

NWPR: JURISDICTIONAL DETERMINATION PROCESS & IMPLEMENTATION

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JURISDICTIONAL DETERMINATION PROCESS



JURISDICTIONAL DETERMINATIONS (JDS)



- APPROVED JD (AJD): Used to make a definitive, official determination that an aquatic resource is or is not jurisdictional (33 CFR 331.2).
- PRELIMINARY JD (PJD): A determination that does not address questions of jurisdiction thereby treating all aquatic resources that could be jurisdictional as if they are jurisdictional for purposes of permit processing (i.e. impacts and compensatory mitigation) (33 CFR 331.2).
- JD request form found in RGL 16-01
- For both AJDs and PJDs aquatic resources must meet the definition of a wetland or contain an ordinary high water mark (OHWM) as defined by USACE methodology.



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REGULATORY GUIDANCE LETTER

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 the field and the regulated public on when it may be appropriate to issue an AJD as opposed to a PJD, or when it may be appropriate to not prepare any JD whatsoever.

The Corps has long provided JDs as a public service. In U.S. Army Corps of Engineers v. Hawkes Co., 136 S.Ct. 1807 (2016), the Supreme Court held that AJDs are subject to judicial review, and several members of the Court highlighted that the availability of AJDs is important for fostering predictability for landowners. The Corps recognizes the value of JDs to the public and reaffirms the Corps commitment to continue its practice of providing JDs when requested to do so, consistent with the guidance below. This clarification RGL does not change or modify the definitions of AJDs and PJDs included in Corps regulations, the documentation practices for each type of JD, or when an AJD is required by the terms of its definition (e.g., only an AJD can be used to determine presence/absence of waters of the U.S.). This RGL also does not address which aquatic resources are subject to CWA or RHA jurisdiction.



PRELIMINARY VS. APPROVED JDS



PRELIMINARY JD

- All potential jurisdictional aquatic features are included in a PJD and treated as if they are jurisdictional, even where initial indications are that a feature may not be jurisdictional were the District to complete an AJD
- To assist the requestor in planning for a proposed project (i.e. avoidance and minimization)
- Not appealable
- Applicant may request an AJD at any time

APPROVED JD

- Only way to determine an aquatic feature is not jurisdictional
- Valid for 5 years
- Appealable
- Includes a basis of jurisdiction with the document, providing the indicators that support the approved JD



NWPR AND PRE-EXISTING AJDS



- The possessor of a valid AJD may request that USACE reassess a parcel and issue a new AJD before the five-year expiration date.

- The NWPR does not invalidate an AJD that was issued before the rule was effective. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL05-02, or the recipient of such an AJD requests that a new AJD be issued.
 - New information may warrant revision of the determination before the expiration date.
 - District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.



JD RESOURCES



- USACE Regulations at 33 CFR 331.2
<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Federal-Regulation/>
- USACE Jurisdictional Information Website:
https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/
- USACE Regulatory Guidance Letter (RGL) 16-01:
<https://www.spn.usace.army.mil/Portals/68/docs/regulatory/resources/RGL/RGL16-01.pdf>
- USACE Jurisdictional Determinations and Permit Decisions Public Interface:
<https://permits.ops.usace.army.mil/orm-public>
- EPA's CWA Approved Jurisdictional Determination website:
<https://watersgeo.epa.gov/cwa/CWA-JDs/>



IMPLEMENTATION



IMPLEMENTATION OF NWPR



Determining contribution of flow downstream:

- USGS maps
- State and local maps
- Aerial photography
- Verified flow path models
- Flow path trace analysis in a Geographic Information System (GIS)
- USGS StreamStats

Determining perennial or intermittent flow:

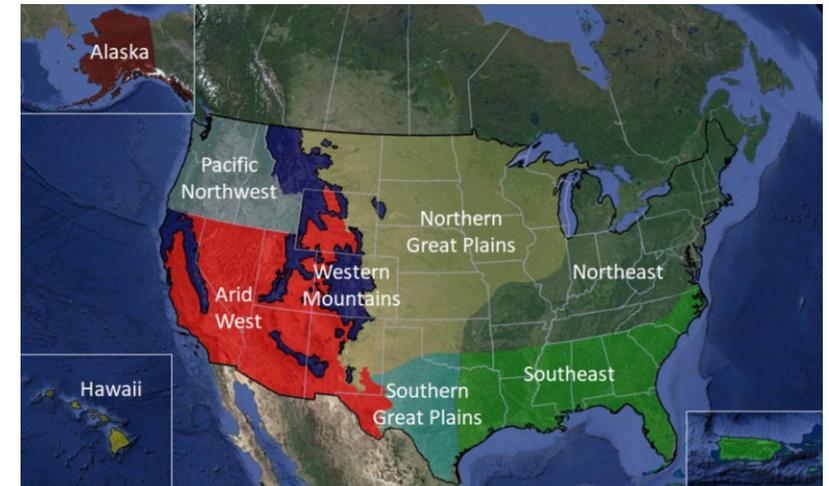
- NHD or local maps
- Aerial photography
- NRCS hydrologic tools and soils maps
- NOAA snow maps
- Verified modeling tools
- Stream Duration Assessment Methods (SDAMs)



