DELINEATION AND JURISDICTION

Waters of the U.S.:

The Pre-2015 Regulatory Regime Consistent with Sackett

Topics

- Aquatic Resource Delineation
- Regulatory Guidance Letter 16-01
- Current WOTUS Regime

U.S. ARMY

US Army Corps of Engineers ®

AQUATIC RESOURCE DELINEATION

U.S. ARMY

US Army Corps of Engineers ®

Federal Wetland Definition

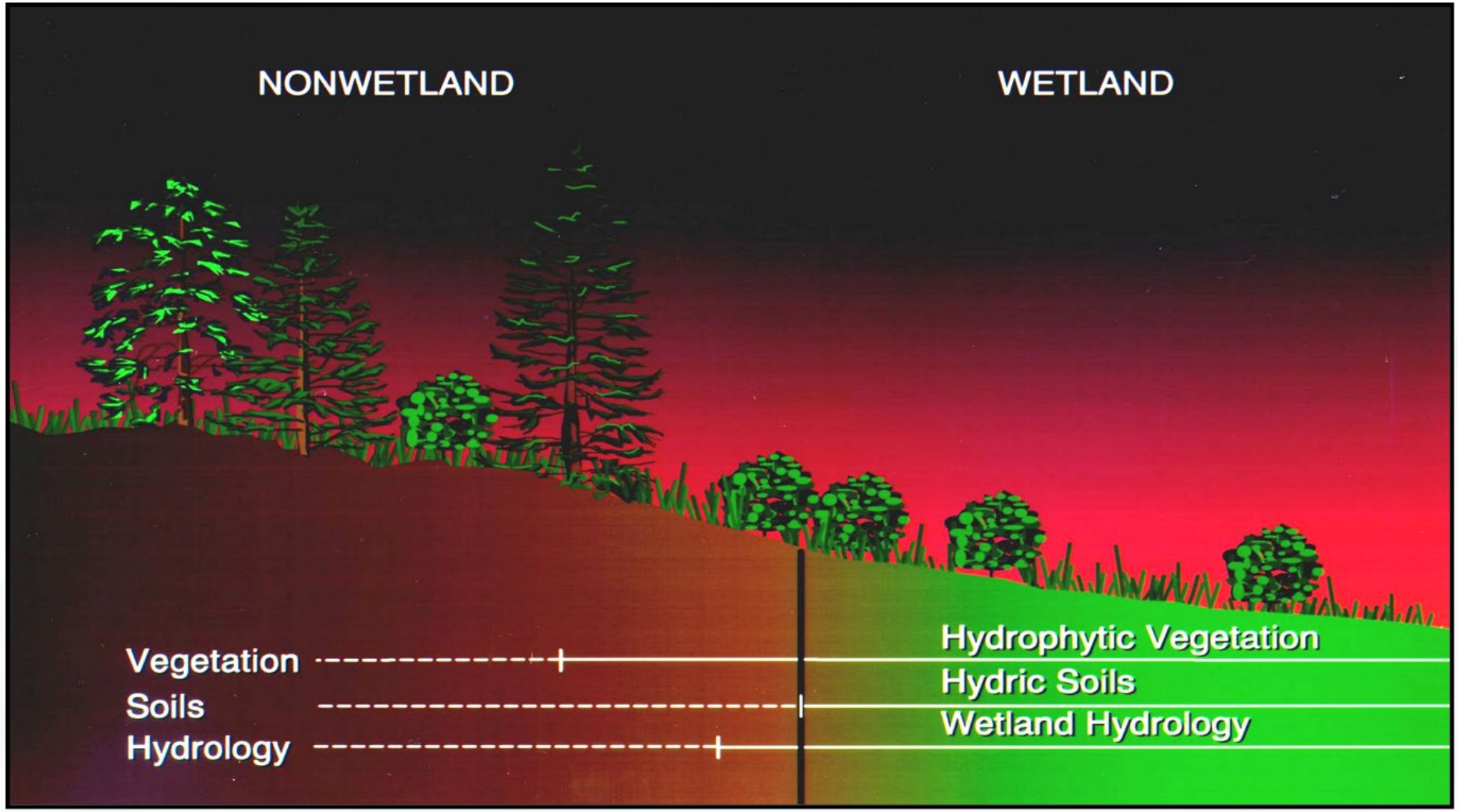
- The federal wetland definition from **33 CFR Part 328.3(b)** is:

- Wetlands are 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 generally include swamps, marshes, bogs, and similar areas.

U.S. ARMY

US Army Corps of Engineers ®

Wetland Delineation – Three Parameters



U.S. ARMY

US Army Corps of Engineers ®

Wetland Identification and Delineation

REGIONAL SUPPLEMENT
MANUAL

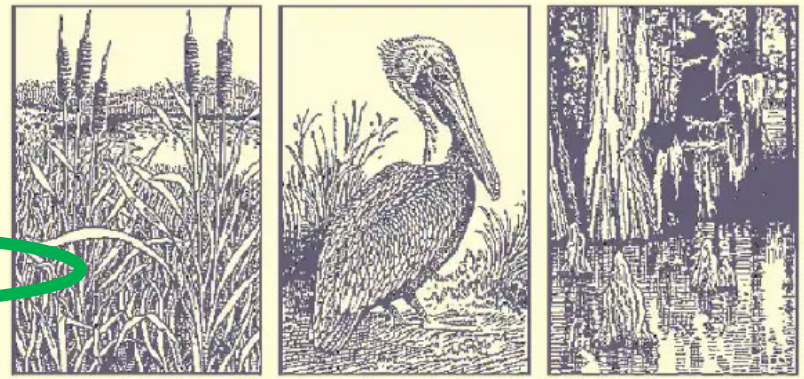
Hawaii & Pacific Is
Caribbean Islan
Alaska
Arid West
Great Plains
Western Mountains, Valley
Midwest
Eastern Mountains and
Northcentral Nort
Atlantic and Gulf Coas

US Army Corps
of Engineers
Waterways Experiment
Station

Wetlands Research Program Technical Report Y-87-1 (on-line edition)

Corps of Engineers Wetlands Delineation Manual

by Environmental Laboratory



January 1987 - Final Report
Approved For Public Release; Distribution Is Unlimited

U.S. ARMY
US Army Corps
of Engineers ®

Additional Information

Provide Corps wetland datasheets for wetland delineations.

- Paired upland-wetland data points.
- Take points near the wetland/upland boundary.
- Minimum one set of paired points per wetland; more if vegetative community changes.
- Take points where desktop resources suggest aquatic resource presence.
- Include map showing data point locations.
- Use Antecedent Precipitation Tool for dates data collected.

Provide photos.

- Include map with photo locations.
- Photos of aquatic resources, features, structures, soil plugs, ordinary high water mark, etc.

Accurate labeling on delineation map.

- Each aquatic resource gets its own name.
- Divided parts of a single aquatic resource get the same name.
- Avoid state terminology, i.e., “other surface water.”
- Use linear feet for linear features (streams, ditches, etc.)
- Label other features like roads, trails, berms, culverts, swales.
- Delineation map should not include impacts or proposed work.

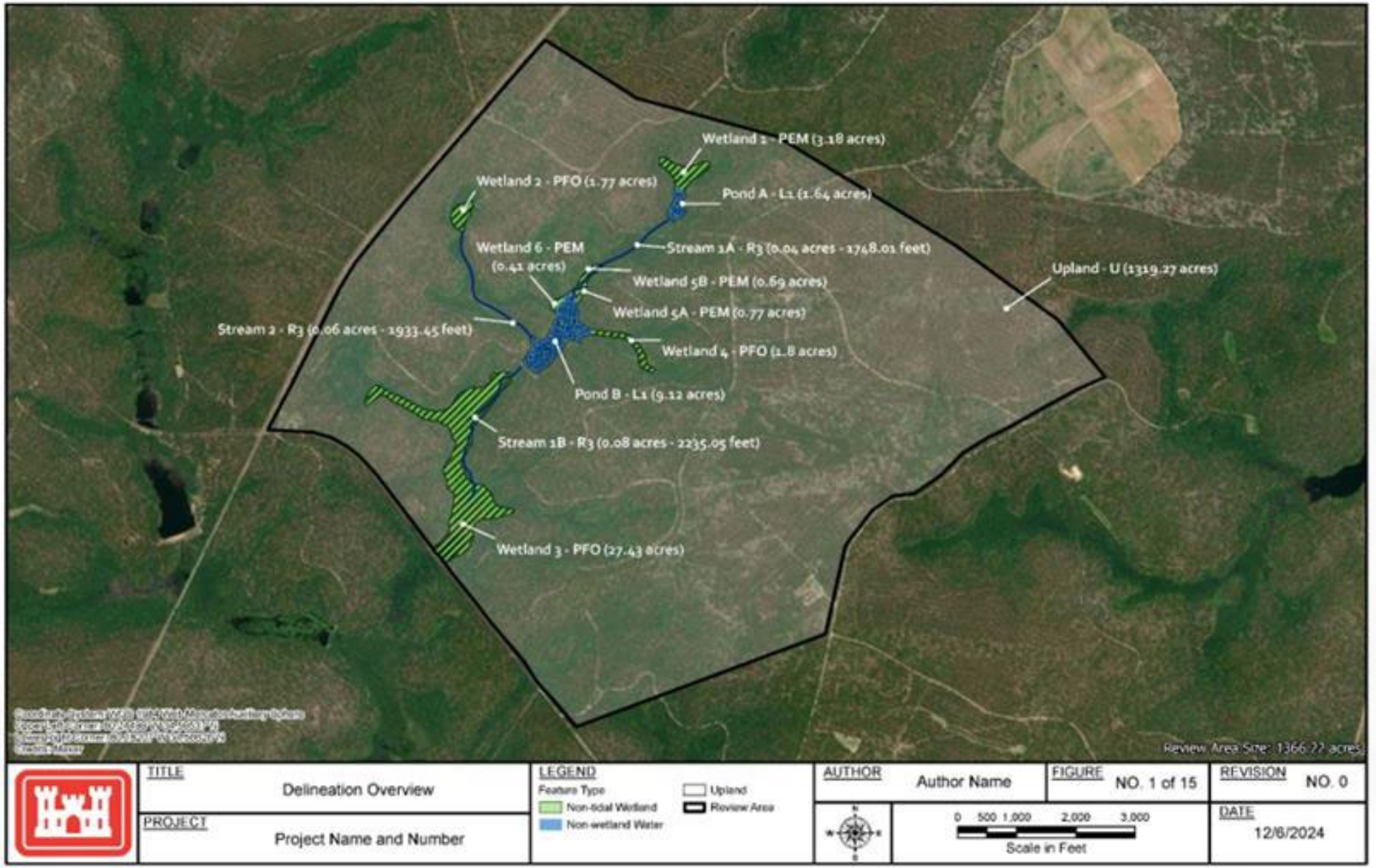
Provide supporting data, such as:

