




An Update on State and Federal Regulation of Drainage and Wetlands

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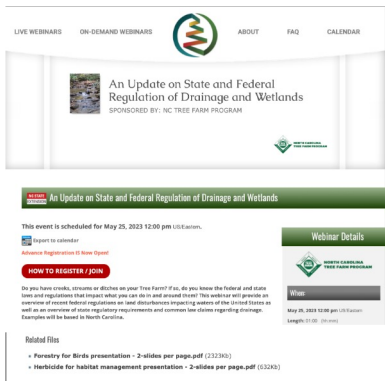


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- Will answer after the presentations



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Water Law Update: State and Federal Wetlands and Drainage Law

Corps of Engineers Regulatory Jurisdiction in **FRESH WATERS**

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The Big Disclaimer

- Presentation is for **educational and enlightenment** purposes only
- **No statement** by Branán (or anyone in Cooperative Extension) should be taken as **legal advice**
- **No statement** by Branán (or anyone in Cooperative Extension) should be taken as expertise on stream and wetlands **jurisdictional determination and delineation**
- **Seek professional input (e.g. consulting forester, referral from North Carolina Association of Environmental Professionals (NCAEP))**

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Today's Webinar Topics

- **Water law** generally
 - riparian law
 - navigability
 - public trust lands
- History and status of **federal jurisdiction**
 - status of WOTUS
 - wetlands delineation
- Overview of **state regulation** and select topics
 - land disturbance general exemptions

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Helpful Resources

[Water Quality Interpretive Guidance Letter](https://www.ncforests.com/water_quality/pdf/regulations/WQweb-Interpretive-Guidance-Letter-2018-1.pdf) (NCDA&CS Division of Forestry)
(https://www.ncforests.com/water_quality/pdf/regulations/WQweb-Interpretive-Guidance-Letter-2018-1.pdf)

[Natural Stream Processes](https://content.ces.ncsu.edu/natural-stream-processes/) (NCSU Extension) (<https://content.ces.ncsu.edu/natural-stream-processes/>)

[Technical Support Document for the Final "Revised Definition of 'Waters of the United States'" Rule](https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf) (US EPA/ACE) (https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf)

[The Status and Trends of Wetland Loss and Legal Protection in North Carolina](https://content.ces.ncsu.edu/the-status-and-trends-of-wetland-loss-and-legal-protection-in-north-carolina/) (NCSU Extension) (<https://content.ces.ncsu.edu/the-status-and-trends-of-wetland-loss-and-legal-protection-in-north-carolina/>)

[NCSU Extension Water Resources](https://waterresources.ces.ncsu.edu/): <https://waterresources.ces.ncsu.edu/>

[NCSU Extension Farm Law for Producers and Landowners](https://farmlaw.ces.ncsu.edu/):
<https://farmlaw.ces.ncsu.edu/>

[Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region \(Version 2.0\)](#)

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Review: Riparian water rights

- "Reasonable Use" theory
 - Not concerned with *which* use
 - **Correlative** to all other use (a shared resource)
- Associated with **ownership** of abutting land, not ownership of water itself
 - **"Usufructuary": the right to use**
- Applies to:
 - Watercourses
 - Underground streams
 - Some springs that create a natural watercourse

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Correlative (riparian) rights not applicable to...

- **Diffuse surface water** (precipitation)
 - Water captured by landowner is owned by landowner (does not have to share)
 - i.e. sheet flow pond (cattle tank)
- **Floodwater** – overflow of natural banks
 - Some states allow capture of floodwater (NC?)
- **Percolating groundwater** *if* not source of natural water course

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Watercourse defined

- 3 Elements define a watercourse
 1. Well-defined **channel**: water flows through a discernable impression left in the land by its running flow
 2. **Bed and banks** – determined by an incline capable of retaining water
 3. **Flow** – must be moving (current) in a certain direction
 - May be intermittent

Diversions of diffuse surface water (runoff)

1. Civil law rule
 - Natural flow, landowner may not change
2. Common enemy
 - All diversions are allowed
 - All retentions allowed (absolute ownership)
3. Reasonable use (**North Carolina**)
 - Diversions must be reasonable
 - Retentions must be reasonable

The Concept of “Navigability”

