

Revised Definition of “Waters of the United States”



Tribal and State Webinars
Webinar 1: Overview
March 22, 2023



Tribal and State Webinar Series

- **March 22, 2023: Overview**
- March 30, 2023: Relatively Permanent Standard
- April 5, 2023: Significant Nexus Standard
- April 12, 2023: Exclusions and Other Topics

Please email wotus-outreach@epa.gov for registration information for the webinars.

Presentation Outline

- Background
- Final Rule Framework
 - Jurisdictional Waters
 - Exclusions
- Effects of the Final Rule
- Additional Resources
- Questions & Answers



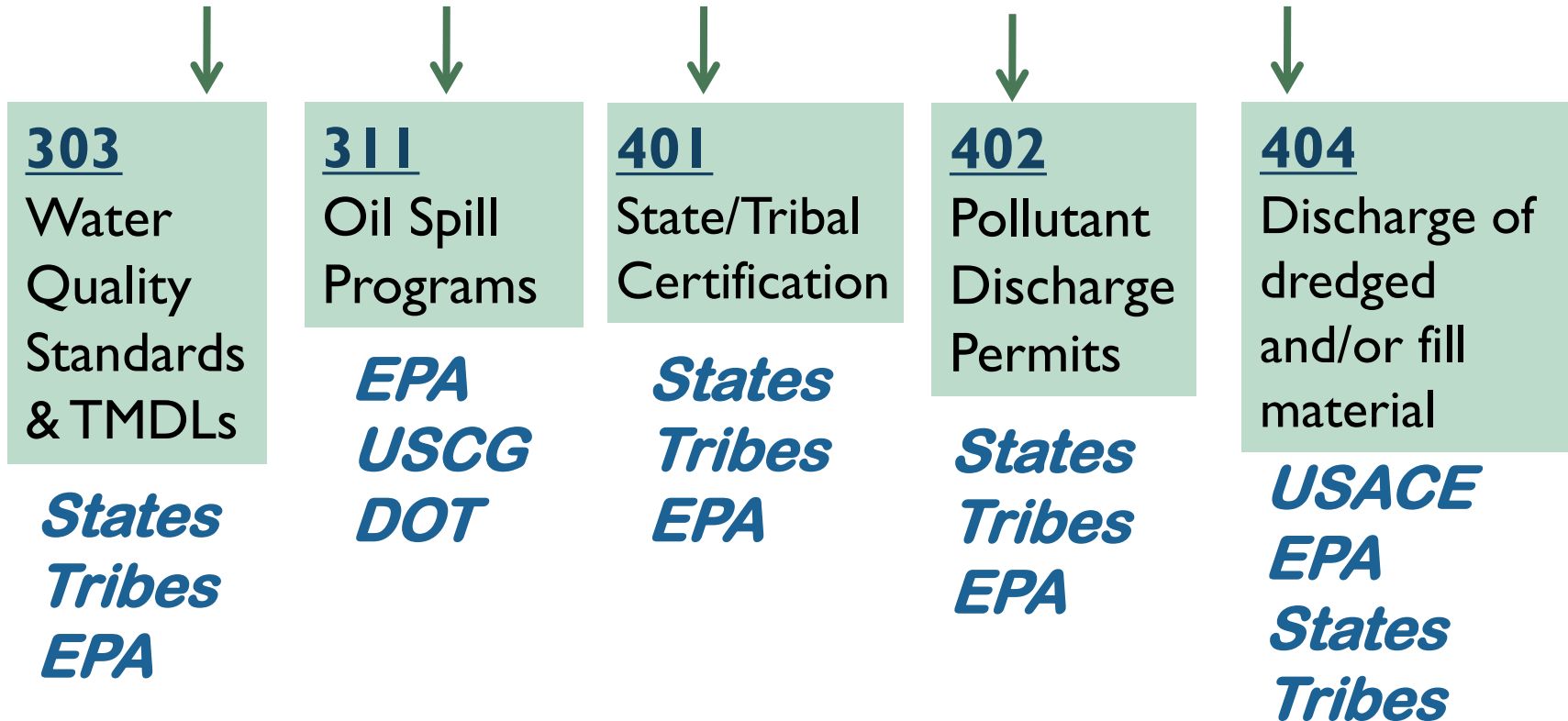
Background: “Waters of the United States” and the Clean Water Act

- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States”; Congress left further clarification to the agencies.
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



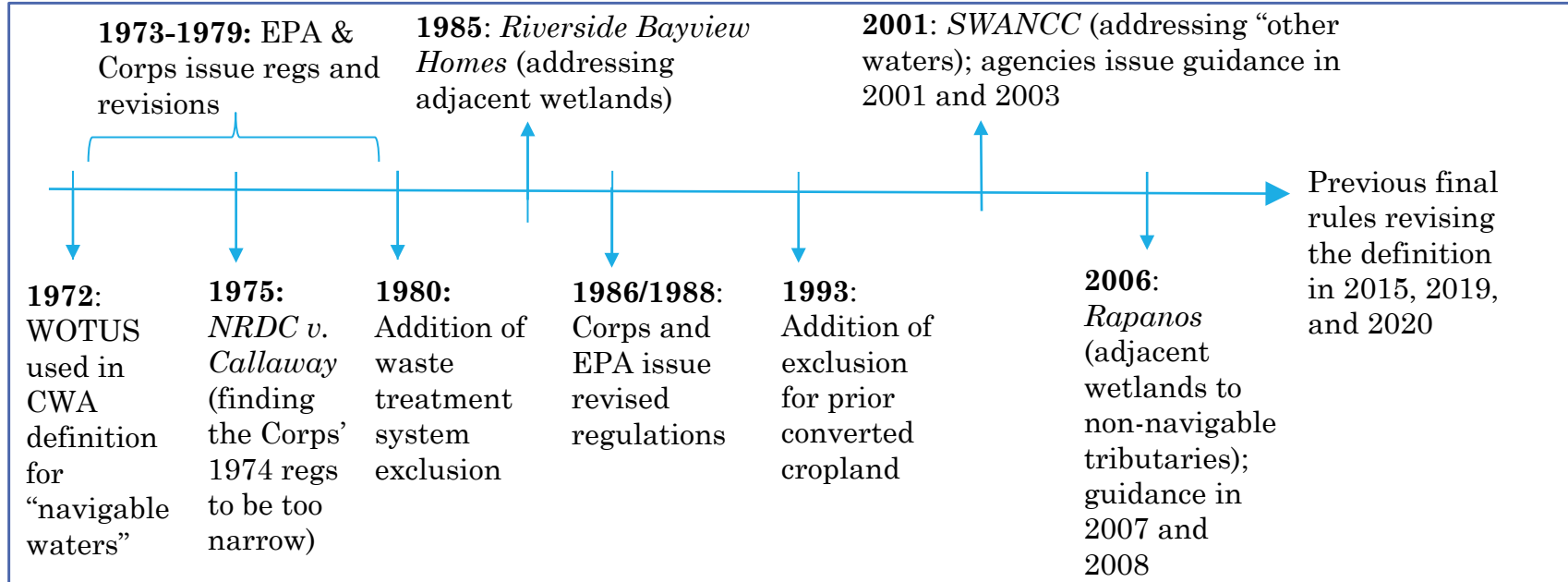
Background: Why “Waters of the United States” Matters

“Navigable Waters”: Waters of the United States, including Territorial Seas



Background: “Waters of the United States” Over Time

- The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



Background: “Waters of the United States” Over Time

- As a result of the agencies’ review of the 2020 Navigable Waters Protection Rule (NWPR) under Executive Order 13990, EPA and the Army asked courts to remand the rule to the agencies for reconsideration, without vacatur, and to dismiss the accompanying litigation.
 - *Pascua Yaqui Tribe v. EPA* (D. Ariz.) – remanded and vacated on August 30, 2021.
 - *Navajo Nation v. Regan* (D.N.M.) – remanded and vacated on September 27, 2021.
- In light of the August 30 vacatur order, the agencies halted implementation of the 2020 NWPR and implemented the definition of “waters of the United States” consistent with pre-2015 practice nationwide.