- Location Map
- Historical and current aerials
- LiDAR and hill shade
- National Hydrography Dataset map
- National Wetlands Inventory map
- Topographic Map
- Hydric Rating by Map Unit soils map

U.S. ARMY

US Army Corps of Engineers ®

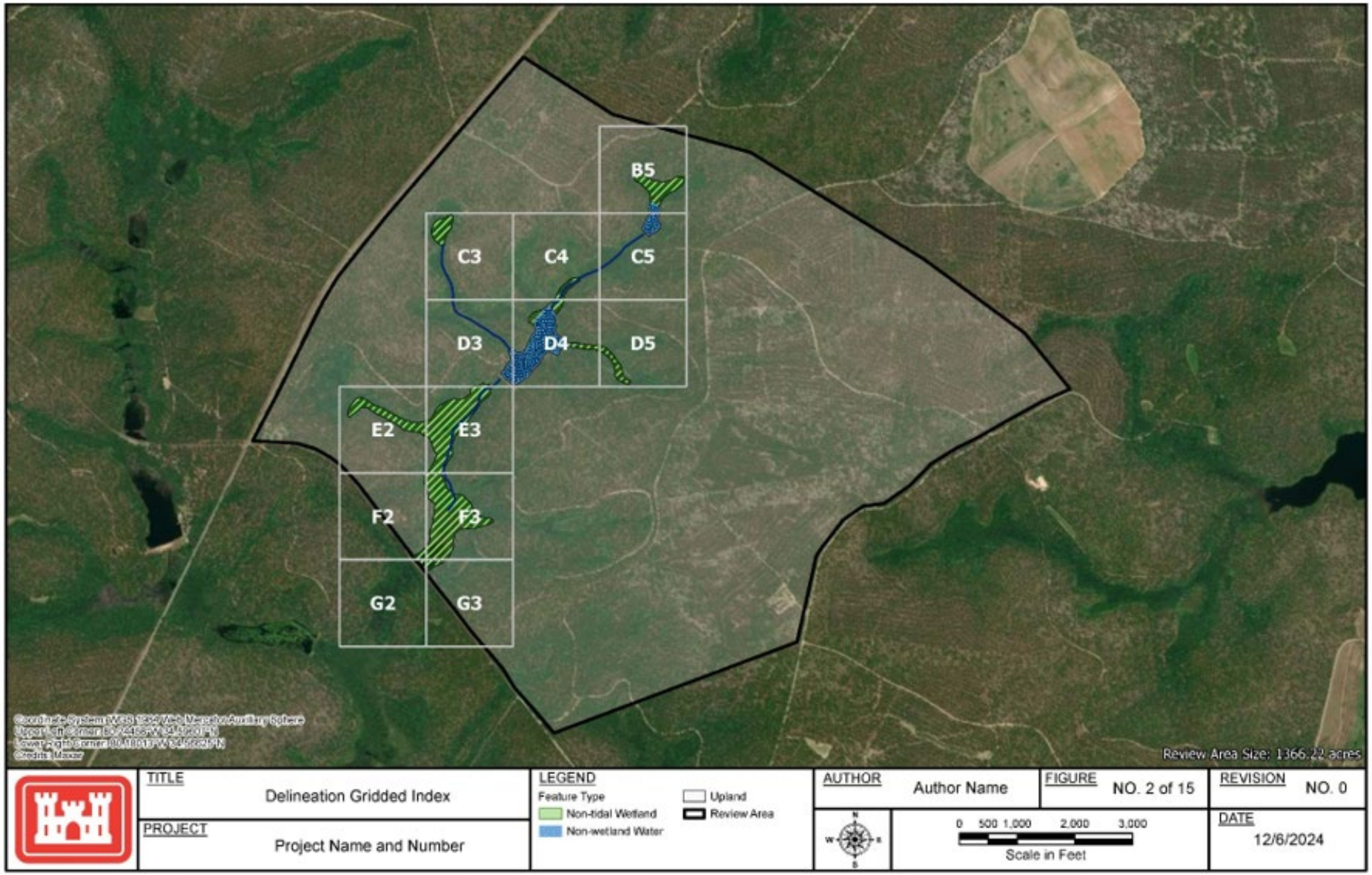
Example: Aquatic Resource Delineation Map



U.S. ARMY

US Army Corps of Engineers ®

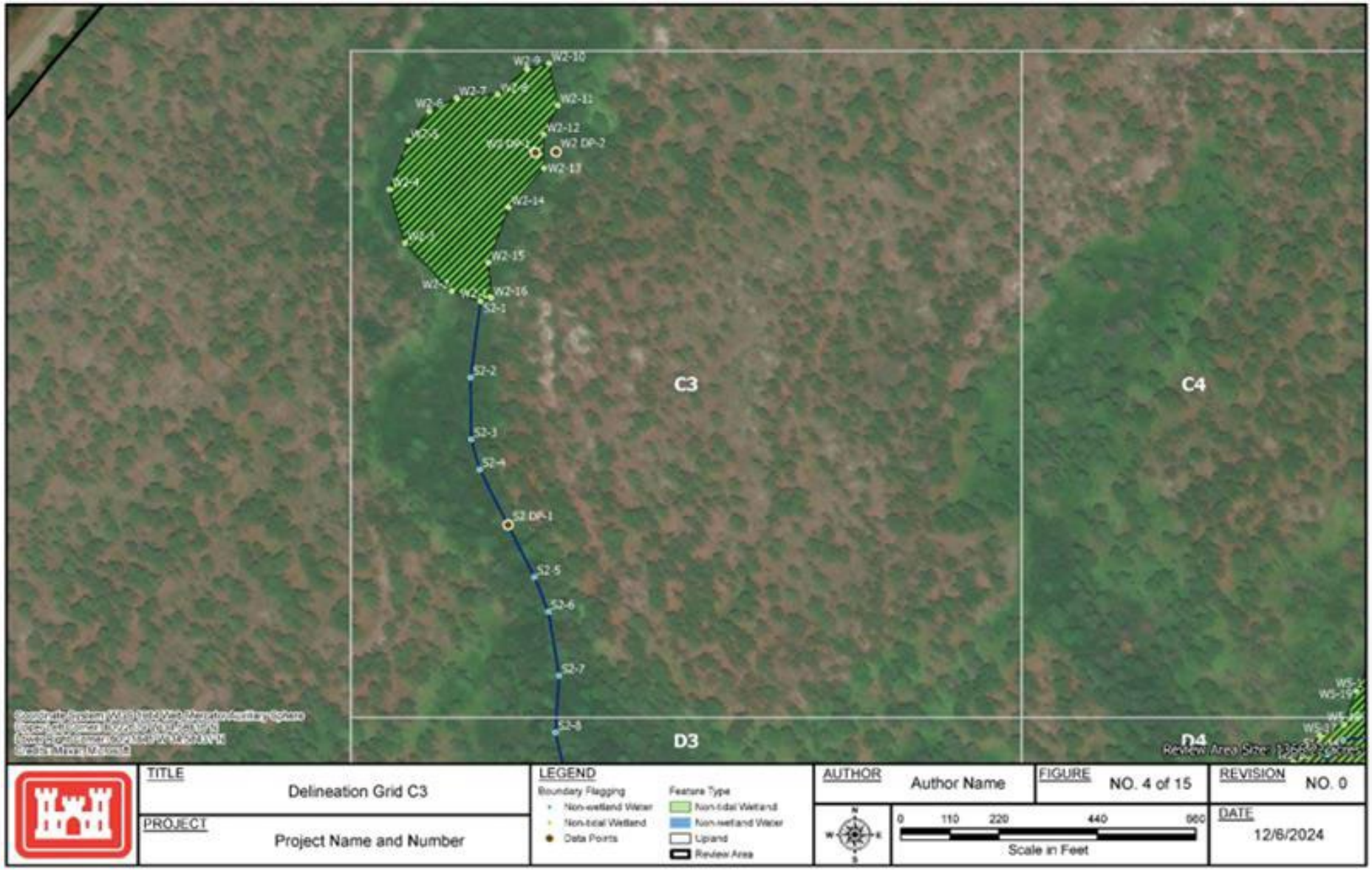
Example: Aquatic Resource Delineation Map



U.S. ARMY

US Army Corps of Engineers ®

Example: Aquatic Resource Delineation Map



U.S. ARMY

US Army Corps of Engineers ®

Automated Data Sheets (ADS)

Informational Section:

- Complete <u>all</u> fields.
- Include exact date of data collection.
- Mark whether climatic conditions and site conditions are normal/typical.
- Double check to ensure summary of findings match each indicator page.
- Use Remarks section.

Hydrology

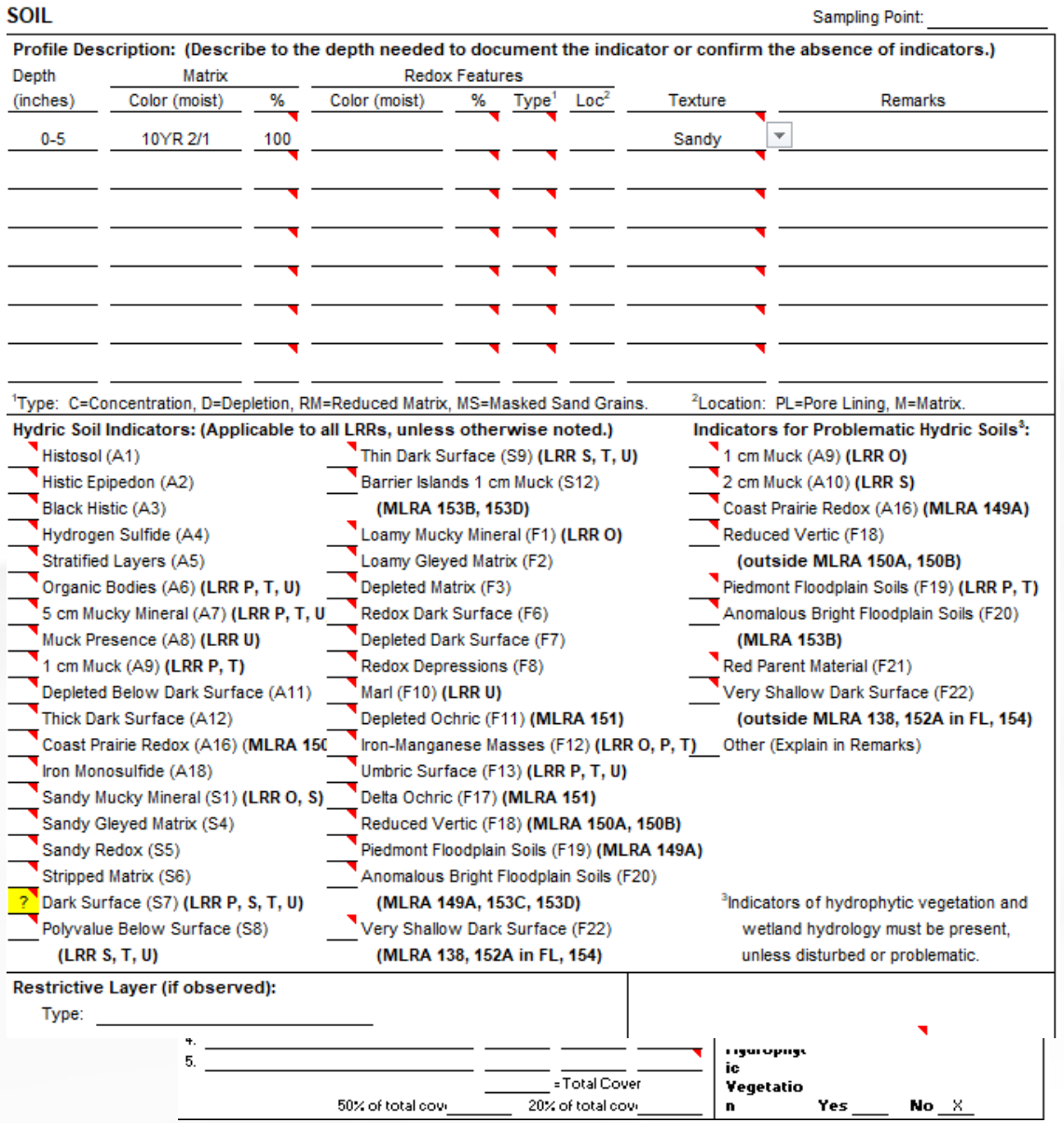
- Include field observations.