- “[N]avigable waters” means the **waters of the United States**, including the territorial seas.” 32 U.S.C. §1362(7)
 - Term originates with the “navigable in fact” jurisdiction of ACOE under Rivers and Harbors Act of 1899
 - keep the waterways clear for water-borne commerce
 - **“Navigable” as a determination for WOTUS was dropped in 1971 conference on CWA**
- **“Navigable in Fact”** – waterways used in ordinary condition as highways for commerce (historical use, and recreation)
 - Distinguished from common law standard concerning subsurface ownership
 - navigability is a **factual inquiry** for trespass under state common law
 - “The test is ‘the capability of being used for purposes of trade and travel in the usual and ordinary mode ... and not the extent and manner of such use.’” *Taylor v. Paper Co.*, 262 N.C. 452, 456, 137 S.E.2d 833, 836 (1964)

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Terms to Know

- **“Ephemeral Stream** means a stream that flows only during and for short periods following precipitation and flows in low areas that may or may not have a well-defined channel.”
- **“Intermittent Stream** means a stream that flows only during wet periods of the year (30-90 percent of the time) and flows in a continuous well-defined channel.”
- **“Perennial Stream** means a stream that flows throughout a majority of the year (greater than 90 percent of the time) and flows in a well-defined channel.”

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Federal Water Quality Regulation History

- Rivers and Harbors Act of 1899 (a/k/a “Refuse Act”)
 - Focus on **navigability** (economic focus)
 - **Army Corps of Engineers** has jurisdiction
- 20th century: industrial and untreated municipal waste discharge to rivers, lakes, ocean
- Post-WWII Hydropower projects opposed by sportsmen (disruption of flow impact on wildlife), development of administrative law and focus on water *quality*
- **Water Pollution Control Act of 1948**
 - Emerging focus on environmental degradation
 - Financing/grants to municipalities for waste-water treatment upgrade
 - Updates in 1956, 1961 and 1965

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Federal Water Pollution Control Act of 1972 (The Clean Water Act)

- Goal to ‘restore’ waters to **swimmable** and **fishable** by 1983, and ‘total elimination’ of pollutant discharge into **navigable waters** by 1985
- EPA Role: Set water quality standards (by regulation)
 1. develop health-based standards
 2. technology-based effluent limitations (TBEL) (by industry)
 - Technology Forcing analogous to Clean Air Act scheme
 3. Public input on regulations required (per Administrative Procedures Act)
- Pollution control through permitting of discharge sources
 - Any point-source discharge into “navigable waters” – **whether or not** contains a pollutant – requires a **National Pollution Discharge Elimination System (NPDES)** permit

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Waters of the United States (“WOTUS”)

- The term WOTUS refers to the **jurisdiction limit** of the Federal government (EPA and ACOE)
 - The “outer limits of Congress’ **commerce** power” (40 FR 37144)
 - The extent of US Constitution’s Article I grant of authority to Congress to regulate private use of land
- FWPCA: “The objective of this chapter is to restore and maintain the **chemical, physical, and biological integrity** of the **Nation’s waters**” ([33 U.S. Code §1251\(a\)](#))

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CWA Section	Coverage	Code Section	CFR Part
301	Effluent Standards	33 U.S.C. §§ 1311	40 C.F.R. §125
303	Water Quality Standards and Plans (including Impaired Water Bodies [“TMDL”])	33 U.S.C. §1313	40 C.F.R. §130
305	Water Quality Inventory	33 U.S.C. §1315	
306	Technology Standards of Performance (New and Existing Point Source)	33 U.S.C. §1316	40 C.F.R. §401
307	Toxic substances and pretreatment	33 U.S.C. §1317	40 C.F.R. §129
402	National Pollution Discharge Elimination System (NPDES) (Permits for point source)	33 U.S.C. §1342	40 C.F.R. §122
404	Dredge or Fill Permits (non-point source)	33 U.S.C. §1345	33 C.F.R. §323
505	Citizen Suits	33 U.S.C. §1365	33 C.F.R. §1365

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<h2>Agriculture and Forestry largely exempt from CWA...</h2>			
<ul style="list-style-type: none"> • Agriculture and Forestry largely exempt for 'normal agricultural activities' including 'return flow of irrigation' <ul style="list-style-type: none"> – sediment and nutrient (and pesticide) runoff from land in agriculture and forest use is a non-point source – dredge or filling not considered a normal agricultural or forestry activity – financial incentives ('carrots') through Farm Bill for water quality protection – note: ditches and tile pipes may be point sources (though exempt from NPDES permit) 			
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Exempt Activities