Background: Rulemaking Process

Summer 2021	Consultations and pre-proposal input
December 2021	Proposed rule published in the <i>Federal Register</i>
February 2022	Public comment period closed
September 2022	Final rule package submitted to OMB for interagency review
December 2022	Final rule signed – “Revised Definition of ‘Waters of the United States’”
Early 2023	Trainings with Federal agencies, Tribes, States, and the public
March 20, 2023	Final rule effective (60 days after January 18, 2023 publication in the <i>Federal Register</i>)



Rule Status and Litigation Update

- On March 19, 2023, the U.S. District Court for the Southern District of Texas granted a motion preliminarily enjoining the 2023 final rule in Idaho and Texas. The agencies are reviewing the decision and their options.
- The rule took effect on March 20, 2023. The rule is currently operative in all jurisdictions of the United States except Idaho and Texas.
- In light of the preliminary injunction, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime in Idaho and Texas until further notice.

Final Rule Framework

- The agencies are interpreting “waters of the United States” to mean the waters defined by the familiar pre-2015 regulations, with amendments to reflect the agencies’ determination of the statutory limits on the scope of “waters of the United States” informed by Supreme Court precedent, the best available science, and the agencies’ experience and technical expertise.
- The final rule is organized in three parts:
 - (a) Jurisdictional Waters
 - (b) Exclusions
 - (c) Definitions



Final Rule Framework

Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds, streams, and wetlands that do not fall within (a)(1) – (a)(4)



***NOTE:** The categories of jurisdictional waters listed on this slide are shorthand categories that are being used for efficiency. See the final regulatory text at 33 CFR 328.3(a) and 40 CFR 120.2(a) for the full text of the categories.

Final Rule Framework

Exclusions

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):
Pre-2015 exclusions, modified
in the final rule

(b)(3) – (b)(8):
Pre-2015 “generally non-
jurisdictional features,” added
to the final rule as exclusions

***NOTE:** The categories of exclusions that are listed on this slide are shorthand categories that are being used for efficiency. See the final regulatory text at 33 CFR 328.3(b) and 40 CFR 120.2(b) for the full text of the categories.

Final Rule Framework

Definitions

(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters

(c)(6) Significantly affect

(c)(1) – (c)(5):
Pre-2015 definitions,
with no changes

(c)(6):
New term and definition
in the final rule



Key Concepts

- The “relatively permanent standard” means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters.
- The “significant nexus standard” means waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters.



Significantly Affect – applies to tributaries, adjacent wetlands, and (a)(5) waters

- The final rule text specifies that “significantly affect” requires a “material influence” on the chemical, physical, or biological integrity of an (a)(1) water.
- The final rule text includes **functions** to be assessed:
 - (A) Contribution of flow;
 - (B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);
 - (C) Retention and attenuation of floodwaters and runoff;
 - (D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or
 - (E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section.

Significantly Affect – applies to tributaries, adjacent wetlands, and (a)(5) waters

- The final rule text specifies that “significantly affect” requires a “material influence” on the chemical, physical, or biological integrity of an (a)(1) water.
- The final rule text includes **factors** to consider:
 - (A) The distance from a water identified in paragraph (a)(1) of this section;
 - (B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;
 - (C) The size, density, or number of waters that have been determined to be similarly situated;
 - (D) Landscape position and geomorphology; and
 - (E) Climatological variables such as temperature, rainfall, and snowpack.

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

- **Traditional Navigable Waters**
 - 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)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
 - Defined in section 502(8) of the Clean Water Act as “the belt of the 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.”