Vegetation

- ADS generate correct indicator status and dominance.
- Use scientific names.
- Include plot size (typically 30 ft radius).

Soils

- Describe the entire profile (adds to 100%).
- Recommended excavation depth is approx. 20 in.
- If highlight and question mark pop up, evaluate whether those indicators are present.



SOIL

Sampling Point: _____

Profile Description: (Describe to the depth needed to document the indicator or confirm the absence of indicators.)

Depth (inches)	Matrix Color (moist)	%	Redox Features Color (moist)	%	Type[1]	Loc[2]	Texture	Remarks
0-5	10YR 2/1	100					Sandy	

[1]Type: C=Concentration, D=Depletion, RM=Reduced Matrix, MS=Masked Sand Grains. [2]Location: PL=Pore Lining, M=Matrix.

Hydric Soil Indicators: (Applicable to all LRRs, unless otherwise noted.)

- Histosol (A1)
- Histic Epipedon (A2)
- Black Histic (A3)
- Hydrogen Sulfide (A4)
- Stratified Layers (A5)
- Organic Bodies (A6) **(LRR P, T, U)**
- 5 cm Mucky Mineral (A7) **(LRR P, T, U**
- Muck Presence (A8) **(LRR U)**
- 1 cm Muck (A9) **(LRR P, T)**
- Depleted Below Dark Surface (A11)
- Thick Dark Surface (A12)
- Coast Prairie Redox (A16) **(MLRA 150**
- Iron Monosulfide (A18)
- Sandy Mucky Mineral (S1) **(LRR O, S)**
- Sandy Gleyed Matrix (S4)
- Sandy Redox (S5)
- Stripped Matrix (S6)
- ? Dark Surface (S7) **(LRR P, S, T, U)**
- Polyvalue Below Surface (S8) **(LRR S, T, U)**
- Thin Dark Surface (S9) **(LRR S, T, U)**
- Barrier Islands 1 cm Muck (S12) **(MLRA 153B, 153D)**
- Loamy Mucky Mineral (F1) **(LRR O)**
- Loamy Gleyed Matrix (F2)
- Depleted Matrix (F3)
- Redox Dark Surface (F6)
- Depleted Dark Surface (F7)
- Redox Depressions (F8)
- Marl (F10) **(LRR U)**
- Depleted Ochric (F11) **(MLRA 151)**
- Iron-Manganese Masses (F12) **(LRR O, P, T)**
- Umbric Surface (F13) **(LRR P, T, U)**
- Delta Ochric (F17) **(MLRA 151)**
- Reduced Vertic (F18) **(MLRA 150A, 150B)**
- Piedmont Floodplain Soils (F19) **(MLRA 149A)**
- Anomalous Bright Floodplain Soils (F20) **(MLRA 149A, 153C, 153D)**
- Very Shallow Dark Surface (F22) **(MLRA 138, 152A in FL, 154)**

Indicators for Problematic Hydric Soils[3]:

- 1 cm Muck (A9) **(LRR O)**
- 2 cm Muck (A10) **(LRR S)**
- Coast Prairie Redox (A16) **(MLRA 149A)**
- Reduced Vertic (F18) **(outside MLRA 150A, 150B)**
- Piedmont Floodplain Soils (F19) **(LRR P, T)**
- Anomalous Bright Floodplain Soils (F20) **(MLRA 153B)**
- Red Parent Material (F21)
- Very Shallow Dark Surface (F22) **(outside MLRA 138, 152A in FL, 154)**
- Other (Explain in Remarks)

[3]Indicators of hydrophytic vegetation and wetland hydrology must be present, unless disturbed or problematic.

Restrictive Layer (if observed):

Type: _____

5. _____ = Total Cover

50% of total cov_____ 20% of total cov_____

Hydrophytic Vegetation Yes ____ No X

U.S. ARMY

US Army Corps of Engineers ®

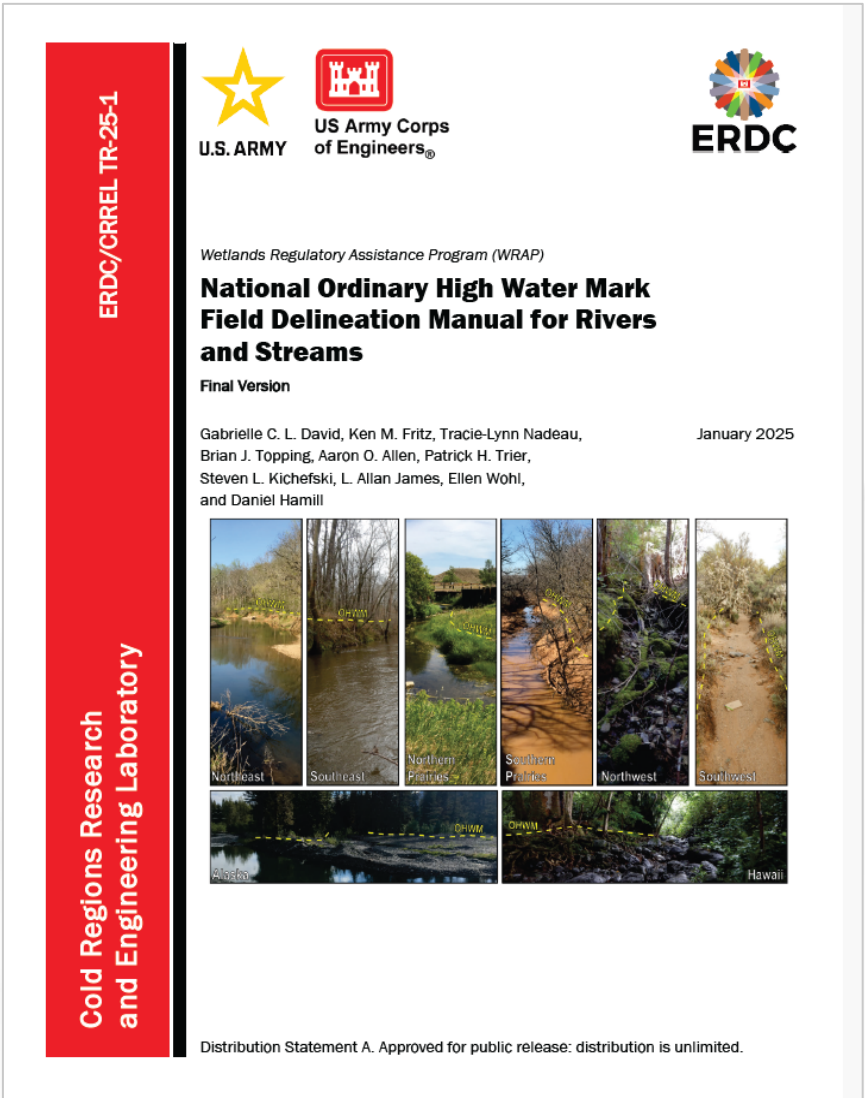
Ordinary High Water Mark (OHWM)

"The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by ***physical characteristics*** *such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."* [33 CFR 328.3(e)]

U.S. ARMY

US Army Corps of Engineers ®

National OHWM Field Delineation Manual for Rivers and Streams: Final Version



ERDC/CRREL TR-25-1

Cold Regions Research and Engineering Laboratory

U.S. ARMY

US Army Corps of Engineers®

ERDC

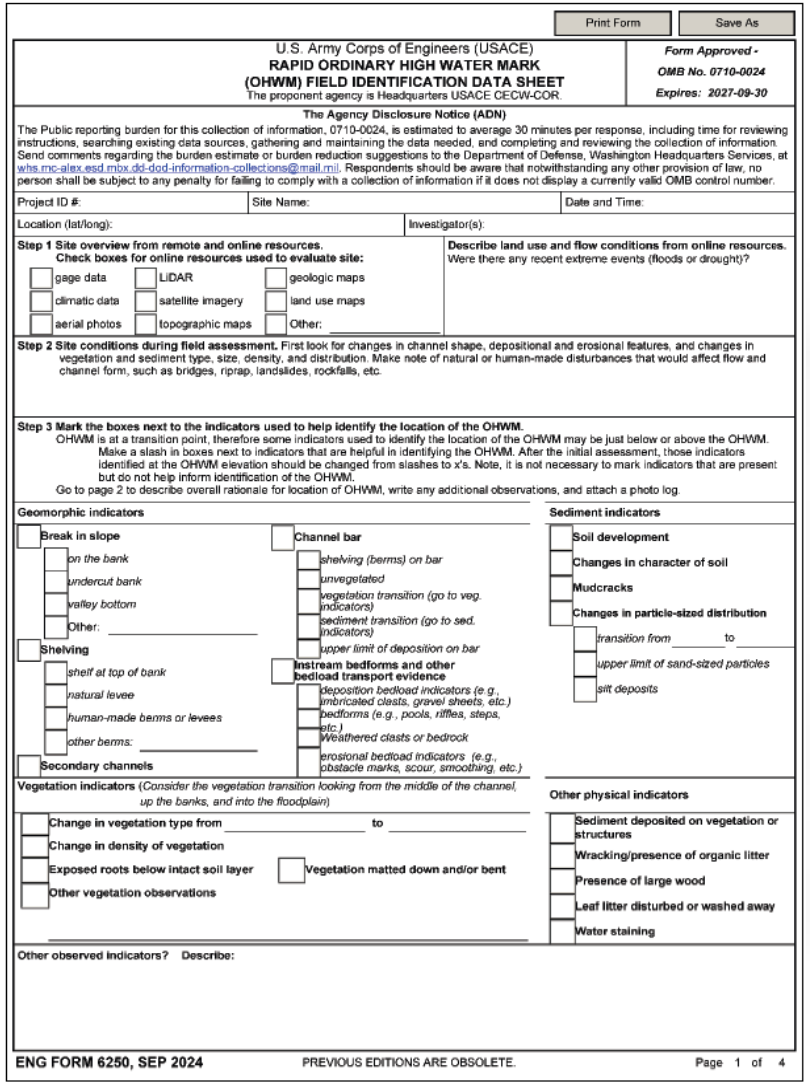
Wetlands Regulatory Assistance Program (WRAP)

