

# Corps Regulatory Program: Current Topics

Headquarters, U.S. Army Corps of Engineers  
August 19, 2015



# Outline of Topics

- New rule defining “Waters of the United States”
- Nationwide Permit re-issuance for 2017
- Permit Streamlining Approaches



# Why a new rule defining “waters of the United States”?

- 1986 – last time definition was revised
- U.S. Supreme Court decisions
  - ▶ 2001 – Solid Waste Agency of Northern Cook County v. Corps
    - 2003 EPA-Army guidance
  - ▶ 2006 – Rapanos v. U.S.
    - 2007 EPA-Army guidance
- Guidance not sufficient to provide clear standards for effective program implementation



Subject	1986 Rule and Guidance	2015 Rule
Navigable Waters	Jurisdictional	Same
Interstate Waters	Jurisdictional	Same
Territorial Seas	Jurisdictional	Same
Impoundments	Jurisdictional	Same
Tributaries	Did not define tributary.	Defined tributary for the first time as water features with bed, banks, and ordinary high water mark, and contribute flow downstream.
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, territorial seas, and impoundments, or tributaries.	Includes waters adjacent to jurisdictional waters within a minimum of 100', or within 100-year floodplain to a maximum of 1,500' from the OHWM, or 1500' from the HTL.
"Isolated" or "Other Waters"	Included all other waters the use, degradation, or destruction of which could affect interstate or foreign commerce.	Includes specific waters that are similarly situated: prairie potholes, Carolina/Delmarva bays, western vernal pools, pocosins, and Texas coastal prairie wetlands, when they have a significant nexus.  Includes waters with a significant nexus within the 100-year floodplain of a TNW, interstate water, or territorial seas, as well as waters with a significant nexus within 4,000' of the first five categories above.

# Features not jurisdictional

- 1986 rule and 2003/2007 guidance
  - ▶ Waste treatment systems
  - ▶ Prior converted cropland
  - ▶ Certain features listed in 1986 rule preamble, such as:
    - Ditches constructed in dry land
    - Ponds and other water features constructed in dry land
- 2015 rule
  - ▶ Waste treatment systems
  - ▶ Prior converted cropland
  - ▶ Certain types of ditches
  - ▶ Groundwater
  - ▶ Stormwater control features constructed in dry land
  - ▶ Wastewater recycling structures
  - ▶ Erosional features (e.g., gullies)



# New definitions

## ▶ Tributary

- Contributes flow, has bed and banks and ordinary high water mark (OHWM)

## ▶ Neighboring

- Within 100 feet of OHWM or in 100-year floodplain (within 1,500 feet of OHWM)
- Within 1,500 feet of high tide line of tidal waters
- Within 1,500 of OHWM of Great Lakes

## ▶ Significant nexus

- Analyze all non-adjacent waters within 4,000 feet of OHWM

## ▶ Adjacency now includes non-wetland waters



# Identifying the 100-year floodplain

- FEMA maps
- If FEMA maps not available, use other tools
  - ▶ Other federal, state, or local floodplain maps
  - ▶ NRCS soil survey flood frequency classes
  - ▶ Tidal gage data
  - ▶ Site-specific modeling
- Agencies plan to develop additional information and tools



Technical Qs and As dated July 2015



**BUILDING STRONG®**

# Waters that require finding of significant nexus

- Identify watershed draining to traditional navigable water
- Evaluate functions and determine if, collectively, there is a significant nexus to a traditional navigable water
- (a)(7) waters (if not adjacent)
  - ▶ Prairie potholes
  - ▶ Carolina bays and Delmarva Bays
  - ▶ Pocosins
  - ▶ Western vernal pools
  - ▶ Texas coastal prairie wetlands
- (a)(8) waters – all non-adjacent waters within 100-year floodplain or 4,000 feet of high tide line or OHWM





# Functions listed in 2015 Rule

- Sediment trapping
- Nutrient cycling
- Pollutant trapping, transformation, filtering, and transport
- Retention and attenuation of flood waters
- Runoff storage
- Contribution of flow
- Export of organic matter
- Export of food resources
- Provision of life-cycle dependent aquatic habitat for species living in traditional navigable waters



