

USACE Regulatory Program – Ongoing Developments

Society of Texas Environmental Professionals
Fort Worth, TX
January 24, 2018

Chandler Peter
Technical Specialist
Regulatory Division
Fort Worth District



®

▪ US Army Corps of Engineers

▪ **BUILDING STRONG**®



Topics

Waters of the US Rule
Jurisdictional Determinations
2017 Nationwide Permits
Recent Water Supply Actions



Waters of the U.S. (1986)

33 CFR 328 states:

- (a)(1) All 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;
- (a)(2) All interstate waters including interstate wetlands;
- (a)(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:
- (a)(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (a)(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (a)(6) The territorial seas;
- (a)(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.



Difficulties with 1986 Rule

- Regulation does not include definitions for many terms such as, “tributary,” “significant nexus”
- Non-jurisdictional waters not clearly defined.
- Regulations do not reflect all features that historically have been considered non-jurisdictional
- Lacks of clarity on ditches
- Court cases have resulted in confusion & lack of clarity for regulated public & federal agencies



Judicial Interpretations



CWA Section 404 Jurisdiction: A Short History

- 1972: Enacted.
- 1975: NRDC vs. Calloway.
- 1977: Regulation & Congressional Amendments; 404(f) Exemptions.
- 1979: Civiletti decision on CWA authority.
- 1985: SCOTUS in *Riverside v. Bayview Homes*.
- 1986: Consolidated regulations including “Migratory Bird Rule.”
- 1993: Codified policy that prior converted croplands are not WoUS.
- 2001: SCOTUS in *SWANCC v. USACE*.
- 2003: Advance Notice of Proposed Rulemaking; 2003 Guidance.
- 2006: SCOTUS in *Rapanos & Carabell*.
- 2007-2008: Rapanos guidance issued and revised.
- 2011-2012: New draft guidance.
- 2012-2015: Clean Water Rule defining WoUS.
- 2015: Multiple legal challenges w/ rule stayed
- 2017: Trump administration initiates efforts to revise rule



| Subject | Former Rule | New Rule |
|------------------------------|--|--|
| Navigable Waters | Jurisdictional | Same |
| Interstate Waters | Jurisdictional | Same |
| Territorial Seas | Jurisdictional | Same |
| Impoundments | Jurisdictional | Same |
| Tributaries | Did not define tributary. | Defined tributary for the first time as water features with bed, banks, and ordinary high water mark, and contribute flow downstream. |
| Adjacent Wetlands/Waters | Included wetlands adjacent to traditional navigable waters, interstate waters, territorial seas, and impoundments, or tributaries. | Includes waters adjacent to jurisdictional waters within a minimum of 100', or within 100-year floodplain to a maximum of 1,500' from the OHWM, or 1500' from the HTL. |
| "Isolated" or "Other Waters" | Included all other waters the use, degradation, or destruction of which could affect interstate or foreign commerce. | <p data-bbox="1302 831 1908 1093">Includes specific waters that are similarly situated: prairie potholes, Carolina/Delmarva bays, western vernal pools, pocosins, and Texas coastal prairie wetlands, when they have a significant nexus.</p> <p data-bbox="1302 1145 1908 1408">Includes waters with a significant nexus within the 100-year floodplain of a TNW, interstate water, or territorial seas, as well as waters with a significant nexus within 4,000' of the first five categories above.</p> |

Waters and Features That Are Not WoUS

Existing Regulatory Definition of WOUS and 2003/2008 Guidance

- 1986 Regulations exclude:
 - Waste treatment systems.
 - Prior converted croplands.
- 1986 Preamble identifies features that are “generally” not considered WoUS.

Clean Water Rule Paragraph (b) of the Rule

- Excluded waters/features, even if they otherwise meet (a)(4)-(a)(8) categories:
 - WTSE and PCC.
 - Certain ditches.
 - Groundwater.
 - Stormwater control features.
 - Wastewater recycling structures.
 - Others similar to 1986 Preamble waters.
 - Erosional features and lawfully constructed grassed waterways.
 - Puddles.

Next Steps?

- Implementing 2 phase approach
 1. Reinstate 1986 regulation
 - Published in Federal Register June 27, 2017
 - Comment period closed September 27, 2017
 - Evaluating comments (+650,000)
 2. Develop new waters of the US rule
 - Public input and out reach and direct coordination w/ state governments
 - Propose 2 year applicability date of new rule
 - Comment period closed Dec. 13, 2017

<https://www.epa.gov/wotus-rule/rulemaking-process>



Jurisdictional Determinations

- Corps offers Approved & Preliminary JDs (2000)
- AJDs
 - Definitively states presence/absence of waters of US
 - Breaks out JD and non-JD water features
 - Requires various levels of coordination
 - Appealable
- PJDs
 - States that waters of US may be present
 - Assumes all waters are jurisdictional
 - No coordination
 - Not appealable



Jurisdictional Determinations

- Supreme Court renders US Army Corps of Engineers v. Hawkes Co., Inc., et al opinion (2016)
 - ▶ Concludes that Corps issuance of AJD is a final agency action and is subject to judicial review under the Administrative Procedures Act
- Previous litigation decisions had found that JDs were not final agency action



Jurisdictional Determinations

- 1986 Regulations 33 CFR 320.1(a)(6) state:
 - The Corps has authorized its district engineers to **issue formal determinations concerning the applicability of the Clean Water Act** or the Rivers and Harbors Act of 1899 to activities or **tracts of land** and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall **constitute a Corps final agency action**. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.