National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams

Final Version

Gabrielle C. L. David, Ken M. Fritz, Tracie-Lynn Nadeau, Brian J. Topping, Aaron O. Allen, Patrick H. Trier, Steven L. Kichefski, L. Allan James, Ellen Wohl, and Daniel Hamill

January 2025



Print Form | Save As

U.S. Army Corps of Engineers (USACE)
RAPID ORDINARY HIGH WATER MARK (OHWM) FIELD IDENTIFICATION DATA SHEET
The proponent agency is Headquarters USACE CECW-COR.

Form Approved -
OMB No. 0710-0024
Expires: 2027-09-30

The Agency Disclosure Notice (ADN)

The Public reporting burden for this collection of information, 0710-0024, is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or burden reduction suggestions to the Department of Defense, Washington Headquarters Services, at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

Project ID #: | Site Name: | Date and Time:

Location (lat/long): | Investigator(s):

Step 1 Site overview from remote and online resources.
Check boxes for online resources used to evaluate site:

☐ gage data ☐ LiDAR ☐ geologic maps
☐ climatic data ☐ satellite imagery ☐ land use maps
☐ aerial photos ☐ topographic maps ☐ Other: _____

Describe land use and flow conditions from online resources.
Were there any recent extreme events (floods or drought)?

Step 2 Site conditions during field assessment. First look for changes in channel shape, depositional and erosional features, and changes in vegetation and sediment type, size, density, and distribution. Make note of natural or human-made disturbances that would affect flow and channel form, such as bridges, riprap, landslides, rockfalls, etc.

Step 3 Mark the boxes next to the indicators used to help identify the location of the OHWM.
OHWM is at a transition point, therefore some indicators used to identify the location of the OHWM may be just below or above the OHWM. Make a slash in boxes next to indicators that are helpful in identifying the OHWM. After the initial assessment, those indicators identified at the OHWM elevation should be changed from slashes to x's. Note, it is not necessary to mark indicators that are present but do not help inform identification of the OHWM.
Go to page 2 to describe overall rationale for location of OHWM, write any additional observations, and attach a photo log.

Geomorphic indicators

☐ **Break in slope**
- ☐ *on the bank*
- ☐ *undercut bank*
- ☐ *valley bottom*
- ☐ Other: _____

☐ **Shelving**
- ☐ *shelf at top of bank*
- ☐ *natural levee*
- ☐ *human-made berms or levees*
- ☐ *other berms:* _____

☐ **Secondary channels**

☐ **Channel bar**
- ☐ *shelving (berms) on bar*
- ☐ *unvegetated*
- ☐ *vegetation transition (go to veg. indicators)*
- ☐ *sediment transition (go to sed. indicators)*
- ☐ *upper limit of deposition on bar*

☐ **Instream bedforms and other bedload transport evidence**
- ☐ *deposition bedload indicators (e.g., imbricated clasts, gravel sheets, etc.)*
- ☐ *bedforms (e.g., pools, riffles, steps, etc.)*
- ☐ *Weathered clasts or bedrock*
- ☐ *erosional bedload indicators (e.g., obstacle marks, scour, smoothing, etc.)*

Sediment indicators

☐ **Soil development**
☐ **Changes in character of soil**
☐ **Mudcracks**
☐ **Changes in particle-sized distribution**
- ☐ *transition from* _____ to _____
- ☐ *upper limit of sand-sized particles*
- ☐ *silt deposits*

Vegetation indicators (*Consider the vegetation transition looking from the middle of the channel, up the banks, and into the floodplain*)

☐ **Change in vegetation type from** _____ **to** _____
☐ **Change in density of vegetation**
☐ **Exposed roots below intact soil layer**
☐ **Vegetation matted down and/or bent**
☐ **Other vegetation observations**

Other physical indicators

☐ **Sediment deposited on vegetation or structures**
☐ **Wracking/presence of organic litter**
☐ **Presence of large wood**
☐ **Leaf litter disturbed or washed away**
☐ **Water staining**

Other observed indicators? Describe:

ENG FORM 6250, SEP 2024 PREVIOUS EDITIONS ARE OBSOLETE. Page 1 of 4

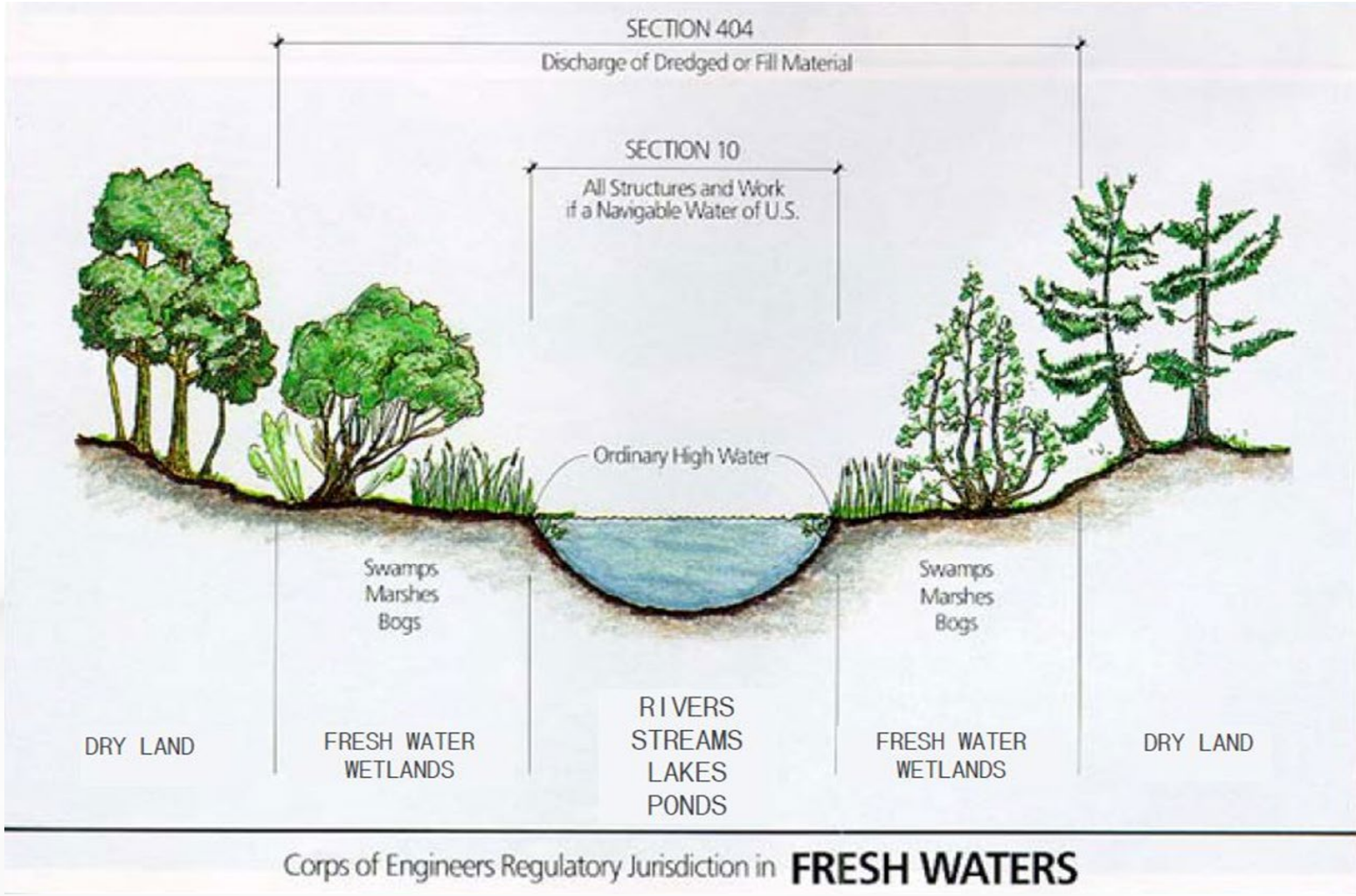
U.S. ARMY

US Army Corps of Engineers ®

Ordinary High Water Mark (OHWM)

The lateral limits of Clean Water Act (CWA) Section 404 jurisdiction over non-tidal waterbodies extend to the OHWM in the absence of adjacent wetlands.

When adjacent wetlands are present, CWA jurisdiction extends beyond the OHWM to the limits of the adjacent wetlands.