- Established (ongoing) farming, ranching, and silviculture activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices
- Maintenance (but not construction) of drainage ditches
- Construction and maintenance of irrigation ditches
- Construction and maintenance of farm or stock ponds
- Construction and maintenance of farm and forest roads, in accordance with best management practices
- Maintenance of structures such as dams, dikes, and levees

References: <https://www.epa.gov/cwa-404/exemptions-permit-requirements-under-cwa-section-404>

[33 U.S.C. 1251](#)
[40 CFR part 232](#)

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§404 Permit: Discharge of Dredge and Fill Material

- **Discharge of dredged material** means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.
- **Discharge of fill material** means the addition of fill material into waters of the United States. (See [33 CFR 323.2\(f\)](#) for the complete definition of this term.)

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Dredge and Fill Material Defined

- **Dredged material** is material that is excavated or dredged from waters of the United States.
- **Fill material** means material placed in waters of the United States where the material has the effect of:
 - (1) **Replacing** any portion of a water of the United States with dry land; or
 - (2) **Changing the bottom elevation** of any portion of a water of the United States.
 - Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. The term fill material does not include trash or garbage. (See [33 CFR 323.2\(e\)](#) for the complete definition of this term.)

§404 Permit Evaluation

- Permit must show:
 1. **No practical alternative** with less adverse impact
 2. **No statutory violations** will occur
 - E.g. Endangered Species Act
 - E.g. Magnuson-Stevens Fishery Conservation and Management Act (**spawning fish habitat**)
 - CZMA (CAMA compliant)
 3. **No significant adverse impacts** (deterioration of water quality)
 4. **Reasonable mitigation** employed
 - Mitigation banking

Nationwide 404 “General Permits”

- Army Corps may issue **nationwide general permits** (“NWP”)
- Designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see [33 CFR 330.1\(b\)](#))
 - Each Army Corps District (e.g. Wilmington District) is required to evaluate environmental impact of each NWP and issue supplemental modification, including veto of NWP in their region (not subject to NEPA or public comment)
- When required, Clean Water Act section 401 water quality certification and/or Coastal Zone Management Act consistency concurrence must be obtained or waived
- The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity.
- NWP’s were reissued as a [Final Rule](#) in effect February 2022 through 2026
- [List of Nationwide Permits \(ACE\)](#) (examples)
 - [NWP 40 - Agricultural Activities](#)
 - [NWP 41- Reshaping Existing Drainage Ditches](#)
 - [NWP 18 - Minor Discharges](#)
 - [NWP 19 - Minor Dredging](#)

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Determination by Corps of WOTUS on a parcel of land

- **Approved Jurisdictional Determination (“AJD”)**
 - provided by the Corps
 - states 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. See 33 C.F.R. § 331.2.
- Under existing Corps’ policy, AJDs are generally valid for five years unless new information warrants revision prior to the expiration date.
 - See U.S. Army Corps of Engineers, [Regulatory Guidance Letter No. 05–02](#), § 1(a), p. 1 (June 2005) (Regulatory Guidance Letter (RGL) 05–02).
- **Rule in effect at time of AJD completion, not at time of submission, controls**
 - An AJD requested during NWPR will need to “discuss with ACE”
 - AJDs pending as of *Pascua Yaqui Tribe v. EPA (August 30, 2021)* vacatur will be consistent with pre-2015 rules (i.e. the 1986 Rule)
 - AJD approved under NWPR will not be revoked (?)
 - AJD determination will not be honored for new permits
- AJD normally lasts 5 years
 - “**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 re-verification on a more frequent basis”
 - per RGL No. 05-02