Regulatory Guidance Letter 16-01

- RGL 16-01 issued to clarify the JD process
- Added a new category: **No JD Whatsoever**
- JDs have to be specifically provided
- Corps does not make a determination without a request
- Clarified further in preamble to 2017 Nationwide Permits (NWP) where they establish that NWP can be verified without discussion of jurisdiction relative to waters of the US
 - Added another new term:
Wetlands, other special aquatic sites and other waters



2017 Nationwide Permits

- 52 Nationwide Permits
- 2 new permits added from 2012 versions
 - NWP 53 - Removal of Low Head Dams
 - NWP 54 - Living Shorelines
- Focus on environmental protection while providing timely and simplified authorizations for work in aquatic environments
- Are valid for 5 years from date of issuance (effective 3/2017 to 3/2022)
- Modified conditions, added notes & clarified definitions
 - Program clarifications?
- Regional conditions
 - Some statewide
 - Some District specific – 1 still pending



2017 Nationwide Permits

- **Pre-Construction Notification (PCN) required in many cases**
 - Potential to impact cultural resources
 - Potential to impact threatened or endangered species
 - Presence of wetlands/special aquatic sites
- Resource agency coordination required in some cases
- If project meets scope & conditions of NWP & does not involve or exceed PCN triggers and/or thresholds, project may be completed w/o a written authorization
 - NOTE: If PCN required but not submitted & work initiated, activity is unauthorized



Changes to Regularly Used NWP's

- NWP 3: Maintenance
 - Clarified removal of **previously authorized** features allowed
- NWP 12: Utility Line Activities (pipelines, power lines)
 - Temporary matting including
 - Clarified single and complete linear project
 - Added drilling fluid “blow out” remediation
 - Overhead line PCNs to be coordinated w/ DoD Siting Clearinghouse
- NWP 13: Bank Stabilization
 - Clarified activities allowed – not just bulkheads/revetments
 - Clarified how to measure cubic yardage
 - Clarified proper maintenance and maintenance activities
 - Requires native plants for bioengineering



Changes to Regularly Used NWP's

- NWP 14: Linear Transportation Projects
 - Clarified single and complete linear project
- NWP 18: Minor Discharges
 - No changes
- NWP 27: Aquatic Habitat Restoration, Enhancement & Establishment
 - Must include ecological reference information
 - Removal of existing features included in approved activities
- NWP 29: Residential Developments
 - Clarified loss of stream bed is to be included in ½ acre limit



Changes to Regularly Used NWP's

- NWP 33: Temporary Construction, Access, and Dewatering
 - PCN requirement narrowed to Section 10 waters only (but see Fort Worth Regional conditions concerning acreage limits for PCN in non-Section 10 wetlands)
- NWP 39: Commercial and Institutional Developments
 - Clarified loss of stream bed is to be included in ½ acre limit
 - Added wastewater treatment plants to list of examples of attendant features
- NWP 42: Recreational Facilities
 - Clarified loss of stream bed is to be included in ½ acre limit
- NWP 43: Stormwater Management Facilities
 - Noted that certain stormwater management facilities may not be waters of the U.S.



Fort Worth Regional Conditions

- Special habitats trigger PCN
 - Pitcher Plant Bogs
 - Bald Cypress-Tupelo Swamps
- Best Management Practice
 - Zebra Mussel transfer limit activities
- Activities on mitigation sites trigger PCN
 - Permittee Responsible Mitigation sites and/or Mitigation Banks
- Water intake structures trigger PCN
- Mitigation required for all losses that exceed 1/10th acre and stream losses over 300 linear feet
- PCN for NWP 12, 14 and/or 33 that involve temporary discharges into ½ acre or more of emergent and 1/10th acre for scrub-shrub/forested wetlands
- NWPs 51 & 52 will require coordination with USFWS



Templates to Expedite Permitting?

U.S. Army Corps of Engineers (USACE) Fort Worth District



Nationwide Permit (NWP) Pre-Construction Notification (PCN) Form

This form integrates requirements of the Nationwide Permit Program within the Fort Worth District, including General and Regional Conditions. Please consult instructions included at the end prior to completing this form.

Contents

- **Description of NWP 12**
- **Part I:** NWP Conditions and Requirements Checklist
 - General Conditions Checklist
 - NWP 12-Specific Requirements Checklist
 - Regional Conditions Checklist
- **Part II:** Project Information Form
- **Part III:** Project Impacts and Mitigation Form
- **Part IV:** Attachments Form
- **Instructions**

DESCRIPTION OF NWP 12 – UTILITY LINE ACTIVITIES

Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States (U.S.), provided the activity does not result in the loss of greater than 1/2-acre of waters of the U.S.

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the U.S., provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the U.S., such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the U.S. for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the U.S. (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the U.S., provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2 acre of waters of the U.S. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the U.S. to construct, maintain, or expand substation facilities.



Water Supply Developments

- Texas Water Availability Model
 - 2016 report issued
 - Found that state water rights model has limits relative to Corps regulatory permitting needs



Water Supply Developments

- Hydrologic Modeling Guidelines
 - Identifies recommended considerations relative to hydrologic analysis and modeling for permit actions
 - Includes scalability relative to permit type involved through inclusion of 3 tier structure
 - Intended to provide predictability in what can be requested for water supply permit reviews
 - To be released January 31, 2018



Water Supply Developments

- Risk and Reserve Analysis
 - 1 of 3 products to be developed by Corps associated with Water Supply Working Group (EPA, TWDB & Corps)
 - Assessing ways risks are incorporated into water supply planning
 - Includes development of interactive tool to be used between Corps and applicants



Corps Regulatory Program Information

- *National Regulatory Program Home Page:*
<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>
- *If this program assisted you, please help us improve our services by completing the survey on the following website: <http://per2.nwp.usace.army.mil/survey.html>*



Questions?



BUILDING STRONG®