

EPA/US Army Corps of Engineers' Final Rule: *Revised Definition of "Waters of the United States"*



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Current (Pre-2015) WOTUS Definition: 33 CFR 328.3 (a)

1. Traditional Navigable Waters
 2. Interstate Waters
 3. Other Waters
 4. Impoundments: preamble exclusions
 5. Tributaries
 6. The Territorial Seas
 7. Adjacent Wetlands
- Excluded and Non-jurisdictional Waters

<https://www.govinfo.gov/content/pkg/CFR-2011-title33-vol3/pdf/CFR-2011-title33-vol3-part328.pdf>

Revised Definition of “Waters of the United States” effective: 20 March 2023

1. Traditional Navigable Waters,
Territorial Seas & Interstate Waters
2. Impoundments
3. Tributaries
4. Adjacent Aquatic Resources
5. Intrastate Lakes and Ponds, Streams
or Wetlands: Relatively Permanent or
Significant Nexus

Exclusions

CWA WOTUS Timeline

1972
Regulations

2003
Guidance
post-
SWANCC

2015 “Clean
Water Rule”

2021 Vacatur of
NWPR and
return to pre-
2015 definition

Sackett vs. EPA
SCOTUS Oral
Arguments: October
2022 Ruling March-
April 2023?

1986
Regulations

2007-2008
Rapanos
guidance
issued and
revised

2020
“Navigable
Waters
Protection
Rule”

WOTUS Definition
Final Rule
Effective 20 March
2023

What are “Waters of the United States”?

- Defines geographic reach of federal jurisdiction under the CWA
- Not defined in the CWA statute
- 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.

1972: TERRITORIAL SEAS AND TRADITIONAL NAVIGABLE WATERS (TNW):



- CWA amendments established federal jurisdiction
- **Interstate** or Foreign Commerce
- Subject to Ebb and Flow of Tide

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.’”



*SWANCC v. United States Army
Corps of Engineers: 2001*

- Interstate commerce:
- Migratory Bird Rule
- Intrastate waters
- Isolated Wetlands

Rapanos v. United States: 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.

Rapanos v. United States: 2006

- Neither opinion invalidated any WOTUS regulatory provisions
- Circuit Court interpretations –
 - Kennedy's significant nexus standard = CWA jurisdiction
 - Only Justice Scalia's relatively permanent standard does not
 - Government may establish jurisdiction under either standard = some

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)

Circuit Court Decisions (interpreting *Rapanos*)

- *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 Engineers*
 - 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.”

Clean Water Rule: 2015

- Scheduled to become effective in August 2015
- Nationwide 3 year implementation delay
- January 2018: CWR WOTUS definition became effective in 22 states: TN and VA only southeastern states
- October 2019: CWR rescinded nationwide, Rapanos reinstated

Navigable Waters Protection Rule

- Effective: 22 June 2020
- Narrowed WOTUS definition
- Required surface connection
- Non-adjacent = Excluded.....**significant
nexus**



NWPR Remanded and Vacated: 30 August 2021

- *Pascua Yaqui Tribe v. EPA*
 - Arizona District Court

- 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.*

Revised Definition of “Waters of the United States”

- 18 November 2021: EPA and USACE announced the signing of a proposed rule to revise the definition of the “waters of the United States”
- 7 December 2021: proposed rule was published in the Federal Register
- 18 January 2023: Final Rule published in the Federal Register Vol. 88, No. 11
- 20 March 2023: Final Rule becomes effective

'23 Final Rule	NWPR	Pre-2015 ('86 Rule+)
Traditional Navigable, Territorial Seas, Interstate Waters	Interstate Waters	Grouped, same definitions/protections
Impoundments	Included lakes and ponds; natural features grouped in other FR categories (a)(5) waters	FR: intrastate waters must meet either RP or SN tests
Tributaries	Ephemeral & Interstate not connected to TNW or TS	RP and SN tests different

'23 Final Rule	NWPR	Pre-2015 ('86 Rule+)
Adjacent Wetlands	Only immediately adjacent (touching) Artificial separation: direct hydrologic surface connection	RP and SN tests different
Intrastate Waters not in others	Not in others	Interstate commerce test
Exclusions	Groundwater & diffuse stormwater Included some TNWs and TSs	Preamble waters added to FR FR clarifies PC cropland

'23 Final Rule	NWPR	Pre-2015 ('86 Rule+)
<p>“Relatively Permanent” Flowing or standing year-round or continuously during certain times of year</p>	<p>Must contribute surface flow to TNW or TS in “typical year”</p> <p>Only adjacent wetlands with a regular surface connection</p>	<p>Typically flow year- round or continuous flow seasonally</p>
<p>Significant Nexus: Significantly affect chemical, physical or biological integrity of WOTUS</p> <p>Defined factors and functions</p>	<p>Significant Nexus</p>	<p>FR analyses “similarly situated waters in the region”</p> <p>FR region = catchment that drains to and includes the tributary (or wetland) of interest; includes all uphill land</p>