U.S. ARMY

US Army Corps of Engineers ®

Resources and Tools

- **1987 Manual and Regional Supplements:** https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/
- **Field Indicators of Hydric Soils version 8.2:** https://www.nrcs.usda.gov/resources/guides-and-instructions/field-indicators-of-hydric-soils
- **National Wetland Plant List:** https://cwbi-app.sec.usace.army.mil/nwpl_static/v34/home/home.html
- **Automated Data Sheets:** https://team.usace.army.mil/sites/HQ-CW/CO/R/CoP/RegulatoryDocuments/Forms/All.aspx?RootFolder=%2Fsites%2FHQ%2DCW%2FCO%2FR%2FCoP%2FRegulatoryDocuments%2FDelineation%2FAutomated%20Datasheets
- **Ordinary High Water Mark Manual:** https://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/
- **Antecedent Precipitation Tool:** https://www.epa.gov/wotus/antecedent-precipitation-tool-apt

REGULATORY GUIDANCE LETTER (RGL) 16-01

U.S. ARMY

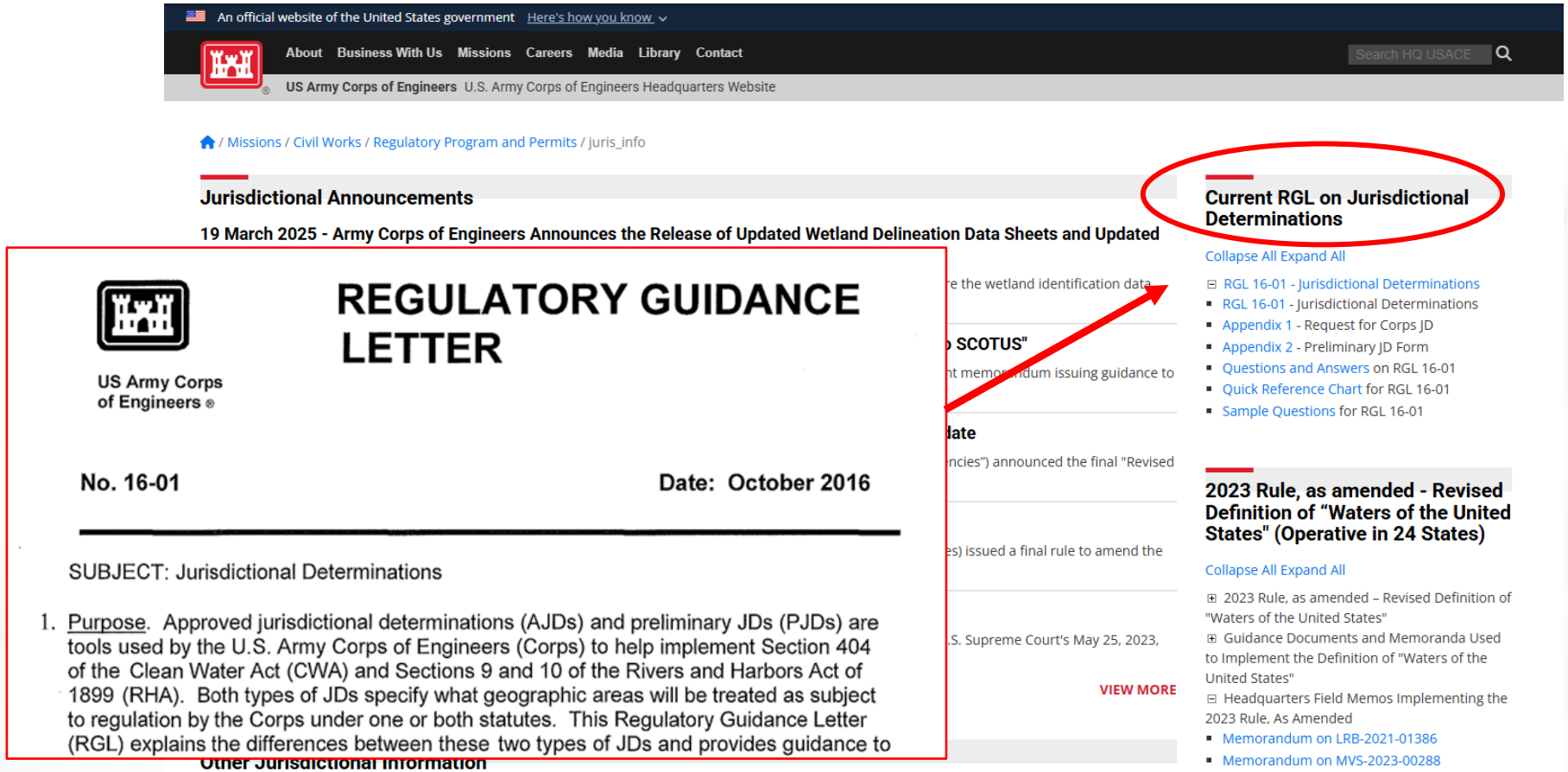
US Army Corps of Engineers ®

Regulatory Guidance Letter (RGL) 16-01

Link:
https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/

Contents of RGL 16-01:

1. RGL
2. Appendix 1: Request for a JD (ENG Form 6247)
3. Appendix 2: PJD form (ENG Form 6249)



An official website of the United States government Here's how you know

About Business With Us Missions Careers Media Library Contact Search HQ USACE

US Army Corps of Engineers U.S. Army Corps of Engineers Headquarters Website

/ Missions / Civil Works / Regulatory Program and Permits / juris_info

Jurisdictional Announcements

19 March 2025 - Army Corps of Engineers Announces the Release of Updated Wetland Delineation Data Sheets and Updated

re the wetland identification data

SCOTUS"

nt memorandum issuing guidance to

date

ncies") announced the final "Revised

es) issued a final rule to amend the

.S. Supreme Court's May 25, 2023,

VIEW MORE

Other Jurisdictional Information

- Overview
- Pictorial Representations of Jurisdiction
- Ordinary High Water Research, Development, and Training
- Recognizing Wetlands

Current RGL on Jurisdictional Determinations

Collapse All Expand All

- RGL 16-01 - Jurisdictional Determinations
- RGL 16-01 - Jurisdictional Determinations
- Appendix 1 - Request for Corps JD
- Appendix 2 - Preliminary JD Form
- Questions and Answers on RGL 16-01
- Quick Reference Chart for RGL 16-01
- Sample Questions for RGL 16-01

2023 Rule, as amended - Revised Definition of "Waters of the United States" (Operative in 24 States)

Collapse All Expand All

- 2023 Rule, as amended – Revised Definition of "Waters of the United States"
- Guidance Documents and Memoranda Used to Implement the Definition of "Waters of the United States"
- Headquarters Field Memos Implementing the 2023 Rule, As Amended
  - Memorandum on LRB-2021-01386
  - Memorandum on MVS-2023-00288
  - Memorandum on NWS-2023-923

US Army Corps of Engineers

REGULATORY GUIDANCE LETTER

US Army Corps of Engineers

No. 16-01 **Date: October 2016**

SUBJECT: Jurisdictional Determinations

1. Purpose. Approved jurisdictional determinations (AJDs) and preliminary JDs (PJDs) are tools used by the U.S. Army Corps of Engineers (Corps) to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). Both types of JDs specify what geographic areas will be treated as subject to regulation by the Corps under one or both statutes. This Regulatory Guidance Letter (RGL) explains the differences between these two types of JDs and provides guidance to

U.S. ARMY US Army Corps of Engineers ®

Regulatory Guidance Letter (RGL) 16-01

Provide guidance on how to identify the appropriate type of JD needed, if any.

- **No JD Whatsoever**
- **Preliminary JD (PJD)**
- **Approved JD (AJD)**

U.S. ARMY

US Army Corps of Engineers ®

No JD Whatsoever

The Corps does not issue a JD of any type when one has not been requested.

No JD may be necessary when:

- The Corps verifies general permits or issues individual permits and questions of jurisdiction do not arise.
- Work is proposed in/over/under a designated Section 10 "navigable water of the U.S.," including waters subject to the ebb and flow of the tide.
  - I.e., docks, seawalls, rip rap, dredging, HDD line, aerial transmission line.

Preliminary JD vs. Approved JD

Preliminary JD:

- Not an official determination of jurisdiction.
- May be requested to expedite the permit process.
- Treats all aquatic resources (ARs) as jurisdictional.
- No expiration date.
- Cannot be appealed.
- Is not posted on the web.
- Is preliminary in nature—PJD recipient may later request an AJD.

Approved JD:

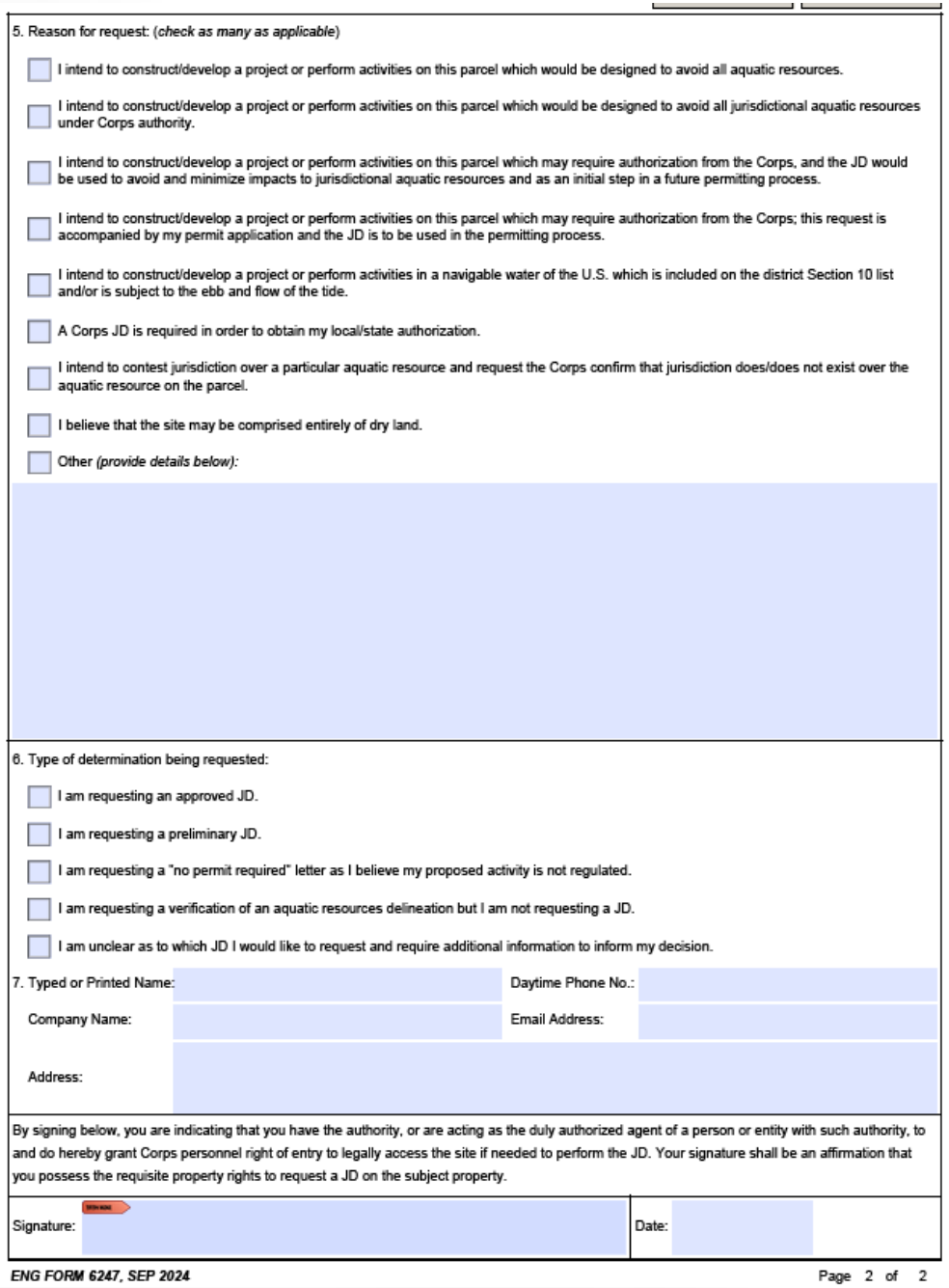
- Official determination of the presence/absence of jurisdictional ARs.
- Official determination of geographic limits of jurisdictional and non-jurisdictional ARs.
- May be stand-alone or associated with a permit action.
- Valid for 5 years.
- Final agency action.
- May be administratively appealed.
- Must be posted on the web

No Permit Required (NPR) Letters

REASON FOR NPR	IS A JD REQUIRED?
1. The activity *may* be in WOTUS, but does NOT involve discharge of dredged/fill material.	**NO**
2. The activity is regulated, but is NOT located in WOTUS.	**YES—AJD is required.**
3. The activity is regulated but is NOT located in ANY aquatic resource that is present in the review area.	**NO, but delineation must be verified.**
4. The activity is an EXEMPT silviculture, farming or ranching activity pursuant to 33 C.F.R. §323.4.	**NO**

JD Request Form

- ENG Form 6247.
- Required for every JD request.
- Used to help identify which type of JD, if any, is appropriate.
- Must be signed.
- Can request JDs via the Regulatory Request System (RRS).