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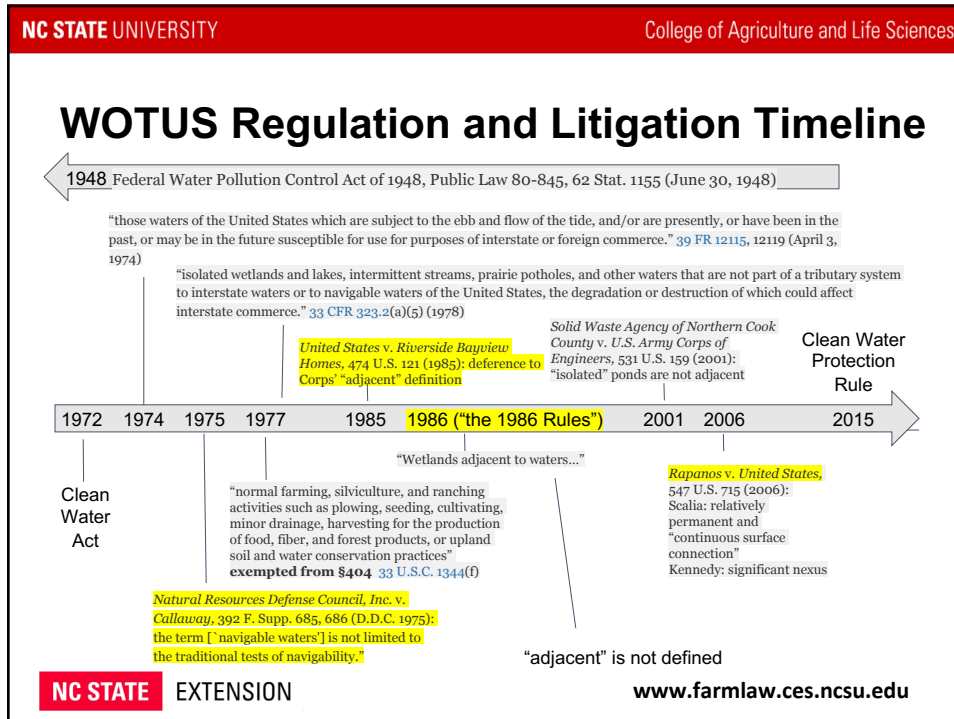
Penalties for Violation

Federal enforcement authority ([EPA summary](#))

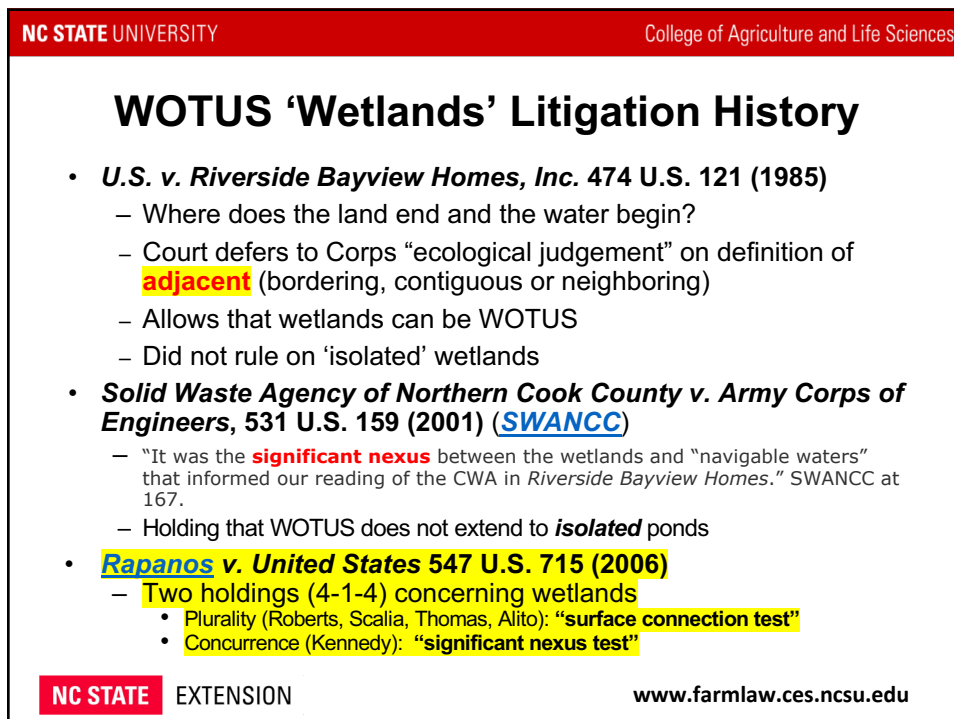
Under Section 309(g)(2)(A) of the Clean Water Act, Class I civil penalties may not exceed \$23,990 per violation, except that the maximum amount of any Class I civil penalty shall not exceed \$59,974. Under Section 404(s)(4) of the Clean Water Act, judicially-imposed civil penalties may not exceed \$59,974 per day for each violation. ([33 CFR § 326.6](#))

[DEQ FAQ on reporting violations](#)

WOTUS-SCOTUS Litigation History



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Justice Scalia (wielding *Webster's Dictionary*) in *Rapanos* writes...

