

USACE REGULATORY UPDATE

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OUTLINE

- Nationwide Permits (NWP)
- Navigable Waters Protection Rule
- Reducing Regulation and Controlling Regulatory Costs



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NWPS - BACKGROUND

- General permits issued by Corps Headquarters to authorize activities across the country
 - Categories of activities with no more than minimal individual and cumulative adverse environmental effects
 - Reissuance process every 5 years
 - Rulemaking activity, with interagency review under EO 12866
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- Current NWPs issued on December 21, 2016
 - 52 NWPs
 - 32 general conditions
 - Effective on March 19, 2017
 - Currently scheduled to expire on March 18, 2022



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NWPS - OBJECTIVES OF THE PROPOSED CHANGES

- Under E.O. 13783, reduce regulatory burdens on the production, distribution and use of energy, while maintaining environmental incentives and protections provided by the NWPs
- Seek comment on ways to reduce duplication with federal agencies that use the NWPs
 - Federal agencies share similar responsibilities for environmental review of their projects
- Simplify the terms and conditions of the NWPs so that they can be implemented more consistently, with lower costs, and with no decline in environmental protection
 - Benefits to the regulated public, the Corps, and other agencies
 - The NWPs will continue to provide incentives to minimize impacts to aquatic resources, to qualify for a streamlined permit process



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EXECUTIVE ORDER 13783

- *Promoting Energy Independence and Economic Growth*
- Requires agencies to consider modifying existing regulations that potentially burden the development and use of domestically produced energy resources, such as oil, natural gas, coal, and nuclear energy
- Army issued a report identifying 9 NWP's that could be modified to reduce burdens on energy producers
- Notice of availability for this report published in Federal Register on November 28, 2017



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EXECUTIVE ORDER 13783

The 9 NWP's identified in the EO 13783 report for proposed changes:

- NWP 3, Maintenance
- NWP 12, Utility Line Activities
- NWP 17, Hydropower Projects
- NWP 21, Surface Coal Mining Activities
- NWP 39, Commercial and Institutional Developments
- NWP 49, Coal Remining Activities
- NWP 50, Underground Coal Mining Activities
- NWP 51, Land-Based Renewable Energy Generation Projects
- NWP 52, Water-Based Renewable Energy Generation Pilot Projects



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NWPS - LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA

- Principle C (Protecting Clean Water with Greater Efficiency)
 - 1. Eliminate Redundancy, Duplication, and Inconsistency in the Application of Clean Water Provisions
 - Authorize Federal agencies to select and use nationwide permits without additional Corps review
- Seek comment on whether to modify 23 additional nationwide permits so that pre-construction notification would not be required for federal permittees



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NWPS - 23 NWPS TO BE CONSIDERED UNDER LEGISLATIVE OUTLINE

- NWP 7, Outfall Structures and Associated Intake Structures
- NWP 8, Oil and Gas Structures on the Outer Continental Shelf
- NWP 18, Minor Discharges
- NWP 22, Removal of Vessels
- NWP 23, Approved Categorical Exclusions
- NWP 27, Aquatic Habitat Restoration, Enhancement, and Establishment Activities
- NWP 33, Temporary Construction, Access, and Dewatering
- NWP 34, Cranberry Production Activities
- NWP 36, Boat Ramps
- NWP 37, Emergency Watershed Protection and Rehabilitation
- NWP 38, Cleanup of Hazardous and Toxic Waste
- NWP 45, Repair of Uplands Damaged by Discrete Events
- NWP 53, Removal of Low-Head Dams
- NWP 54, Living Shorelines



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NWPS - DRAFT SCHEDULE

- January 29, 2020 – Draft proposed NWPs and regulatory impact analysis sent to OMB OIRA for EO 12866 review
- April 2020 – After proposed NWPs cleared by OMB OIRA, publish proposed NWPs in Federal Register for public comment (60-day comment period)
 - Corps districts issue public notices to solicit comment on proposed regional conditions
- June to August 2020 – Review comments, write draft final NWPs with responses to comments, and regulatory impact analysis
- September 2020 to November 2020 – Draft final NWPs and regulatory impact analysis at OMB OIRA for EO 12866 review
- December 2020 – Publish final NWPs in Federal Register, with effective date 60 days after publication



