

# NAEP WEBINAR:

## *WATERS OF THE UNITED STATES DEFINITION EVOLUTION: MEANDERING RIFFLES, POOLS, AND RUNS*

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Disclaimer: The views expressed in this presentation are my own and do not necessarily represent the views of the Army or DoD.

# OVERVIEW

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## ➤ THE CWA & THE CORPS' 404 PERMITTING ROLE

- A Brief History

## ➤ WOTUS RULES

- Past & Present
- Supreme Court (Sackett 2.0)
- Future?
- Retroactivity

## ➤ CORPS JDs

- Judicial Review
- NWPR Vacatur & AJs

# WOTUS

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- The 1972 amendments to the Clean Water Act established federal jurisdiction over “navigable waters.”
- What are “navigable waters”?
  - Section 502(7) of the Act defines “navigable waters” as the “waters of the United States, including the territorial seas.”

# WOTUS

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- What are “Waters of the United States”?
  - A term used to establish the geographic reach of federal jurisdiction under the CWA.
  - Not defined in the CWA statute.
  - The CWA provides discretion for EPA and the U.S. Department of the Army to define “waters of the United States” in regulations.
  - Since the mid-1980s, Corps regulations define WOTUS at 33 CFR 328.3.

# CWA Section 404 Permitting

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- The U.S. Army Corps of Engineers (Corps) administers the CWA Section 404 permitting program.
- Corps 404 permits authorize the discharge of dredged or fill material from a point source into “waters of the United States.”

# “WOTUS” under Section 404

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## ➤ The “Civiletti Memorandum”

- 43 U.S. Op. Atty Gen. 197 (1979)

“I, therefore conclude that the structure and intent of the Act support an interpretation of § 404 that gives the [EPA] Administrator the final administrative responsibility for construing the term ‘navigable waters.’”

The 1986 Regulations  
(33 C.F.R. Part 328)  
&  
2008 Rapanos Guidance

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In coordination with EPA, the Corps promulgated the 1986 Regulations interpreting “WOTUS” as:

- Traditional navigable waters, interstate waters, and territorial seas;
- Impoundments of jurisdictional waters;
- Intrastate waters and wetlands, the “use, degradation, or destruction of which could affect interstate or foreign commerce;”
- Tributaries of jurisdictional waters; and
- Wetlands adjacent to jurisdictional waters (other than waters that are themselves wetlands).

33 C.F.R. 328.3(a) (1986)



## ➤ *Rapanos v. United States*

- 547 U.S. 715 (2006)

### Justice Scalia's plurality opinion for "WOTUS"

- "Relatively permanent" waters connected to traditional navigable waters; and
- Wetlands with a "continuous surface connection" with those waters.

### Justice Kennedy's concurring opinion for "WOTUS"

- Waters or wetlands must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.
- A wetland or water meets the "significant nexus" test if it "significantly affects the chemical, physical, and biological integrity" of a navigable water.

## ➤ The 2008 Rapanos Guidance

- Clean Water Act jurisdiction exists if a water meets either the relatively permanent standard or the significant nexus standard.
- The agencies have consistently construed *Rapanos* to mean that a water is jurisdictional under the Clean Water Act if it meets either the relatively permanent standard or the significant nexus standard.
- The agencies' assertion of jurisdiction over traditional navigable waters and their adjacent wetlands remains unchanged by *Rapanos*.

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## ➤ The Results of *Rapanos*

- Neither the plurality nor the concurring opinions in *Rapanos* invalidated any of the regulatory provisions defining “waters of the United States.”
- Circuit Court interpretations –
  - Clean Water Act jurisdiction exists where Justice Kennedy’s significant nexus standard is met.
  - None have held that solely the Justice Scalia’s relatively permanent standard may be used to establish CWA jurisdiction.
  - Some have held that the government may establish jurisdiction under either standard.

# Circuit Court Decisions (interpreting *Rapanos*)

- *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006)
- *United States v. Gerke Excavating*, 464 F.3d 723 (7th Cir. 2006)
- *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011)
- *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009)
- *Precon. Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011)
- *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007)(superseding the original opinion published at 457 F.3d 1023 (9th Cir. 2006))
- *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008)
- *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007)
- *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)

## ➤ *U.S. v. Robison*

- 505 F.3d 1208 (11th Cir. 2007)
  - “[W]e adopt Justice Kennedy's ‘significant nexus’ test as the governing definition of ‘navigable waters’ under *Rapanos*.”

## ➤ *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*

- 633 F.3d 278 (4th Cir. 2011)
  - “The parties here agree that Justice Kennedy's ‘significant nexus’ test governs and provides the formula for determining whether the Corps has jurisdiction over the Site Wetlands.”
  - Did not address “whether the plurality's ‘continuous surface connection’ test provides an alternate ground upon which CWA jurisdiction can be established.”