- (1) “the phrase ‘waters of the United States’ includes only those **relatively permanent, standing or continuously flowing bodies of water** forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes”; and
- (2) “only those **wetlands** with a **continuous surface connection** to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between waters and wetlands, are adjacent to such waters and covered by the [CWA].”

Justice Kennedy, concurring in *Rapanos* writes...

“[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, **significantly affect the chemical, physical, and biological integrity of other covered waters** more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

Administrative History

- **1974 Rules** - takes “navigable” literally (rejected by courts as too restrictive)
- **1986 Rules** - become standard use (and are currently in force) (includes ‘adjacent wetlands’)
- **2015 Clean Water Protection Rule** - employed a categorical ‘case by case’ evaluation of certain land features based on Kennedy’s *Rapanos* “significant nexus” test (a rejection of the ‘surface connection’ test)
 - Lower courts hold EPA/Corps may follow the narrower *Rapanos* rule
- **2019 CWP ‘Repeal’ Rule** ([Executive Order 13778](#)) (Reinstates 1986 Rules)
- **2020 Navigable Waters Protection Rule (NWPR)** - generally embraced Justice Scalia’s *Rapanos* “surface connection” rule
- **2023 New Rule (Current)**

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West Virginia v. EPA, No. 20–1530 (June 30, 2022)

- 6-3 conservative majority limits Environmental Protection Agency’s authority to regulate carbon emissions under Clean Air Act
- Ruled that limitations imposed on utilities from the Obama-era “Clean Power Plan” lacked a clear mandate from Congress
 - Court embraces the “**major questions doctrine**”: issues of “vast economic and political significance” must be clearly mandated by Congress
 - an exception to the *Chevron deference* doctrine (from *Chevron v NRDC*, 467 U.S. 837 [1984]), which defers to agency authority to interpret “vague” statutes with a “reasonable” interpretation
- Reflects a general conservative suspicion of the administrative state making regulatory policy
 - SCOTUS conservative majority now decides what is a major question and what is not
- Congress responds in **Inflation Reduction Act**, amends Clear Air Act to state that carbon dioxide is a pollutant under CAA
 - clearly signals Congressional policy to move away from fossil fuels
 - However, IRA did not directly address the regulatory power over stationary sources at issue in *West Virginia v EPA*

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[Sackett v. Environmental Protection Agency](#)

- Oral argument held October 3 [[recording and transcript](#)]
 - case in litigation since 2004
 - **Issue:** Whether the U.S. Court of Appeals for the 9th 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)**.
 - **Petitioner** (Sackett's) goal: Install the Scalia "**surface water rule**" from plurality opinion in [Rapanos v US, 547 U.S. 715 \(2006\)](#) to determine federal jurisdiction over wetlands regulation (RAB "the dictionary rule")
 - vs. Kennedy "**hydrologic nexus**" rule, under which current regulations were implemented (RAB "the science rule")
 - With current 6-3 conservative majority, prediction: Surface-connection rule will become the 'law of the land' (until Congress changes it)
 - NC still offers significant state protection of wetlands, but drainage disputes will be fought in state court

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Comparison of NWPR and New 2023 Rule

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Technical Support Document (TSD)

(https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf)

Builds its credibility with reference to scientific peer-reviewed study on how land and water features impact water quality, for example:

*The Science Report, as well as the peer-reviewed updated synthesis of the scientific literature by Fritz et al. (2018), Schofield et al. (2018), and Goodrich et al. (2018), conclude that the scientific evidence unequivocally demonstrates that streams, **including ephemeral, intermittent, and perennial streams** and rivers are **physically, chemically, and biologically** connected to downstream rivers via channels and associated alluvial deposits. (TSD p. 57)*

Examples of recent advances include quantifying the probability of perennial stream flow (e.g., Jaeger et al. 2019), quantifying streamflow responses to shifts in future climates (e.g., Jaeger et al. 2014), mapping stream systems (e.g., Allen et al. 2018; Hafen et al. 2020), isotopically analyzing material exchange between floodplain wetlands and adjoining stream networks (e.g., Tetzlaff et al. 2014; Sánchez-Carrillo and Álvarez-Cobelas 2018), and incorporating high temporal and high spatial resolution data into coupled floodplain and stream models (e.g., Hansen et al. 2018; Jensen and Ford 2019). (TSD p. 77)

