

# Jurisdiction Update

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## USACE Norfolk District



US Army Corps of Engineers  
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# Most Recent Jurisdiction Change

- On 30 August 2021, a U.S. District Court in Arizona issued an order vacating and remanding the Navigable Waters Protection Rule (NWPR) in the case of Pascua Yaqui Tribe v. U.S. Environmental Protection Agency.
- In accordance with a 2 September 2021 directive from the Acting Assistant Secretary of the Army for Civil Works, the Corps resumed conducting approved jurisdictional determinations (AJDs) nationwide, consistent with the pre-2015 waters of the U.S. (WOTUS) regulatory regime. The pre-2015 WOTUS regulatory regime is the 1986 WOTUS regulation, as informed by the 2003 SWANCC and 2008 Rapanos Guidance documents.
- Again, as a result, the Corps and EPA no longer utilize the Navigable Waters Protection Rule (NWPR).

# 1986 Regulations

## 33 CFR § 328.3 Definitions (**for Section 404 CWA**)

(a) The term waters of the United States means

- (1) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

# 86 Regulations continued

- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.
- (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

# Rapanos Guidance

- The Corps and EPA utilize the December 2, 2008 version of The Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States.
- Replaced initial June 6, 2007 memorandum.

# Rapanos Jurisdictional

The agencies **will assert jurisdiction** over the following waters:

- Traditional navigable waters (TNW)
- Wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to the TNW.
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g ., typically three months)
- Wetlands that directly abut such tributaries

# Rapanos Potentially Jurisdictional

The agencies **will decide jurisdiction** over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent waters
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

# Rapanos generally not jurisdictional

The agencies **generally will not assert jurisdiction** over the following features:

- Swales or erosional features (e .g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) **excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water** generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has a relatively permanent flow into waters of the U.S., or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to the surface hydrologic connection between an adjacent wetland and a TNW.



# SWANCC

-concluded only that the Corps and EPA could not continue to use the migratory bird rule to assert section 404 jurisdiction over isolated waters.

# Prior Approved Jurisdiction Determinations

As a result of the change in jurisdiction, the Corps can no longer utilize any Approved Jurisdictional Determinations (AJDs) made from any prior jurisdictional rule, including the NWPR, for any permit decisions.

Preliminary Jurisdictional Determinations (PJDs) not affected and can be used for permit decisions.

# Jurisdictional Determination Options

Preliminary JD (PJD): assumption by the recipient that all waters shown in the review area are jurisdictional.

Approved JD (AJD): states what is within Corps jurisdiction. But may not be usable in the future for permits.

Delineation only: No PJD or AJD issued by the Corps. Consists only of a review of delineated areas proposed to be impacted. It will not address the remaining areas of waters or wetlands on the site. Usually consists of a delineation submitted with a permit application.

Talk with your designated Corps project manager regarding these options to determine what is best for your situation. In addition, for any questions regarding jurisdiction discuss them with your Corps project manager who can raise the issue per our internal procedures if warranted.

# Proposed Rule

On 18 November 2021, the U.S. Environmental Protection Agency and the Department of the Army (“the agencies”) announced the signing of a proposed rule to revise the definition of “waters of the United States” (WOTUS) under the Clean Water Act.

On December 7, 2021 the proposed rule was released in the Federal Register for public comment.

The agencies are proposing to restore the longstanding, familiar 1986 regulations, with amendments to reflect the agencies’ determination of the statutory limits on the scope of the “waters of the United States” informed by Supreme Court case law. Therefore, this proposed rule retains the structure of the agencies’ 1986 definition of “waters of the United States,” and the text of that definition where revisions are not warranted. Continuity with the 1986 regulations will minimize confusion and provide regulatory stability for the public, the regulated community, and the agencies, while protecting the nation’s waters.

Potentially could be issued late this year.