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NAVIGABLE WATERS PROTECTION RULE: “WATERS OF THE UNITED STATES” (WOTUS)

Final Rule: Categories of WOTUS

- Territorial seas and traditional navigable waters (TNW) (a)(1)
- Tributaries (a)(2)
- Lakes and ponds, and impoundments of jurisdictional waters (a)(3)
- Adjacent wetlands (a)(4)



KEY CHANGES TO CATEGORIES

From the Proposal:

- The proposal established six categories of WOTUS, whereas the final rule has four.
- Jurisdictional ditches must meet the conditions of other categories and are no longer a stand-alone category.
- Combines the category of lakes and ponds with the impoundments category.

From the 2019 Rule (i.e., pre-2015 practice):

- As in the proposal, the stand-alone interstate waters category is not included.
- As in the proposal, combines the categories of TNWs and territorial seas.
- As in the proposal, the final rule eliminates case-specific significant nexus analysis.



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NAVIGABLE WATERS PROTECTION RULE: “WATERS OF THE UNITED STATES” (WOTUS)

(a)(1) Territorial seas and TNWs:

- The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.

Key Changes from the 2019 Rule:

- TNWs and territorial seas combined.
- No substantive changes. Appendix D on TNWs retained;
- Key Changes from the proposal:
- No substantive change to this category from proposal



NAVIGABLE WATERS PROTECTION RULE: “WATERS OF THE UNITED STATES” (WOTUS)

(a)(2) Tributaries:

- “Tributary” means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a paragraph (a)(1) water in a typical year either directly or through one or more paragraph (a)(2)-(4) waters. A tributary must be perennial or intermittent in a typical year.
- A tributary does not lose its jurisdictional if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream, non-jurisdictional ditch), through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.
- The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of the definition.



KEY ELEMENTS AND CHANGES

Key Changes from the 2019 Rule:

- Removes the significant nexus test.
- All ephemeral streams are non-jurisdictional, whereas some are found jurisdictional under 2019 Rule following a significant nexus test.

Key Changes from the Proposal:

- Ditch is incorporated into tributary definition (see next slide).
- Perennial and intermittent waters are jurisdictional if they are upstream of an ephemeral break but contribute surface water flow to a downstream jurisdictional water in a typical year.
- This change may be particularly relevant to waters in the West, where intensive water management takes place, and ephemeral breaks are more common.



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KEY ELEMENTS AND CHANGES

Ditches:

- The term *ditch* means a constructed or excavated channel used to convey water.
- Ditches are jurisdictional where they:
 - are TNWs, including those subject to the ebb and flow of the tide;
 - are either constructed in or relocate a tributary, or are constructed in an adjacent wetland, and satisfy the flow conditions of the tributary definition; or
 - are constructed in an adjacent wetland and develop wetland characteristics.
- Key Changes from 2019 Rule:
 - Ditches constructed in upland (other than TNWs), certain ditches constructed in wetlands, and ditches with ephemeral flow will be non-jurisdictional.
- Key Changes from the Proposal:
 - Ditches are not a separate category of jurisdictional waters.

KEY ELEMENTS AND KEY CHANGES

(a)(3) Lakes and ponds, and impoundments of jurisdictional waters:

- The term means standing bodies of open water that contribute surface water flow to a paragraph (a)(1) water in a typical year either directly or through one or more paragraph (a)(2)-(4) waters.
- A lake, pond, or impoundment does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream, non-jurisdictional ditch), through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.
- A lake, pond, or impoundment is also jurisdictional if it is inundated by flooding from a paragraph (a)(1)-(3) water in a typical year.