STREAMFLOW DURATION ASSESSMENT METHODS (SDAMS)



- EPA is working cooperatively with USACE to develop rapid, field-based methods to classify streamflow duration by region
- Status of Northeast/Southeast SDAM
 - Preparation for baseline data collection and site sampling is underway
 - Candidate indicators were identified through a literature review of existing SDAMs
 - 240 baseline reaches are planned to be instrumented with conductivity loggers in 2020/2021
 - 160 validation reaches will also be visited throughout both regions 2021
- Will be available publicly on the EPA's website for download
 - <https://www.epa.gov/nwpr/implementation-resources>





IMPLEMENTATION OF NWPR



Determining surface flow and surface water connections that occur in a typical year:

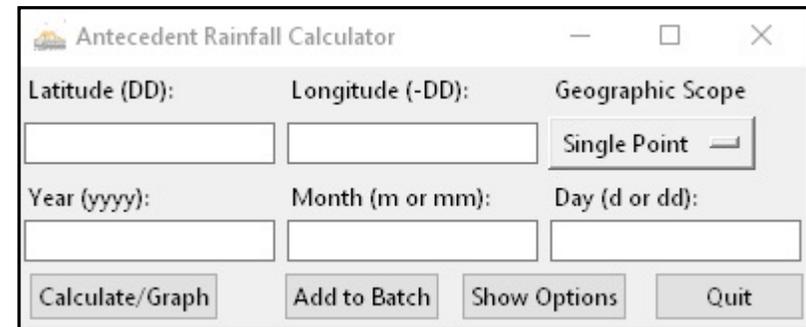
- The agencies have developed an Antecedent Precipitation Tool (APT) that collects NOAA precipitation from nearby weather stations and compares precipitation from the time period of interest with precipitation data from the past 30 years, that may be used to determine whether precipitation conditions fall within the normal range.
- Other data sources and tools that may be used to inform whether hydrologic flows or surface water connections occur under normal climatic conditions include:
 - Palmer Drought Severity Index
<https://www.ncdc.noaa.gov/temp-and-precip/drought/historical-palmers/psi/201811-201910>
 - WebWIMP - <http://climate.geog.udel.edu/~wimp/>
 - NOAA National Snow Analysis Map - <https://www.nohrsc.noaa.gov/nsa/>
 - NRCS Snow Telemetry – <https://www.wcc.nrcs.usda.gov>
 - Standard Precipitation Index - <https://www.ncdc.noaa.gov/temp-and-precip/drought/nadm/indices>
 - NOAA/National Weather Service Meteorological Stations
 - WETS tables - https://www.wcc.nrcs.usda.gov/climate/wets_doc.html
 - Continuous flow models
 - Hydrologic models
 - Familiar resources (aerials, topographic maps, soil surveys, etc...)
 - Physical and biological field indicators



THE ANTECEDENT PRECIPITATION TOOL (APT)