5. Reason for request: (*check as many as applicable*)

- ☐ I intend to construct/develop a project or perform activities on this parcel which would be designed to avoid all aquatic resources.
- ☐ I intend to construct/develop a project or perform activities on this parcel which would be designed to avoid all jurisdictional aquatic resources under Corps authority.
- ☐ I intend to construct/develop a project or perform activities on this parcel which may require authorization from the Corps, and the JD would be used to avoid and minimize impacts to jurisdictional aquatic resources and as an initial step in a future permitting process.
- ☐ I intend to construct/develop a project or perform activities on this parcel which may require authorization from the Corps; this request is accompanied by my permit application and the JD is to be used in the permitting process.
- ☐ I intend to construct/develop a project or perform activities in a navigable water of the U.S. which is included on the district Section 10 list and/or is subject to the ebb and flow of the tide.
- ☐ A Corps JD is required in order to obtain my local/state authorization.
- ☐ I intend to contest jurisdiction over a particular aquatic resource and request the Corps confirm that jurisdiction does/does not exist over the aquatic resource on the parcel.
- ☐ I believe that the site may be comprised entirely of dry land.
- ☐ Other *(provide details below)*:

6. Type of determination being requested:

- ☐ I am requesting an approved JD.
- ☐ I am requesting a preliminary JD.
- ☐ I am requesting a "no permit required" letter as I believe my proposed activity is not regulated.
- ☐ I am requesting a verification of an aquatic resources delineation but I am not requesting a JD.
- ☐ I am unclear as to which JD I would like to request and require additional information to inform my decision.

7. Typed or Printed Name: | Daytime Phone No.:

Company Name: | Email Address:

Address:

By signing below, you are indicating that you have the authority, or are acting as the duly authorized agent of a person or entity with such authority, to and do hereby grant Corps personnel right of entry to legally access the site if needed to perform the JD. Your signature shall be an affirmation that you possess the requisite property rights to request a JD on the subject property.

Signature: | Date:

ENG FORM 6247, SEP 2024 Page 2 of 2

U.S. ARMY

US Army Corps of Engineers ®

CURRENT WOTUS REGIME

U.S. ARMY

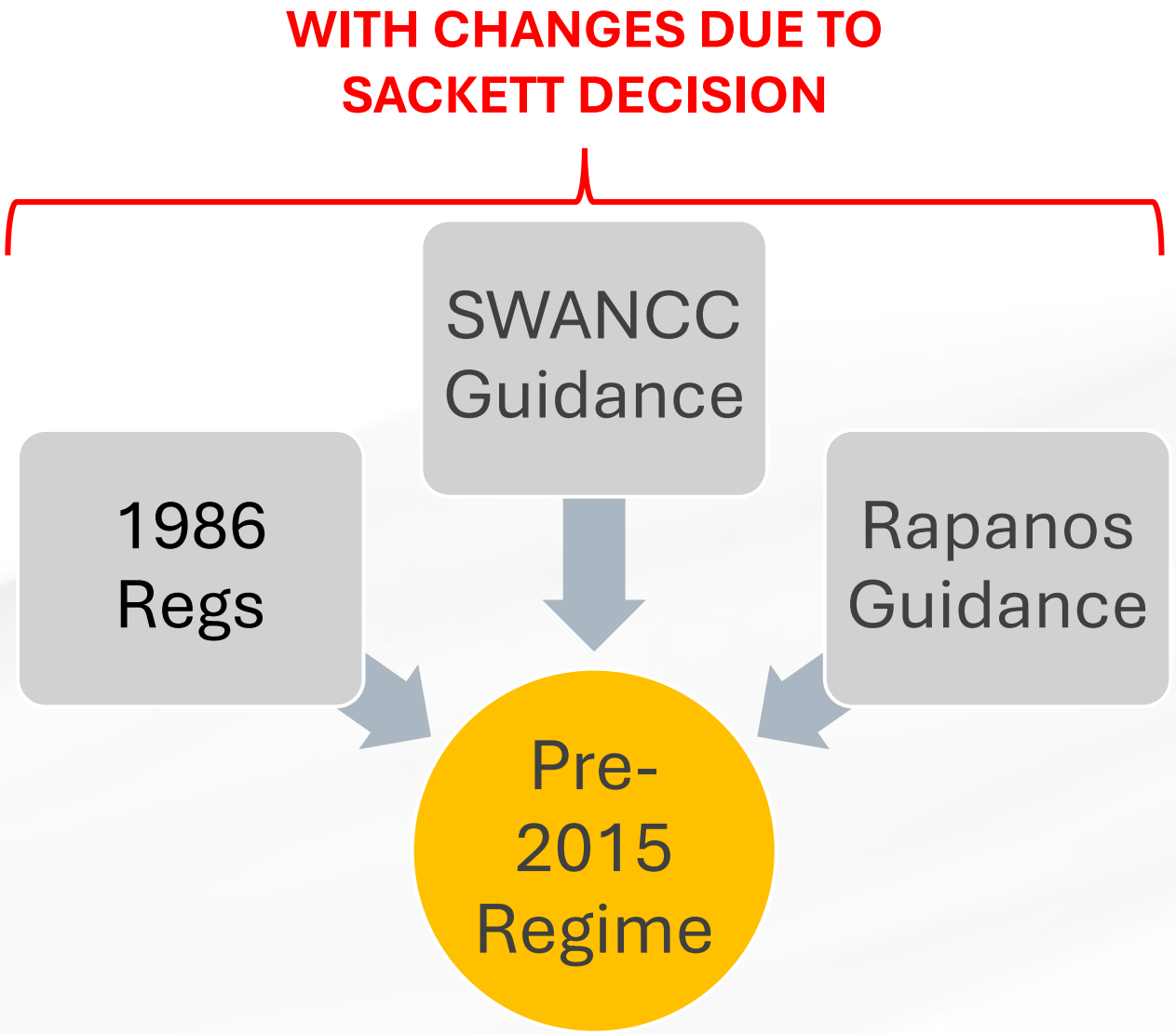
US Army Corps of Engineers ®

Background Pre-2015 Regime

In Florida, WOTUS is governed by the pre-2015 regulatory regime, consistent with the Sackett decision.

= WOTUS definitions in 1986 regs (33 C.F.R. §328.3), as informed by:

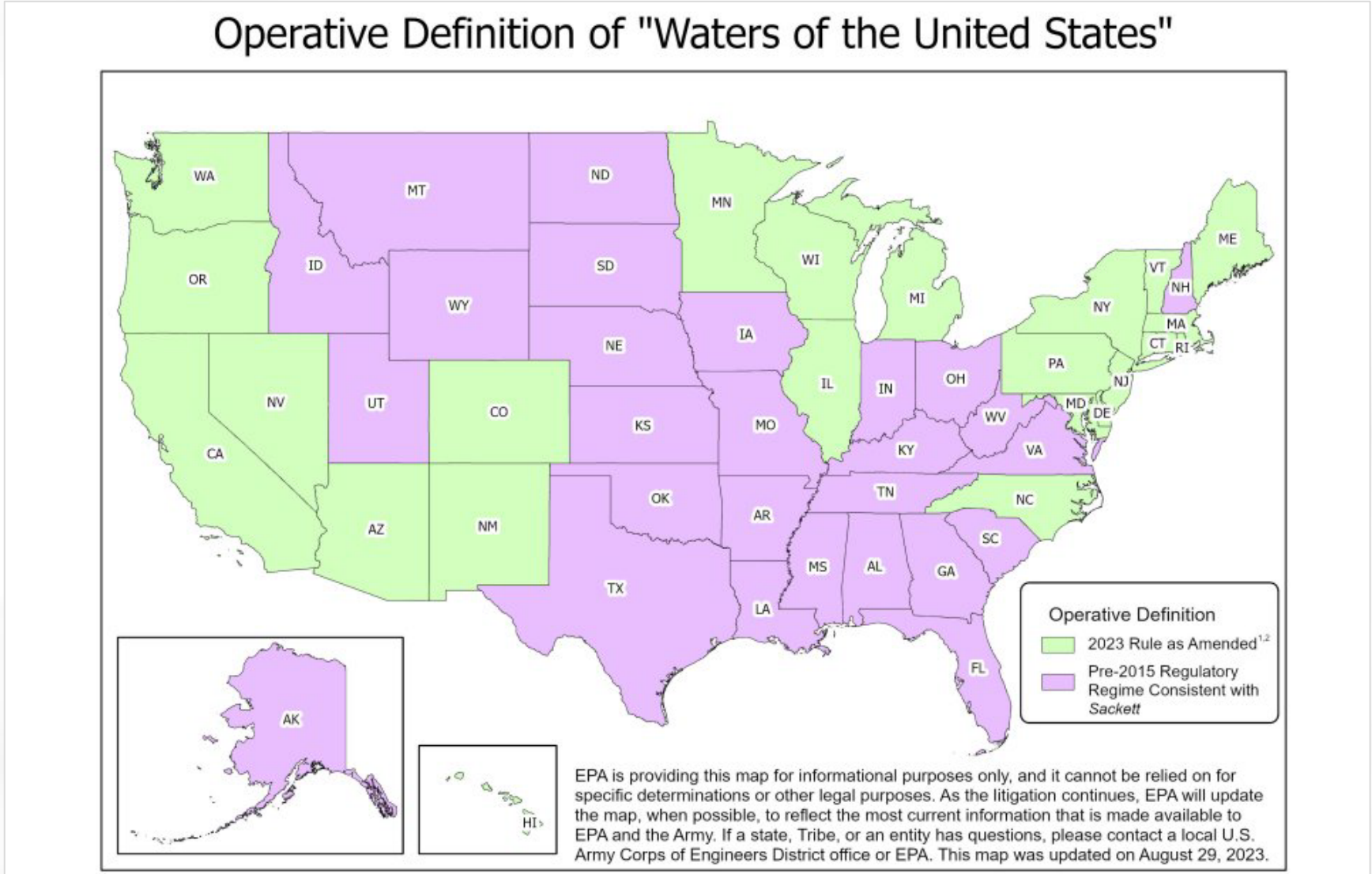
- 2003 SWANCC guidance
- 2008 Rapanos guidance
- Consistent with the Sackett decision.