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KEY ELEMENTS AND KEY CHANGES

Key Changes from the 2019 Rule:

- Consistent with the 2019 Rule practice of regulating lakes and ponds as part of the tributary network, but clarifies that other kinds of surface hydrologic connections (*e.g.*, inundation by flooding from an (a)(1)-(3) waters) can also render lakes and ponds jurisdictional.
- Impoundments of jurisdictional waters are non-jurisdictional if they do not contribute surface water flow to a downstream jurisdictional water in a typical year.

Key Changes from the Proposal:

- Lakes, ponds, and impoundments are jurisdictional if they are upstream of an ephemeral break but contribute surface water flow to a downstream jurisdictional water in a typical year.
- Combines the longstanding impoundments category with the newer category of lakes and ponds. Surface water flow connections can occur through spillways, culverts, and similar artificial features.



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KEY ELEMENTS AND CHANGES

(a)(4) Adjacent wetlands:

- abut, meaning to touch at least at one point or side of, a paragraph (a)(1)-(3) water;
 - are inundated by flooding from a paragraph (a)(1)-(3) water in a typical year;
 - are physically separated from a paragraph (a)(1)-(3) water only by a natural berm, bank, dune, or similar natural feature; or
 - are physically separated from a paragraph (a)(1)-(3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection in a typical year through a culvert, flood or tide gate, pump, or similar artificial feature.
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- An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.



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KEY ELEMENTS AND CHANGES

Key Changes from 2019 Rule:

- Wetlands are not evaluated based on a significant nexus.
- Wetlands behind an artificial berm, dike, or similar artificial feature must have a direct hydrologic surface connection to be considered adjacent.

Key Changes from the Proposal:

- Perennial or intermittent flow is not required between the wetland and (a)(1)-(3) water.
- Natural features such as berms and dunes do not sever jurisdiction – rather they demonstrate that wetlands are inseparably bound up with the TNW/tributary/lake/pond/impoundment.



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KEY DEFINITIONS

Perennial:

- The term *perennial* means surface water flowing continuously year-round.

Intermittent:

- The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

Ephemeral:

- The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

Snowpack:

- The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions).

Typical year:

- “Typical year” means when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.



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WATERS/FEATURES EXCLUDED FROM FINAL WOTUS DEFINITION

Waters not listed as WOTUS

- Groundwater
- Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools
- Diffuse stormwater run-off and directional sheet flow over upland
- Ditches not identified as WOTUS
- Prior converted cropland (PCC)
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes and ponds constructed/excavated in upland or in non-jurisdictional waters, with the exception of jurisdictional impoundments
- Water-filled depressions constructed/excavated in upland or in non-jurisdictional waters incidental to mining or construction activity
- Stormwater control features constructed/excavated in upland or in non-jurisdictional waters
- Groundwater recharge, water reuse, and wastewater recycling structures constructed/excavated in upland or in non-jurisdictional waters
- Waste treatment systems



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WATERS/FEATURES EXCLUDED FROM FINAL WOTUS DEFINITION

Additional modifications from proposal:

- Distinguishes more clearly between ephemeral features and diffuse stormwater runoff and overland sheet flow.
- The exclusion for artificially irrigated areas refers generally to areas being used for agricultural production and does not specifically refer to cranberry and rice crops.
- The exclusion for artificial lakes and ponds excludes many farm and stock ponds and similar features regardless of potential surface water connection to a jurisdictional water, with the exception of artificial lakes/ponds that meet the condition of a jurisdictional impoundment.
- In exclusions for features that must be constructed or excavated in uplands, clarified that they may also be constructed or excavated in “non-jurisdictional waters.”



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REDUCING REGULATION AND CONTROLLING REGULATORY COSTS

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

- Signed on 30 January 2017
- USACE Regulations, and recommendations for amending or removing regulations, have been reviewed by DoD
- Planning CoP is drafting amendments to its NEPA regulations
 - likely on hold until CEQ issues its final rule amending its NEPA regulations
- Recreation is close to having its proposed firearm rule published in the Federal Register for public comment
- Other USACE efforts on Regulation Reform are on hold or slowed because of other work priorities, including the efforts to comply with the recent E.O. on guidance documents.



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QUESTIONS?

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