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

- **Interstate Waters**
 - “Waters of the United States” include interstate waters, including wetlands.
 - The preamble clarifies implementation of interstate waters:
 - Lakes, ponds, and wetlands crossing state boundaries are jurisdictional as interstate waters in their entirety.
 - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.
 - The agencies plan to address waters that cross between state and tribal boundaries in a future action.



(a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- However, waters determined to be jurisdictional under paragraph (a)(5), and that are subsequently impounded, do not retain their jurisdictional status under this (a)(2) impoundments provision. Such waters may still be determined to be jurisdictional under another rule category.



(a)(2) Impoundments

The agencies consider paragraph (a)(2) impoundments to include:

- (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under this rule’s definition at the time the impoundment was created, and
- (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of this rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



(a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
 - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
 - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet either:
 - The relatively permanent standard **OR**
 - The significant nexus standard



(a)(3) Tributaries

Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.
- Waters that do not meet the relatively permanent standard must be assessed under the significant nexus standard.



(a)(3) Tributaries

Significant Nexus Standard

- Tributaries meet the significant nexus standard if they either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters.
- The 2023 Rule preamble explains the scope of significant nexus (i.e., which waters are “similarly situated” “in the region”).
 - Adjacent wetlands and tributaries are aggregated together within the catchment of the tributary of interest.



(a)(4) Adjacent Wetlands

- The final rule includes the agencies' longstanding definitions of “wetlands” and “adjacent.”
 - **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
 - **Adjacent** means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”



(a)(4) Adjacent Wetlands

The agencies have three well-established criteria to determine adjacency; if any one of the criteria is met, the wetland is “adjacent,” but may require further analysis to determine if it is “waters of the United States.”

- **First**, there is an unbroken surface or shallow subsurface connection to a jurisdictional water.
- **Second**, the wetland is physically separated from a jurisdictional water by human-made dikes or barriers, or natural landforms (e.g., river berms, beach dunes).
- **Or third**, the wetland’s proximity to a jurisdictional water is reasonably close such that “adjacent wetlands have significant effects on water quality and the aquatic ecosystem.”



(a)(4) Adjacent Wetlands

- Jurisdictional adjacent wetlands include:
 - Wetlands that are adjacent to an (a)(1) water;
 - Adjacent wetlands that meet the relatively permanent standard;
 - Adjacent wetlands that meet the significant nexus standard.



(a)(4) Adjacent Wetlands

Relatively Permanent Standard

- Adjacent wetlands meet the relatively permanent standard if they have a continuous surface connection to a relatively permanent paragraph (a)(2) impoundment or a relatively permanent jurisdictional tributary.
- A **continuous surface connection** means the wetlands either physically abut or touch the relatively permanent water, or are connected to the relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
 - A natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent they provide evidence of a connection.
- Wetlands adjacent to tributaries or to impoundments, and that do not meet the relatively permanent standard, must be assessed under the significant nexus standard.



(a)(4) Adjacent Wetlands

Significant Nexus Standard

- Adjacent wetlands meet the significant nexus standard if they either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters.
- The 2023 Rule preamble explains the scope of significant nexus (i.e., which waters are “similarly situated” “in the region”).
 - Adjacent wetlands and tributaries are aggregated together within the catchment of the tributary of interest.



(a)(5) Waters: waters not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds, streams, and wetlands not identified in the other jurisdictional categories, that meet either:
 - The relatively permanent standard **OR**
 - The significant nexus standard



(a)(5) Waters: waters not identified in (a)(1) – (a)(4)

Relatively Permanent Standard

- Waters assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess waters under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries in preamble section IV.C.4.
- The agencies will assess a **continuous surface connection** between waters assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for adjacent wetlands in preamble section IV.C.5.
- Waters assessed under paragraph (a)(5) that do not meet the relatively permanent standard must be assessed under the significant nexus standard.



