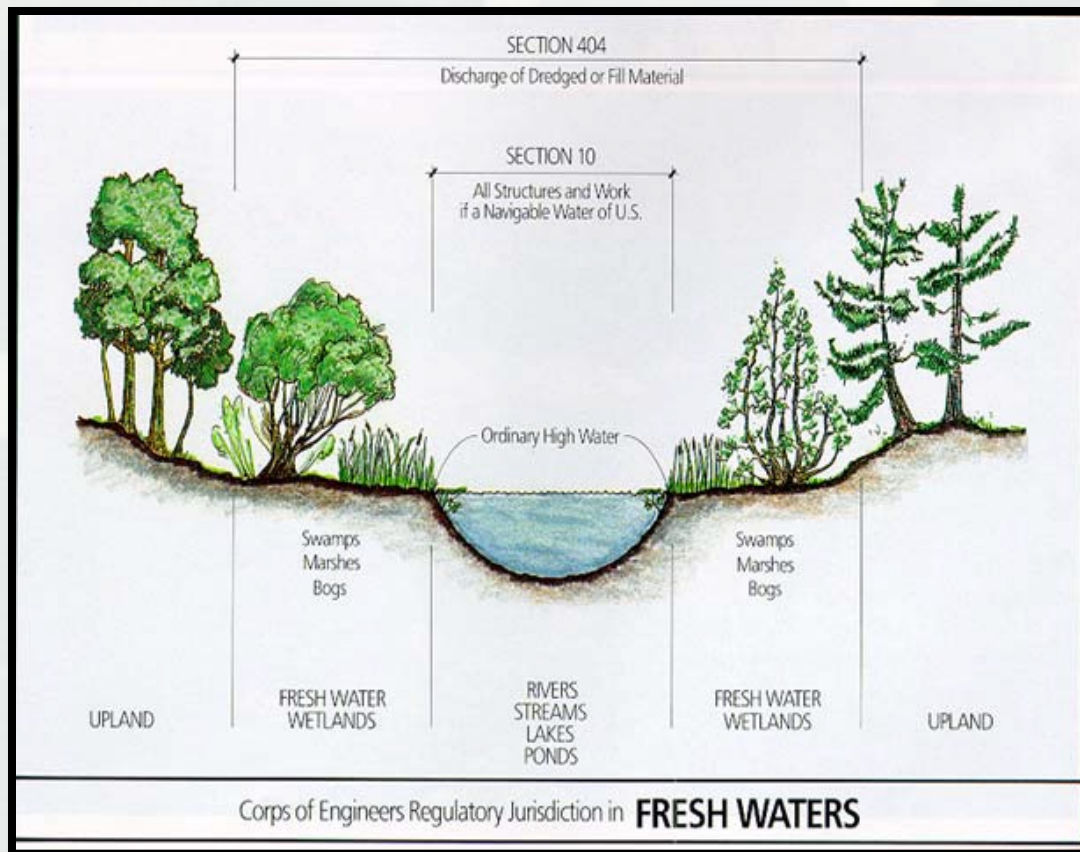


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Authorities

- Section 10 Rivers and Harbors Act of 1899 [33 USC 401]
- Section 404 Clean Water Act (1972) [33 USC 1344]



Section 10

- ▶ Regulates activities that affect course, location, condition or navigable capacity of a navigable water
- ▶ All work over, under, or through (in or affecting)
- ▶ Each USACE Office maintains a list of Section 10 in their area of responsibility



Section 404

- ▶ Regulates the discharge of dredged or fill material into waters of the United States, including wetlands



OTHER LAWS

- ❖ Section 401 (Water Quality Certification)
- ❖ Section 402 (NPDES Permit and BMP's)
- ❖ National Environmental Policy Act (NEPA)
- ❖ Fish and Wildlife Coordination Act
- ❖ Endangered Species Act (ESA)
- ❖ Wild and Scenic Rivers Act (WSRA)
- ❖ National Historic Preservation Act (NHPA)
- ❖ Migratory Bird Treaty Act (MBTA)
- ❖ Bald and Golden Eagle Protection Act



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The Section 404 Program

- *What is the purpose of Section 404 Program?*
 - ▶ “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
- *What work requires a Section 404 Permit?*
 - ▶ Discharge of dredged or fill material into waters of the United States.
 - ▶ Once there’s a discharge, then ALL activities associated with the project are included in the evaluation.
- *Who needs a permit?*
 - ▶ Any person, firm or agency, regardless of affiliation, planning to work in waters of the United States.
- *Do the regulations apply only on Corps or Federal lands?*
 - ▶ No. The regulations apply on all lands regardless of ownership.