U.S. ARMY

US Army Corps of Engineers ®

Waters of the U.S.



U.S. ARMY

US Army Corps of Engineers ®

Background: Pre-2015 Regime

1986 Regulations at 33 C.F.R. §328.3

Seven categories of WOTUS and certain excluded/non-jurisdictional waters:

(a)(1): Traditional Navigable Waters
(a)(2): Interstate Waters
(a)(3): Other Waters
(a)(4): Impoundments
(a)(5): Tributaries
(a)(6): The Territorial Seas
(a)(7): Adjacent Wetlands
PLUS: Excluded and Non-Jurisdictional Waters

(a)(5) – Tributaries

- Tributaries of waters identified in paragraphs (a)(1) through (a)(4).
  - Can be natural, man-altered, or man-made water bodies that flow directly or indirectly into a TNW or interstate water.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.

- Tributaries can also include ditches and canals.
- **Jurisdictional tributaries <u>must be relatively permanent</u>**.

U.S. ARMY

US Army Corps of Engineers ®

(a)(5) – Tributaries

Relatively Permanent

- Relatively permanent waters include tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).
  - The duration of seasonal flow may vary regionally, but the tributary must have predictable flow seasonally.
  - The flow could be due to a variety of sources including groundwater, snowmelt, and/or precipitation.

- Non-relatively permanent tributaries are those that generally flow only in response to precipitation.
  - These tributaries do not flow in a predictable seasonal manner.

(a)(7) Adjacent Wetlands

- Consistent with *Sackett*, **adjacent** is interpreted to mean "**having a continuous surface connection**."

- Jurisdictional adjacent wetlands include:
  - Wetlands that have a continuous surface connection to a TNW, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.

U.S. ARMY

US Army Corps of Engineers ®

(a)(7) Adjacent Wetlands

Continuous Surface Connection (CSC)

- Wetlands have a CSC when they **physically abut or touch** a requisite water.*
  - Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- A wetland cannot be jurisdictional based on adjacency to another wetland.
- The agencies consider the entire wetland to be “adjacent” if any part of the wetland is “adjacent.”

U.S. ARMY

US Army Corps of Engineers ®

*See 2008 Rapanos guidance and March 12, 2025, joint policy memo on CSC.

(a)(7) Adjacent Wetlands

Wetlands Divided by Artificial Structures

- Two or more parts of a divided wetland are considered the same wetland for the purpose of assessing wetland adjacency if a hydrological connection is maintained between the divided parts.
- The EPA-Army joint policy memos on coordinated AJDs discussing wetlands divided by artificial structures were not rescinded by the March 12, 2025, memo and are still valid.
- The question of whether the separate parts of a divided wetland should be considered one wetland is separate from the question of whether that entire wetland is considered an adjacent wetland. If one part of a divided wetland directly abuts a jurisdictional water, the entire wetland is considered an (a)(7) adjacent wetland.

See Joint Decision Memos for NWO-2003-60436, LRB-2021-01386 and SAS-2001-13740.

Exclusions and Generally Non-Jurisdictional Features

- Regulatory **exclusions** include:
  - Waste treatment exclusion, prior converted cropland exclusion

- Features that are **generally not jurisdictional** per the 1986 preamble language and the 2008 *Rapanos* guidance include:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

Generally Non-Jurisdictional Features

Waters that are generally non-jurisdictional per the preamble of the 1986 regulations and the 2008 *Rapanos* Guidance:

- Artificially irrigated areas which would revert to upland if the 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 by excavating or diking dry land to retain water for primarily aesthetic reasons;
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States;
- Ditches (including roadside ditches) **excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water**; and
- Swales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow).

U.S. ARMY

US Army Corps of Engineers ®

Implementation Policy Memos

- **Interpretation and implementation also guided by EPA-Army joint policy memos**
- **March 12, 2025, memo on continuous surface connection.**
- Case-specific decision memos on coordinated AJDs.
  - Memos on CSC were rescinded after the March 12, 2025, memo.
  - Remaining memos continue to be valid and are located at: https://www.epa.gov/wotus/current-implementation-waters-united-states

    https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/

MEMORANDUM TO THE FIELD BETWEEN
THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE PROPER IMPLEMENTATION
OF "CONTINUOUS SURFACE CONNECTION" UNDER THE DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

March 12, 2025

PURPOSE

This memorandum provides guidance to the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency regarding the implementation of the definition of "waters of the United States" under both regulatory regimes currently operative across the country: the "Revised Definition of 'Waters of the United States,'" as amended by the final rule "Revised Definition of 'Waters of the United States'; Conforming" (the amended 2023 rule; 40 C.F.R. 120.2 and 33 C.F.R. 328.3) and the "pre-2015 regulatory regime"[1] consistent with the Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).[2]

This memorandum is being issued in response to requests for clarification on the implementation of the Federal Water Pollution Control Act, also known as the Clean Water Act, with respect to adjacent wetlands in light of the Supreme Court's decision in *Sackett v. Environmental Protection Agency*. Specifically, the preamble to the 2023 Rule ("Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023)) and the preamble to the conforming rule ("Revised Definition of 'Waters of the United States'; Conforming," 88 FR 61964, September 8, 2023) did not include adequate direction or guidance on the meaning of the "continuous surface connection" requirement, and the agencies' case-specific policy memoranda issued post-*Sackett* neither provided national guidance on the topic nor clear and transparent direction for the public or the agencies. The case-specific policy memoranda also contain conclusions which are inconsistent with the discussion of "continuous surface connection" as described in the pre-2015 regulatory regime guidance documents and the *Sackett* decision. In order to provide national consistency and eliminate confusion about the scope of "adjacent wetlands," and

[1] The "pre-2015 regulatory regime" refers to the agencies' definition of "waters of the United States" set forth in pre-2015 Corps and EPA regulations (the Corps' 1986 regulations and the EPA's 1988 regulations, inclusive of the exclusion for prior converted cropland, which both agencies added in 1993), implemented consistent with relevant case law, including *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). It also refers to longstanding practice, as informed by applicable guidance, including "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) (2008 *Rapanos* Guidance), available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf. Additionally, the agencies interpret the phrase "waters of the United States" consistent with the Supreme Court's decision in *Sackett v. Environmental Protection Agency*.

[2] For more information about the operative definition of "waters of the United States" for specific geographic areas in light of litigation, please visit https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

U.S. ARMY

US Army Corps of Engineers ®

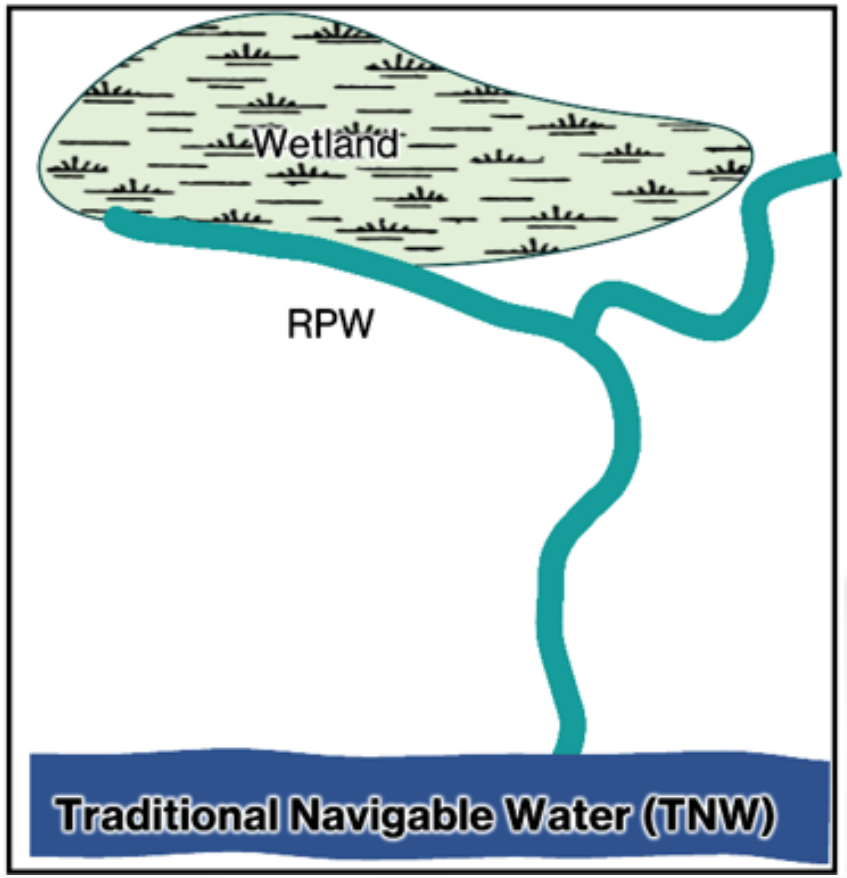
March 12, 2025, Joint Policy Memo on CSC

The memo is only applicable to the agencies' implementation of WOTUS for determining **wetland adjacency**. The policy direction in the memo does **not** affect the agencies' implementation of WOTUS for **non-wetland aquatic resources such as tributaries, lakes, ponds or traditional navigable waters** under the pre-2015 regulatory regime consistent with Sackett.

The memo **rescinds previous guidance** and training materials that discuss a **discrete feature (such as a non-jurisdictional pipe, ditch or swale) providing a continuous surface connection between a wetland and a jurisdictional water for the purposes of determining wetland adjacency.**

As stated in the memo, when determining if a **wetland** has a continuous surface connection to a requisite jurisdictional water, the **wetland must directly abut (physically touch) the requisite water**. In other words, adjacent wetlands are only those wetlands that directly abut a jurisdictional water (such as a relatively permanent tributary or traditional navigable water).