(a)(5) Waters: waters not identified in (a)(1) – (a)(4)

Significant Nexus Standard

- Waters assessed under paragraph (a)(5) meet the significant nexus standard if they either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters.
- The 2023 Rule preamble explains the scope of significant nexus (i.e., which waters are “similarly situated” “in the region”).
 - Waters assessed under paragraph (a)(5) will generally be assessed individually within the catchment of the tributary of interest.



Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- The final rule includes the pre-2015 regulatory exclusions, with modifications:
 - Waste treatment exclusion, prior converted cropland exclusion
- The final rule includes regulatory exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
 - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

(b)(1) Exclusion: Waste Treatment Systems

- The final rule text excludes waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The final rule preamble provides clarification on implementation:
 - Excluded waste treatment systems do not sever upstream jurisdiction.
 - The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.

(b)(2) Exclusion: Prior Converted Cropland

- The final rule exclusion for prior converted cropland only covers wetlands.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.
- Prior converted cropland loses its exclusion status if there is a "change in use" – meaning the area is no longer available for the production of an agricultural commodity.

(b)(3) – (b)(8) Exclusions

- The final rule text specifies that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
 - 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.

Effects of the Final Rule

- Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review), the agencies have prepared an Economic Analysis (EA) to inform the public of potential effects associated with this rulemaking.
- In comparison to the pre-2015 regulatory regime, the agencies' primary estimate is that the final rule will have *de minimis* impact.
 - The agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime.
 - These increases are related to implementation of the relatively permanent standard and the significant nexus standard.

Technical Support Document

- The Technical Support Document provides additional detail on the existing scientific literature and technical information in support of the final rule.
- The document utilizes the 2015 Science Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.
- The agencies have also reviewed and summarized relevant literature published since the 2015 Science Report's release, which is overwhelmingly supportive of the conclusions of the Report and has expanded scientific understanding and quantification of functions that ephemeral streams and non-floodplain waters perform that affect the integrity of larger downstream waters, particularly in the aggregate.

Existing Jurisdictional Determinations

- As of March 20, 2023, the date the 2023 Rule took effect, any approved jurisdictional determination completed must be finalized under the 2023 Rule, except in Idaho and Texas. In Idaho and Texas, the Corps will continue to utilize the AJD form used under the pre-2015 regulatory regime, also known as the *Rapanos* AJD form, until further notice.
- As a matter of policy, AJDs are valid for a period of five years from the date of issuance, unless new information warrants revision of the determination before the expiration date, or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit reverification on a more frequent basis. Additionally, anyone with a valid AJD, may ask the Corps to reassess the parcel and issue a new AJD before the five-year expiration date.
- However, after the 2020 NWPR was vacated by two district courts, the agencies clarified that the Corps will no longer rely on approved jurisdictional determinations issued under the 2020 NWPR in making new permit decisions.

Additional Resources: AJD Form and Guidebook

- The Corps will use the interim 2023 Rule Approved Jurisdictional Determination Form (the “2023 Rule AJD Form”) to document the basis of jurisdiction for AJDs completed under the 2023 Rule.

- For more information:

https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/

Information on finalized AJDs:

- Corps Website: <https://permits.ops.usace.army.mil/orm-public#>
- EPA Website: <https://watersgeo.epa.gov/cwa/CWA-JDs/>

Additional Resources: Implementation Memoranda

- EPA and Army have prepared a new **Coordination Memo** to ensure consistency of jurisdictional determinations under the final rule.
- EPA and Army have also partnered with USDA to prepare a new **Ag Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion under the final rule.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

Additional Resources: Fact Sheets

- The **public fact sheet** provides a general overview of the final rule.
- The **agricultural community fact sheet** highlights particular areas of interest to the agricultural community.
- The **landowners guide fact sheet** is intended to assist landowners in determining whether activities on their land require a Clean Water Act permit.

<https://www.epa.gov/wotus>

Questions and Answers

Please type your questions into the chat box.