Definition of WOUS

- **33 CFR 328.3(a)** defines the term waters of the United States as follows:
 1. All waters currently used, used in the past, or susceptible to use in interstate for foreign commerce;
 2. All interstate waters, including interstate wetlands
 3. All 'other waters' (intrastate lakes, rivers, streams, mudflats, sandflats, wetlands and natural ponds_ where the use, degradation or destruction of which could affect interstate/foreign commerce including those:
 - Which are or could be used by interstate/foreign travelers for recreation or other purposes
 - From which fish or shellfish could be taken and sold in interstate/foreign commerce
 - Which are used, or could be used for industrial purposes by industries in interstate/foreign commers
 4. All impoundments of waters of the US
 5. Tributaries of waters identified in 1-4 above
 6. Territorial Seas.
 7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in 1-6 above

Certain features are generally not waters of the United States: non-tidal drainage and irrigation ditches excavated in uplands; artificially irrigated areas which would revert to upland if irrigation ceased; artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created for aesthetic reasons; waterfilled depressions created in dry land for the purposes of obtaining fill, sand or gravel...unless abandoned; upland swales/draws; upland erosional features; and waste treatment facilities.



Court Decisions Affecting Waters of the United States

- SWANCC (2001) – Migratory Bird Rule cannot be the sole basis for taking jurisdiction over Isolated, Intrastate, Non-navigable waters
- Rapanos (2006) – Resulted in current guidance for documenting jurisdiction and agency coordination requirements based on new categories of waters



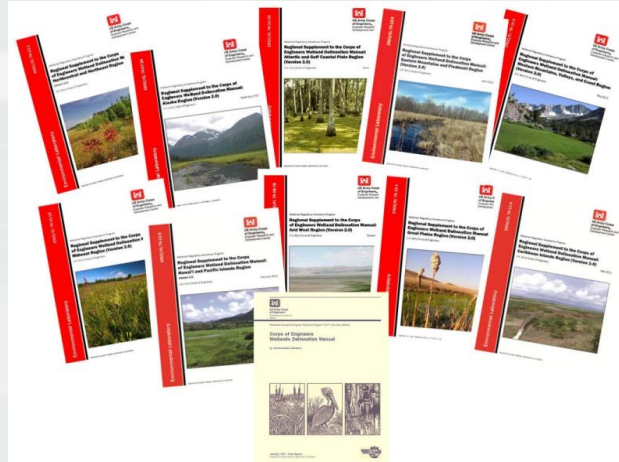
How Do I Know If There Are Waters of the US Located on My Property?

- Complete an aquatic resource delineation!
- A delineation identifies all potential resources on the property and their boundaries, based on physical features.
- Before going out in the field, do your research. Remote sensing methods are a great start, but rarely can provide the detail needed when entering the permitting realm.



Identifying Wetlands

- Complete an **Aquatic Resource Delineation** using Corps of Engineers 1987 Wetland Delineation Manual & Regional Supplements
 - Wetlands are identified on three parameters
 - Prevalence of hydrophytic vegetation
 - Evidence of hydrology
 - AND presence of hydric soils
 - Best results when performed during the growing season...*generally between May and November*
 - Exceptions occur when dealing with a problem area or atypical situation:
 - Problem areas are naturally occurring (eg drought conditions, sodic-saline areas, sparsely vegetated)
 - Atypical situations occur when a parameter is missing due to anthropogenic causes.



OHWL Delineation for Other Waters

- 'Ordinary High Water Mark' is defined at 328.3(e)
 - ▶ '...that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that considers the characteristics of the surrounding areas.'
 - ▶ Further clarified in Regulatory Guidance Letter (RGL) 05-05



Jurisdictional Determinations

- The applicant can submit a request for a Jurisdictional Determination or “JD Request” to the Corps for an official determination to identify jurisdictional wetlands or waters of the U.S.

- There are 2 types of JD Requests: Preliminary and Approved.
 - ▶ Preliminary JD
 - Most commonly requested
 - Quicker turn-around time
 - Reviewed on in-office desktop available resources, however, may require a site visit
 - If the applicant disagrees, this determination cannot be appealed, however, the applicant can request an Approved JD

 - ▶ Approved JD
 - Site visit required
 - Longer process that may involve coordination with other agencies
 - Sent to EPA and USACE HQ for a 15-day review if there is a “significant-nexus” determination
 - Sent to EPA and USACE HQ for a 21-day review if there is an “isolated wetlands” determination
 - If the applicant disagrees with the Approved JD, the applicant can go through the appeal process



Link to Delineation Resources

- <https://www.nwo.usace.army.mil/Missions/Regulatory-Program/North-Dakota/>
- For additional information, contact me at Toni.R.Erhardt@usace.army.mil or by phone at (701) 255-0015, extension 2003



A scenic view of a river flowing through a grassy area with trees and a concrete bridge in the background. The river is surrounded by lush green grass and some trees. A concrete bridge spans across the river in the background. The sky is blue with some clouds.

THANK YOU!

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