March 12, 2025, Joint Policy Memo on CSC



This guidance is operative under the Amended 2023 Rule and the pre-2015 regulatory regime consistent with *Sackett.*

- **Wetlands meet the CSC requirement when they abut (or touch) waters that are "waters of the United States" in their own right.**

- Wetlands "are considered jurisdictional under the plurality standard" where they directly abut such waters "(e.g., they are no separated by uplands, a berm, dike, or similar feature)." 2008 *Rapanos* Guidance at 7, fn. 29.

For more detail, see the 2008 *Rapanos* Guidance.

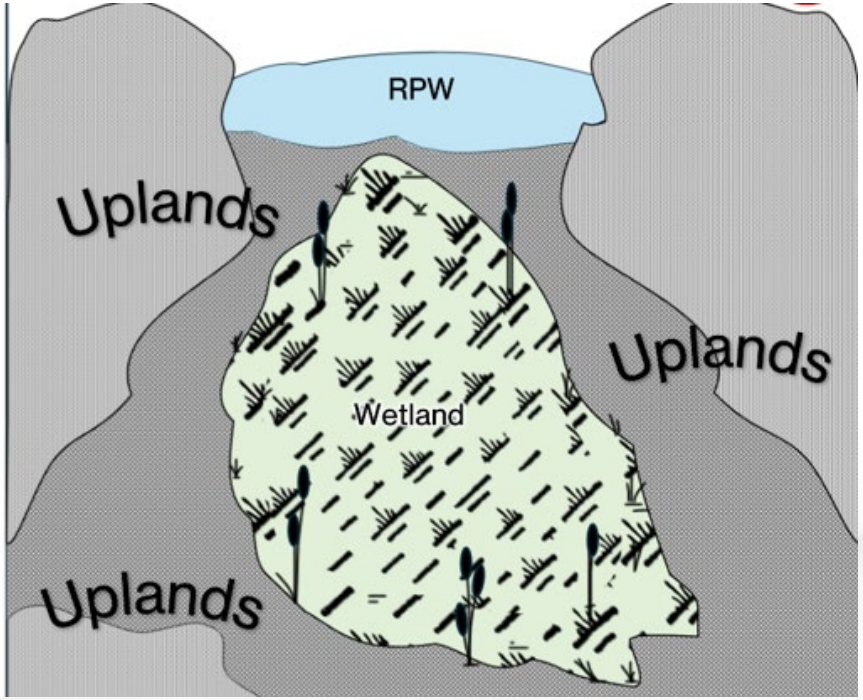
*Determinations are made on a case-by-case basis. These are simplified examples.

U.S. ARMY

US Army Corps of Engineers ®

March 12, 2025, Joint Policy Memo on CSC

Example 1



Background: Wetland is completely surrounded by uplands.

- **Is the feature a "water of the United States" in its own right?**
  Yes, the water is an RPW connected to a TNW.
- **Is the wetland abutting a "water of the United States"?**
  No, the wetland is separated from an RPW by uplands**.**
- **Does the wetland meet the CSC requirement and is thus an adjacent wetland?**
  No.

U.S. ARMY

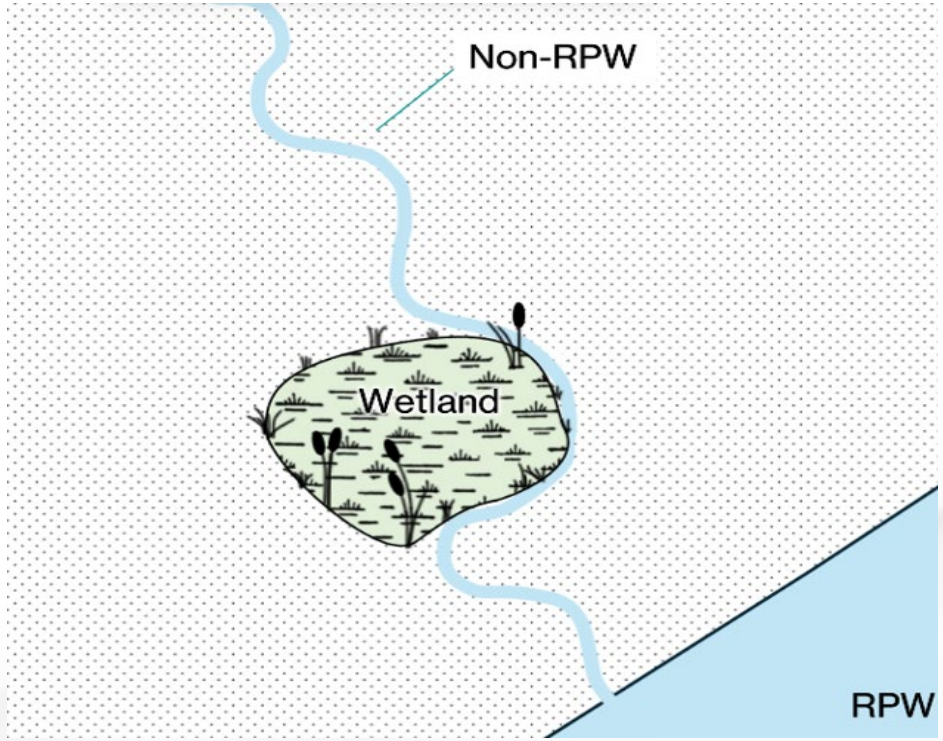
US Army Corps of Engineers ®

*Determinations are made on a case-by-case basis. These are simplified examples.

March 12, 2025, Joint Policy Memo on CSC

Example 2: Non-RPW

Example 2: Non-RPW



- **Is the feature a "water of the United States" in its own right?**

  Non-RPW: **No**, it is not a "water of the United States" because it is excluded under the Amended 2023 Rule or is considered generally not jurisdictional under the pre-2015 regulatory regime.

  RPW: **Yes**, the water is an RPW connected to a TNW.

- **Is the wetland abutting a "water of the United States"?**
  No, the wetland touches a non-RPW which flows into the RPW. Because discrete features cannot be used to establish a CSC, the wetland is not abutting the RPW.

- **Does the wetland meet the CSC requirement and is thus an adjacent wetland?**
  No.

U.S. ARMY

US Army Corps of Engineers ®

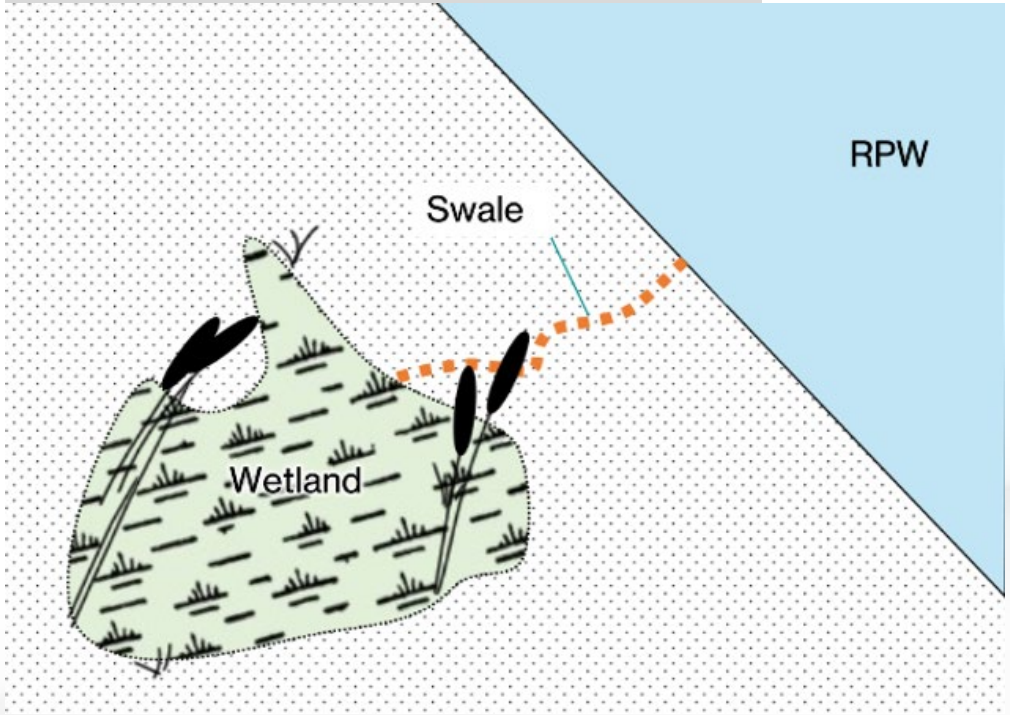
*Determinations are made on a case-by-case basis. These are simplified examples.

March 12, 2025, Joint Policy Memo on CSC

Example 2: Non-RPW

Background: Wetland > swale > RPW.

Example 3: Swale/discrete feature



- **Is the feature a "Water of the United States" in its own right?**

  Swale: No, it lacks an ordinary high water mark and relatively permanent flow.

  RPW: Yes, the RPW has relatively permanent flow and is connected to a TNW.

- **Is the wetland abutting a "water of the United States"?**
  No, the wetland touches a swale which flows into the RPW. Because discrete features cannot be used to establish a CSC, the wetland is not abutting the RPW.

- **Does the wetland meet the CSC requirement and is this an adjacent wetland?**
  No.

*Determinations are made on a case-by-case basis. These are simplified examples.

Where to Find Info: (a)(5) Tributaries

Tools and resources for assessing relatively permanent standard:

- Direct observation
- Regional field observations
- USACE Antecedent Precipitation Tool (APT)
- USGS Topographic Maps
- Regionalized streamflow duration assessment methods (SDAMs)
- Aerial and satellite imagery
- USGS National Hydrography Dataset (NHD)
- Stream Gage data, including from USGS
- Regional regression analysis
- Hydrologic modeling tools such as HEC-HMS
- Elevation data and models, including LIDAR (from USGS or Property Appraiser websites)
- State, tribal, and local data and maps
- USGS StreamStats
- Probability of Streamflow Permanence (PROSPER) by the USGS (including for the Pacific Northwest)
- NRCS hydrologic tools and soil maps
- USEPA WATERS GeoViewer and How's My Waterway
- USGS National Map Viewer

U.S. ARMY

US Army Corps of Engineers ®

Where to Find Info: (a)(7) Adjacent Wetlands

Tools and resources for assessing continuous surface connection:

- Direct observation
- Regional field observations
- USGS Topographic Maps
- Aerial and satellite imagery
- USGS NHD
- USFWS National Wetlands Inventory (NWI)
- Elevation data such as LIDAR-based topographic models
- Elevation data such as LIDAR-based topographic models
- State, Tribal, and local data and maps
- NRCS hydrologic tools and soil maps
- FEMA flood zone or other floodplain maps

Questions?

EPA

USACE, HQ

U.S. ARMY

US Army Corps of Engineers ®