# 2015 CLEAN WATER RULE

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## The 2015 Clean Water Rule:

- Introduced 3 categories of WOTUS jurisdiction.
  - Waters considered to be “jurisdictional by rule.”
  - Waters subject to case-specific analysis.
  - Categorically excluded waters.
- Never implemented in South Carolina due to litigation stays.
- Rescinded in 2019; EPA and the Corps reinstated the 1986 Regulations while working on a new “WOTUS” rule, which became the NWPR.

# 2020 Navigable Waters Protection Rule (NWPR)

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## The 2020 Navigable Waters Protection Rule :

- Redefined WOTUS based on 4 general categories (w/ new definitions):
  - The territorial seas and traditional navigable waters;
  - Tributaries of such waters (i.e., perennial and intermittent tributaries that contribute surface water flow to such waters);
  - Certain lakes, ponds, and impoundments of jurisdictional waters; and
  - Wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands).
- Provided a narrower scope of “WOTUS” jurisdiction.

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➤ *Pascua Yaqui Tribe v. EPA*

- 2021 WL 3855977 (D. Ariz. Aug. 30, 2021)
- Remanded the NWPR to the agencies and vacated the rule.

➤ EPA and Corps: Joint Announcement (September 2021)

- “In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.”

# Supreme Court Developments

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## ➤ *Sackett v. EPA*

- 8 F.4th 1075 (9<sup>th</sup> Cir. 2021)
- Dispute over which *Rapanos* test governs WOTUS jurisdiction.
  - Sackett argued that Justice Scalia’s plurality test governed whether the on-site wetlands were “WOTUS.”
  - *Held*: Justice Kennedy’s “significant nexus” test is controlling.

## ➤ Supreme Court Granted Cert. to Review:

- Whether the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C § 1362(7).

# Proposed “WOTUS” Rulemaking

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➤ The Proposed Rule's approach to "WOTUS":

- Waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of the "waters of the United States" and informed by Supreme Court case law.
- Clean Water Act jurisdiction would exist if a water meets either the relatively permanent standard or the significant nexus standard.

## The Proposed Rule interprets “WOTUS” as:

- Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands;
- Most impoundments of “waters of the United States”;
- Tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard;
- Wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and
- “Other waters” that meet either the relatively permanent standard or the significant nexus standard.

# Retroactivity of WOTUS Regulations

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# 2015 Clean Water Rule

- *United States v. HVI Cat. Canyon, Inc.*
  - 314 F.Supp.3d 1049 (C.D. Cal. 2018)
  - “The 2015 EPA Clean Water Rule was not in effect when [the] discharges occurred and [the 2015 Clean Water Rule] therefore does not govern this case.”
  
- *Jones Creek Investors, LLC v. Columbia Cty.*
  - 2016 WL 593631 (S.D. Ga. 2016)
  - “[I]t is clear . . . That the [2015 Clean Water Rule] does not apply retroactively.”
  
- *Foster v. EPA*
  - 2017 WL 3485049 (S.D. W.Va. Aug. 14, 2017) (same).

# 2020 Navigable Waters Protection Rule

## ➤ *United States v. Mashni*

- 547 F.Supp.3d 496 (D.S.C. 2021)
- “[T]he court concludes that the presumption against retroactivity controls and the law in effect at the time of defendants’ conduct—the 1986 Regulations, not the NWPR—governs this case.”

➤ The Ninth Circuit and Western District of New York have also reached the conclusion that the NWPR does not have retroactive application.

➤ *United States v. Lucero*, 989 F.3d 1088 (9<sup>th</sup> Cir. 2021).

➤ *United States v. Acquest Transit LLC*, 2021 WL 809984 (W.D.N.Y. Mar. 3, 2021).

# Judicial Review of Corps JDs

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# Corps-issued Approved Jurisdictional Determinations (AJDs)

- An AJD is a document provided by the Corps 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 C.F.R. 331.2.
- AJDs are generally valid for five years unless new information warrants revision prior to the expiration date.
  - RGL No. 05-02.

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## *U.S. Army Corps of Engineers v. Hawkes Co.*

- 136 S. Ct. 1807 (2016)
- *Held*: An Approved Jurisdictional Determinations (AJD) issued by the Corps is a final agency action subject to APA judicial review.

## Regulatory Guidance Letter (RGL) No. 16-01

- JDs are not addressed in the CWA statute.
- Corps regulations make their use discretionary; there is no right to a JD.
- The Corps has discretion to:
  - Determine how to respond to a request for a JD.
  - Set reasonable priorities based on workload and available regulatory resources.
  - Give higher priority to a JD request when it accompanies a permit request.

# NWPR Vacatur & AJDs

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## ➤ Corps Announcement (January 2022)

- Corps actions are governed by the regulatory definition at the time of the action.
  - Example: WOTUS definition in effect at the time the Corps completes the AJD governs (rather than the date of the AJD request).
- AJDs completed prior to the [*Pascua Yaqui Tribe*] decision and not associated with a permit action (also known as “stand-alone” AJDs under RGL No. 16-01) will not be reopened until their expiration date, unless one of the criteria for revision is met under RGL No. 05-02.
- NWPR AJDs will not be used for Corps permit actions.

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QUESTIONS?