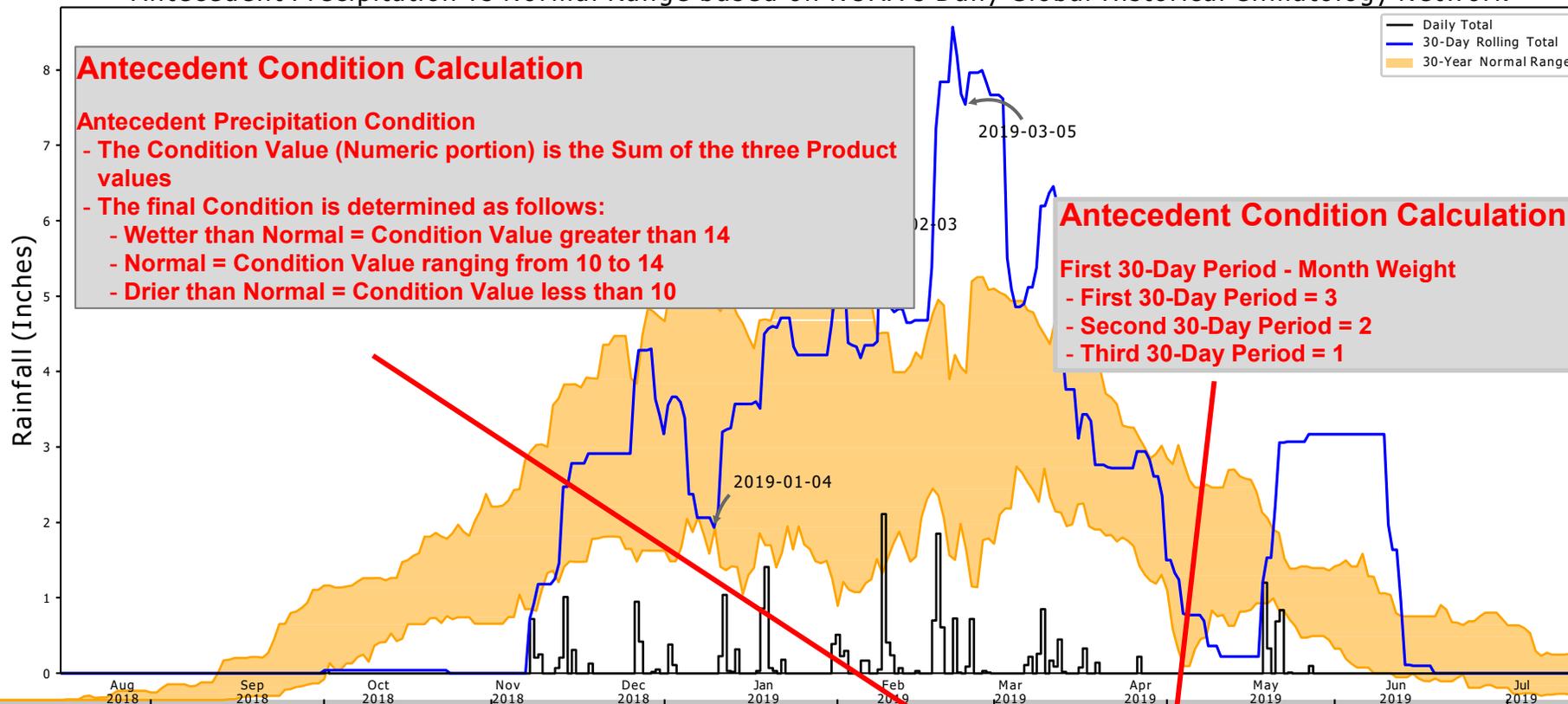


- Developed and maintained by USACE.
- Assesses rainfall data from the preceding 30 years.
- The APT is automated and provides a consistent methodology.
- Includes information from the Web-based Water-Budget Interactive Modeling Program (WebWIMP) and Palmer Drought Severity Index.
- In addition to the information generated by the APT, the following should also be considered:
 - the range of climatic variables and data available through remote tools, and
 - direct on-site observations.



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

Antecedent Precipitation vs Normal Range based on NOAA's Daily Global Historical Climatology Network



Coordinates	38.5, -121.5
Observation Date	2019-03-05
Elevation (ft)	7.14
Drought Index (PDSI)	Moderate wetness
WebWIMP H₂O Balance	Wet Season

30 Days Ending	30 th %ile (in)	70 th %ile (in)	Observed (in)	Wetness Condition	Condition Value	Month Weight	Product
2019-03-05	2.669291	4.561024	7.543307	Wet	3	3	9
2019-02-03	1.259449	4.777953	5.350394	Wet	3	2	6
2019-01-04	1.748425	5.048425	1.933071	Normal	2	1	2
Result							Wetter than Normal - 17

Weather Station Name	Coordinates	Elevation (ft)	Distance (mi)	Elevation	Weighted	Days (Normal)	Days (Antecedent)
SACRAMENTO EXECUTIVEAP	38.5069, -121.495	15.092	0.548*	7.952*	0.251*	11345	90
SACRAMENTO 5 ESE	38.5556, -121.4169	38.058	5.398	22.966	2.553	8	0



Figure generated using the Antecedent Rainfall Calculator

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Determining adjacency can be determined through a combination of:

- Federal, state and local maps
- Aerial photography and satellite imagery
- Other remote sensing information
- On-site observations
- Identification of artificial structures that allow for a direct hydrologic surface connection:
 - Construction design plans
 - Permitting data
 - State and local information,
 - Levee or drainage district information

The agencies will continue to use existing resources, methods, and practices to verify the presence of wetlands and to delineate wetland boundaries (e.g., the Corps' Wetland Delineation Manual).



IMPLEMENTATION OF NWPR



Determining inundation by flooding can be determined through a combination of:

- USGS stream gage records
- Recurrence intervals of peak flows
- Wetland surface water level records
- Flood records
- Aerial photography and satellite imagery
- Inundation modeling techniques and tools
- Site visits and dated photographs

Hydrologic Engineering Center's River Analysis System (HEC-RAS)

- USACE software which allows users to perform inundation mapping and create inundation depth datasets.

<https://www.hec.usace.army.mil/software/hecras/>

Welcome to the Hydrologic Engineering Center's (CEIWR-HEC) River Analysis System (HEC-RAS) website. This software allows users to perform one-dimensional steady flow, one and two-dimensional unsteady flow calculations, sediment transport/bed computations, and water temperature/water quality modeling.



WHAT ARE THE IMPLICATIONS OF NWPR?



The NWPR clarifies the definition of waters of the U.S.

- Does **not** change the types of activities regulated under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.
- Does **not** change the USACE permitting process.
- Does **not** affect state or local permitting processes or jurisdiction.



RULE TEXT AND DOCUMENTATION AVAILABLE AT :
[HTTPS://WWW.EPA.GOV/NWPR](https://www.epa.gov/nwpr)