Nationwide Permits

Reissuance

- December 2021 - 40 reissued nationwide permits and 1 new nationwide permit 59, Water Reclamation and Reuse Facilities - Authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities.
- 41 permits went into effect on February 25, 2022
- They will expire on March 14, 2026, along with the 16 nationwide permits reissued, modified, and added in January 2021.
Nationwide Permits

General Conditions and Definitions

• All nationwide permits have same general conditions and definitions published in January 2021

• General Condition 23, Mitigation –
  - Wetland mitigation at a minimum 1:1 ratio is required for all wetland losses that exceed 0.10 acre
  - Stream mitigation at a minimum 1:1 ratio is required for all losses of stream bed that exceed 0.03 acre
Nationwide Permits

Regional Conditions

• Applicable to the 41 permits issued in December

• Notable changes from 2017 –
  - Nixed springs
  - Fen language
  - No Designated Critical Resource Waters
  - Only nationwide permit 27 has its own regional conditions – most notably the requirement for using a reference stream for the design.
August 30, 2021 – The Arizona District Court vacated the NWPR.

The agencies stopped implementation of the Navigable Waters Protection Rule.

The agencies are currently interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice.
2008 Rapanos Guidance

Clean Water Act Jurisdiction
Following the U.S. Supreme Court’s Decision in
Rapanos v. United States & Carabell v. United States

This memorandum provides guidance to EPA regions and U.S. Army Corps of Engineers ("Corps") districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act. The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- 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)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors
What’s Next?

EPA intends to revise the definition of waters of the U.S. through 2 rulemakings:
  1) A foundational rule to restore longstanding protections
  2) A second rule that builds on that regulatory foundation

Sacketts vs. EPA - What is the proper test for determining if wetlands are "waters of the United States"?
  - Decision no later than June 2023
THANKS!

Questions/comments?

Becky Pierce
rebecca.pierce@state.co.us
(303) 512-4051