

WATERS OF THE UNITED STATES (WOTUS)

THE CURRENT DEFINITION

Scott Matthews
Louisville District
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REGULATORY ROLLERCOASTER

- Bottom Line Up Front – Back to where we started pre-2015 WOTUS regime (i.e. 1986 WOTUS Regulation and Rapanos/SWANCC Guidance documents).
- On August 30, 2021, the U.S. District Court for the District of Arizona issued an order vacating and remanding the 2020 Navigable Waters Protection Rule (NWPR) in the case of *Pascua Yaqui Tribe v. U.S. EPA*.



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The 1986 regulation at 33 CFR 328.3 describes seven categories of waters of the US and identifies certain excluded/non-jurisdictional waters:

1. (a)(1): Traditional Navigable Waters
2. (a)(2): Interstate Waters
3. (a)(3): Other Waters
4. (a)(4): Impoundments
5. (a)(5): Tributaries
6. (a)(6): The Territorial Seas
7. (a)(7): Adjacent Wetlands
8. (a)(8): Excluded and Non-jurisdictional Waters

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



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(A)(5) OR TRIBUTARIES OF WATERS

2008 Rapanos Guidance:

- “The agencies will assert jurisdiction over **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).”



- “The agencies will assert jurisdiction over **non-navigable, not relatively permanent tributaries and their adjacent wetlands** where such tributaries and wetlands have a **significant nexus** to a traditional navigable water.”



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(A)(7) ADJACENT WETLANDS

Wetland – Dominance of hydrology, hydrophytic vegetation, and hydric soils (by 1987 Delineation manual and Regional Supplements)

Wetlands “abutting” an RPW



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(A)(7) ADJACENT WETLANDS

Wetlands physically separated from jurisdictional waters.



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(A)(7) ADJACENT WETLANDS

RPW (and abutting wetland)

Swale ("unbroken
surface connection")

Wetland



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PRIOR CONVERTED CROPLAND (PCC)



MEMORANDUM TO THE FIELD BETWEEN
THE U.S. DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION
SERVICE (NRCS),
THE U.S. DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS (CORPS),
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)
CONCERNING ISSUES RELATED TO IMPLEMENTATION OF
SECTION 404 OF THE CLEAN WATER ACT (CWA)
AND THE FOOD SECURITY ACT OF 1985, AS AMENDED (FSA)

July 2020

Any area that prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible.
33 CFR 328.3(c)(9)

EPA/Corps will recognize PCC designations by the Secretary of Agriculture unless area is abandoned and reverts to wetland.

For purposes of the Clean Water Act, abandonment occurs when PCC is not used for, or in support of, agriculture purposes at least once in the immediately preceding 5 years.



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WHERE DOES THAT LEAVE US?

- Any approved JDs completed on or after September 2, 2021, must be completed in accordance with the “pre-2015 WOTUS regulatory regime” (i.e. 1986 WOTUS Regulation and Rapanos/SWANCC Guidance documents).
- On January 5, 2022, the ASA(CW) issued guidance stating, “The Corps will not rely on an AJD issued under the NWPR...in making a new permit decision.”
 - The NWPR AJDs are still valid until the expiration date provided at the time of issuance of the AJD, but they can’t be used if a Section 404 CWA permit is necessary.
 - If a permit is required, the Corps will discuss options with the applicant, which may include presuming jurisdiction (“PJD”), issuing a new AJD under the current regulatory regime, or a combination of both [RGL 16-01].



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QUESTIONS?

Scott Matthews
(317) 543-9424 ext. 2
Scott.A.Matthews@usace.army.mil



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