(a)(1) Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- No changes to text or substance of 1986 regulations
- Consolidated into one paragraph to streamline text and increase clarity
- Does not alter the agencies' longstanding interpretation and implementation
- Cannot be protected without also protecting the waters that have a significant nexus to those waters
- Waters that cross a state-tribal boundary
 - Agencies are not taking a position at this time
 - Agencies will address in a subsequent action
 - May be jurisdictional if it otherwise falls within the rule's WOTUS definition

(a)(1) Traditional Navigable Waters

- 33 CFR part 329: Any test:
 - (a) subject to the ebb and flow of the tide
 - (b) the waterbody is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce)
- Identical to 1986 and NWPR (2020) definitions

(a)(1) Territorial Seas

- Seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.
- Included in 1986, 2015 CWR and NWPR (2020) definitions
- Not a type of Traditional Navigable Water
- Portions that are not navigable or able to be used in interstate or foreign commerce are still jurisdictional

(a)(1) Interstate Waters

- All rivers, lakes, and other waters that flow across, or form a part of, State boundaries and with other countries
 - Amargosa River: flows from NV into a Death Valley, CA
 - Great Dismal Swamp: crosses NC/VA border
- Jurisdictional through the entirety of their delineated extent
 - Streams and rivers crossing state boundaries determined using stream order
- Reasonable to construe...without need for further assessment
 - History of the statute
 - Supreme Court case law
 - Legislative history
 - Objective of the Act to restore and maintain the integrity of the nation's waters
- Included in 1986, 2015 CWR
- **Not in NWPR (2020) definitions**

(a)(2) Impoundments

- Distinguishable from natural lakes and ponds
 - Created by discrete structures (e.g. dams or levees)
 - Artificial (e.g. reservoirs) and natural (e.g. beaver ponds)
- Impoundments of waters that:
 - Are WOTUS under this rule's (a)(1), (a)(3) or (a)(4) definitions at the time the impoundment was created
 - Meet WOTUS (a)(1), (a)(3) or (a)(4) at the time of assessment, **regardless of status at the time of impoundment**
- **Not categorically covered by (a)(5)**
 - Impounded (a)(5) waters must be reassessed under (a)(5)
 - Jurisdictional if they meet relatively permanent or significant nexus standards
- Tributaries to (a)(2) impoundments and wetlands adjacent to them are WOTUS if they meet relatively permanent or significant nexus standards
- Wetlands adjacent to (a)(2) impoundments are WOTUS if they meet relatively permanent or significant nexus standards

(b) Exclusions

(a)(1) Waters not included

- waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
- prior converted cropland;
- ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- artificially irrigated areas that would revert to dry land if the irrigation ceased;
- artificial lakes or ponds created by excavating 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; and
- swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Relatively Permanent Standard (RP)

- Flowing or standing water year-round or continuously during certain times of the year
- Certain wetlands that are characterized by standing water (*e.g.*, many swamps)
- Does not include features with flowing or standing water for only a short duration in direct response to precipitation.

Significant Nexus Standard

- Waters that alone, or **in combination with other similarly situated waters** in the region, **significantly affect** the chemical, physical, or biological integrity of the waters identified in paragraph (a)(1) of this rule.
- ...limited to consideration of effects on traditional navigable waters, the territorial seas, and interstate waters
- ...whether waters are providing **common, or similar, functions** for paragraph (a)(1) waters such that it is reasonable to consider their effects together.
- ...**not an assessment** of whether a particular discharge of a pollutant will **have an effect** on a paragraph (a)(1) water
- ...**clear framework** for the significant nexus analysis that will be done on a **case-specific basis**
- Significantly affect = a **material influence** on the **chemical, physical, or biological integrity** of” a paragraph (a)(1) water...
 - evaluated either alone or in combination
 - other similarly situated waters in the region
 - the functions the evaluated waters perform

SCOTUS

Sackett v. EPA

Oral arguments: 3 October

- 8 F.4th 1075 (9th 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).

Sackett v. EPA

Oral arguments: 3 October

- Focused on Adjacency, much less on Significant Nexus
- “Bright Line Rule...tried that in the 2015 Rule...criticized by many as being arbitrary”
- “laws...text isn’t susceptible to bright-line rules
- “...adjacency is one of those”

Retroactivity of WOTUS Regulations

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 (9th Cir. 2021).
- *United States v. Acquest Transit LLC*, 2021 WL 809984 (W.D.N.Y. Mar. 3, 2021).

Judicial Review of Corps JDs

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.

- *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

JURISDICTIONAL DETERMINATIONS

PRELIMINARY vs APPROVED

Preliminary	vs	Approved
Advisory		Final
May be present		Present or absent
Presumes all are WOTUS		WOTUS/nonWOTUS
Does not expire		Valid for 5 years
No WOTUS documentation		WOTUS documentation required
Cannot be appealed		Appealable

USACE Announcement (January 2022)

- USACE 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.**

WATERS OF THE STATE: North Carolina

1996: Isolated Wetland Rule

**STATE OF NORTH CAROLINA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER RESOURCES**

**STATE GENERAL PERMIT FOR IMPACTS TO ISOLATED AND
OTHER NON-404 JURISDICTIONAL WETLANDS AND SURFACE WATERS
PERMIT NUMBER: IWGP100000**



QUESTIONS?

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