Technical Support Document (TSD)

(https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf)

Significant Nexus Standard (TSD p. 214)

*[S]everal categories of waters require a **case-specific analysis** to determine if they meet the significant nexus standard. This includes tributaries not meeting the relatively permanent standard, wetlands adjacent to tributaries and impoundments and that do not meet the relatively permanent standard*

Key Terms:

“similarly situated” (TSD p. 215): *Science supports analyzing the contributions of similarly situated waters in combination with each other for their effect on downstream traditional navigable waters, the territorial seas, and interstate waters. ...stream channel networks and the watersheds they drain are fundamentally cumulative in how they are formed and maintained.*

“in the region” (TSD p. 220): *For tributaries and their **adjacent wetlands**, the agencies consider similarly situated waters to be “in the region” when they lie within the catchment area of the tributary of interest.*

“significantly effect” (TSD p. 222): *The functions include contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature in traditional navigable waters, the territorial seas, or interstate waters; or provision of habitat and food resources for aquatic species located in traditional navigable waters, the territorial seas, or interstate waters.*

Technical Support Document (TSD)

(https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf)

Relatively permanent standard (TSD p. 232)

Waters that meet the relatively permanent standard are an example of a subset of waters that will virtually always significantly affect traditional navigable waters, the territorial seas, or interstate waters, and therefore properly fall within the Clean Water Act's scope.

General gist of new WOTUS

“The definition of “tributary” in the 2020 NWPR failed to advance the objective of the Clean Water Act and was inconsistent with scientific information about the important effects of many types of tributaries on the integrity of downstream paragraph (a)(1) waters.” (proposed rule preamble)

“[T]he agencies are not categorically including or excluding streams as jurisdictional based on their flow regime in this rule. The agencies agree that ephemeral streams can provide many important functions for paragraph (a)(1) waters.”

Navigable Water Protection Rule Highlights 2020

[85 FR 22340](#)

- **Wetlands** must have “**direct hydrologic surface connection**” to traditional water (continuous surface)
 - Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also **lacking a direct hydrologic surface connection** to such waters are **not adjacent**
- **Ditches** are generally proposed **not** to be “waters of the United States” **unless**
 - functioning as traditional navigable waters
 - constructed in a tributary and also satisfy the conditions of the proposed “tributary” definition
 - constructed in an adjacent wetland and also satisfy the conditions of the proposed “tributary” definition.
- **Tributaries** *do not* include surface features that flow only in direct response to precipitation, such as **ephemeral** flows, dry washes, arroyos, and similar features
 - Perennial means year round
 - Intermittent means continuous flow at certain times in a “typical” year (based on a 30 year rolling period)
- **Groundwater** is not WOTUS

NWPR Struck Down 2021

- NWPR struck down by 9th Circuit in ***Pascua Yaqui Tribe v. U.S. Environmental Protection Agency (August 30, 2021)***
 - EPA and Corps announce no longer follow NWPR
 - **Does not revert rules to 2015, but defaults to the [1986 definition of WOTUS](#)**
 - recall that properly revoked the 2015 rule and reinstated the 1986 rule (per [85 FR 22340](#)), so the 1986 definition is **currently in effect** until the new (Biden) rule is finalized

New WOTUS Rules (Biden Admin)

- Final Rule became effective March 20, 2023
- The “**relatively permanent standard**” means waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such 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 traditional navigable waters, interstate waters, or the territorial seas (the “foundational waters”)

TRIBUTARIES

“A tributary for purposes of this rule includes rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, an interstate water, or a paragraph (a)(2) impoundment.”

“Wetlands” means...

(1) *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.

NWPR: *Adjacent Wetlands meant...*

(1) *Adjacent wetlands*. The term **adjacent wetlands** means wetlands that:

(i) **Abut**, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3) of this section;

(ii) Are **inundated by flooding** from a water identified in paragraph (a)(1), (2), or (3) of this section **in a typical year**;

(iii) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by a **natural berm, bank, dune, or similar natural feature**; or

(iv) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by an artificial dike, barrier, or similar artificial structure **so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water** identified in paragraph (a)(1), (2), or (3) of this section in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. 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.

New Rule: Wetlands are WOTUS when...

(4) Wetlands **adjacent** to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) **Relatively permanent**, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, **significantly affect** the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

Wetlands “adjacent” now means...

(2) *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.”

from TSD p. 171

(1) There is an unbroken surface or shallow sub-surface hydrologic connection to jurisdictional waters (discussed in section III.B.ii.2.a); or

(2) They are physically separated from jurisdictional waters by “man-made dikes or barriers, natural river berms, beach dunes, and the like” (discussed in section III.B.ii.2.b); or

(3) Where their proximity to a jurisdictional water is reasonably close such that “adjacent wetlands have significant effects on water quality and the aquatic ecosystem.” *Riverside Bayview*, 474 U.S. at 135 n.9 (discussed in section III.B.ii.2.c).

New Rule: “Significantly Affect” means

(1) *Wetlands* means those areas that are inundated or saturated by surface or groundwater 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.

(i) 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;

(ii) Factors to be considered:

- (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.

Agricultural and Silvicultural Exceptions (from proposed rules preamble)

“The proposed rule also would **not affect** any of the **exemptions**, including exemptions from section 404 permitting requirements provided by section 404(f), such as those for **normal farming, ranching, and silviculture activities**. 33 U.S.C. 1344(f); 40 CFR 232.3; 33 CFR 323.4”

“The proposed rule would **not affect** the existing statutory or regulatory **exemptions or exclusions** from section **402 NPDES permitting requirements, such for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers.**” 33 U.S.C. 1342(1)(1),(1)(2); 33 U.S.C. 1362 (14); 40 CFR 122.3(f), 122.2

Current: Non-Jurisdictional Waters

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

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

(5) 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;

(6) 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;

(7) 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

(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Ditches (excerpts from the New Proposed Rule preamble)

The preamble to the 1986 regulations explains that "[n]on-tidal drainage and irrigation ditches excavated on dry land" are generally not considered "waters of the United States." [51 FR 41217](#).

The agencies intend to continue implementing the approach to ditches described in the *Rapanos* Guidance. **This approach is more consistent with the relatively permanent standard** than the approach in the preamble to the 1986 regulations. **Consistent with previous practice, ditches constructed wholly in uplands and draining only uplands with ephemeral flow would generally not be considered "waters of the United States."** p. 69433

Where a ditch is jurisdictional, the agencies have historically taken the position that the ditch can be both a "water of the United States" and a point source and are proposing to reinstate this position. p. 69434

Ditches, for example, are tributaries under this rule if they flow directly or indirectly to paragraph (a)(1) waters and they are jurisdictional tributaries if they also meet the relatively permanent standard or significant nexus standard and are not excluded from jurisdiction under this rule. See section IV.C.7 of this preamble for additional discussion on excluded ditches. (p 3082)

State Regulation of Water

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Beyond WOTUS - NC land disturbance regulation

- Sedimentations Pollution Control Act of 1973 ([NCGS §113A-50](#))
- Exempt includes

(1) Activities, including the **production and activities relating or incidental to the production of crops**, grains, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agriculture undertaken on agricultural land for the production of plants and animals useful to man, including, but not limited to:

- a. Forages and sod crops, grains and feed crops, tobacco, cotton, and peanuts.
- b. Dairy animals and dairy products.
- c. Poultry and poultry products.
- d. Livestock, including beef cattle, llamas, sheep, swine, horses, ponies, mules, and goats.
- e. Bees and apiary products.
- f. Fur producing animals.
- g. Mulch, ornamental plants, and other horticultural products. For purposes of this section, "mulch" means substances composed primarily of plant remains or mixtures of such substances.

(2) Activities undertaken on forestland **for the production and harvesting of timber** and timber products and conducted in accordance with standards defined by the Forest Practice Guidelines Related to Water Quality, as adopted by the Department of Agriculture and Consumer Services.

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Beyond WOTUS - NC Isolated Wetlands Regulation

- Air and Water Resources, NCGS Article 21 (§ 143-211)
- **Isolated Wetlands disturbance deemed permitted (15A NCAC 02H.1305)**
 - **one acre coastal region (a)(3)(A)**
 - **one-half acre piedmont region (a)(3)(B)**
 - **one-third acre mountain region (a)(3)(C)**
- [The Status and Trends of Wetland Loss and Legal Protection in North Carolina](#) (Branan, Burchele, Kukri-Fox [NCSU])

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Limits of Constitutional Deference for EPA/ACE to Define WOTUS

- **The Administrative Procedures Act (5 U.S.C. Ch. 5§551 et seq)**
 - Passed in 1946 following the proliferation of federal agencies New Deal and WWII
 - Effort to “systematize” the function of federal agencies
 - Imposes **procedural** requirements upon agencies in their function of rulemaking and other decisions
 - Authorizes **federal courts** to review whether regulation is permissible under the authorizing statute
 - Courts continually develop rules of interpretation and review
 - Body of law concerning sufficiency of public disclosure, etc.
- **The WOTUS battleground concerns current US Supreme Court’s views on Executive U.S. Const. Art. II authority to interpret and implement federal policy as established by Congress’ U.S. Const. Art. I legislative powers**
 - how much **deference** should the Administration be allowed to interpret the ‘words and phrases’ passed by a body of 535 +/- people largely unversed in policy and science (outside of their respective committees) (Congress)

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Stream Obstructions

Obstructions in Streams ([NCGS §77-13](#))

*If any person, firm, or corporation shall fell any tree, or put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, stream, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, or whereby the navigation of such stream may be impeded, delayed, or prevented, the person, firm, or corporation so offending shall be guilty of a **Class 2 misdemeanor**...*

*Nothing in this section shall prevent the erection of fish dams or hedges across any stream which do not extend across more than **two thirds of its width** at the point of obstruction.*

This section may also be enforced by specially commissioned forest law-enforcement officers of the Department of Agriculture and Consumer Services for offenses occurring in woodlands. For purposes of this section, the term "woodlands" means all forested areas, including swamp and timber lands, cutover lands, and second-growth stands in previously cultivated sites.

Ditch Obstruction

Obstructions in streams and drainage ditches ([NCGS 77-14](#))

*If any person, firm or corporation shall fell any tree or put any slabs, stumpage, sawdust, shavings, lime, refuse or any other substances in any creek, stream, river or natural or artificial drainage ravine or ditch, **or in any other outlet which serves to remove water from any land whatsoever whereby the drainage of said land is impeded, delayed or prevented**, the person, firm or corporation so offending shall be guilty of a **Class 2 misdemeanor**...*

...the court may, in its discretion, order the person, firm, or corporation so offending to remove the obstruction and restore the affected waterway to an undisturbed condition, or allow authorized employees of the enforcing agency to enter upon the property and accomplish the removal of the obstruction and the restoration of the waterway to an undisturbed condition, in which case the costs of the removal and restoration shall be paid to the enforcing agency by the offending party.

This section may also be enforced by specially commissioned forest law-enforcement officers of the Department of Agriculture and Consumer Services for offenses occurring in woodlands.

Dam Construction

[§ 143-215.25A](#). Exempt dams.

(5) Under a single private ownership that provides protection only to land or other property under the same ownership and that does not pose a threat to human life or property below the dam.

(6) That is **less than 25 feet in height** or that has an **impoundment capacity of less than 50 acre-feet**, unless the Department determines that failure of the dam could result in loss of human life or significant damage to property below the dam.

(7) Constructed for and maintains the purpose of **providing water for agricultural use**, when a person who is licensed as a professional engineer or is employed by the Natural Resources Conservation Service, county, or local Soil and Water Conservation District, and has federal engineering job approval authority under Chapter 89C of the General Statutes designed or approved plans for the dam, supervised its construction, and registered the dam with the Division of Energy, Mineral, and Land Resources of the Department prior to construction of the dam. This exemption shall not apply to dams that are determined to be high-hazard by the Department.

[§ 143-215.26](#). Construction of dams.

(a) *No person shall begin the construction of any dam until at least 10 days after filing with the Department a statement concerning its height, impoundment capacity, purpose, location and other information required by the Department.*

Dam Removal

§ 143-215.27. Repair, alteration, or removal of dam. (a) Before commencing the repair, alteration or removal of a dam, application shall be made for written approval by the Department, except as otherwise provided by this Part.

NC STATE UNIVERSITY College of Agriculture and Life Sciences

THANKS FOR INVITING ME!



Robert Andrew Branan
 Assistant Extension Professor
 Department of
 Agriculture and Resource Economics
 North Carolina State University
rabrana2@ncsu.edu



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