# Steps to implement 2015 Rule

- Effective date is August 28th
- Corps developing tools to implement rule for §404
  - ▶ Modification of its Regulatory Program database to track jurisdictional determination requests and findings
  - ▶ Geographic information system and other tools to assist in significant nexus determinations
- Additional guidance through Qs and As
- Training of district staff
- Public/stakeholder outreach



# Types of jurisdictional determinations

- Approved jurisdictional determination (JD)
  - ▶ Corps' official, written position stating presence or absence of jurisdictional waters on a site
  - ▶ Valid for 5 years
  - ▶ Can be appealed
- Preliminary jurisdictional determination
  - ▶ Non-binding Corps document stating there may be jurisdictional waters on the site
    - Cannot be used to make finding of “no jurisdiction”
  - ▶ No expiration date
  - ▶ Cannot be appealed



# Transition to 2015 Rule (Grandfathering)

- Previously issued approved JDs remain in effect until they expire, unless environmental conditions have changed (Regulatory Guidance Letter 05-02)
- JD associated with issued permit continues to be effect until permit expires
- If complete permit application received before publication date of 2015 Rule, permit decision will be made under 1986 rule and 2003/2007 guidance
- Requests for approved JDs finalized after publication date of 2015 Rule (June 29<sup>th</sup>) completed using the new Rule
- Preliminary JDs not affected by 2015 Rule



# 2017 Nationwide Permits

- Rulemaking process
  - ▶ E.O. 12866 – Regulatory Planning and Review
- Evaluating suggestions for changes and new nationwide permits
- Incorporating clarifications needed from experience of implementing 2012 NWP's
- Now drafting proposed rule



# Schedule

- September 2015 – submit draft proposed rule to OMB for E.O. 12866 interagency review
- December 2015/January 2016 – proposed rule cleared by OMB
  - ▶ Publish proposal in Federal Register for public comment
  - ▶ 60-day comment period
- Summer 2016 – review comments, prepare draft final rule



# Schedule

- September 2016 – submit draft final rule to OMB for interagency review
- December 2016/January 2017 – final rule cleared by OMB
  - ▶ Publish final rule in Federal Register
  - ▶ Complete water quality certification, Coastal Zone Management Act consistency concurrence processes
  - ▶ Corps divisions complete regional conditions
- March 19, 2017 – effective date of 2017 NWP



# NWP 31

- **Maintenance of existing flood control facilities**
- Authorizes removal of vegetation (if permit required)
- Return facility to maintenance baseline
  - ▶ Removal of sediment and vegetation
  - ▶ Approved or constructed capacity of facility
  - ▶ Established baseline applies to subsequent reissuances of NWP 31
  - ▶ Compensatory mitigation may be required once to get to maintenance baseline established by Corps
- Dredged materials must be deposited in area with no waters of the U.S., unless permittee obtains separate authorization for disposal in waters





# Streamlined permitting

- Individual permits
  - ▶ Authorize specific activity or series of activities on one or more sites
  - ▶ Public notice and comment on proposal
  - ▶ Expiration dates at district's discretion
- General permits
  - ▶ Authorize categories of activities nationwide, in a state, or in another type of geographic region
  - ▶ Limited to activities with no more than minimal adverse environmental effects
  - ▶ Valid for 5-year period (statutory limit)



# Regulatory Program Authorities

**Construction and dredging Section 10  
Rivers and Harbors Act**



**Discharge of dredged and fill material  
Section 404 Clean Water Act**



**Transport and discharge of  
Dredged material  
Section 103 Ocean Dumping Act**



# Regional general permits

- Issued by Corps districts
  - ▶ County, state, other geographic area
- Activities with no more than minimal adverse environmental effects
- Can be issued to work with Special Area Management Plan, large-scale Habitat Conservation Plan
- Can have different limits, conditions than Nationwide Permits



# Streamlined permitting

- Compliance with other environmental laws can influence best approach
  - ▶ Section 7 of the Endangered Species Act
  - ▶ Section 106 National Historic Preservation Act
- Consultations can affect timing of (re)issuance of general permits
- Consultations can cover authorized activities for the life of an individual permit



# Endangered Species Act compliance

- Section 7 consultation required for regulated activities that “may affect” listed species or critical habitat
- Consultations can take more than a year
- Biological opinions can be issued for any length of time (at Services’ discretion)
- Programmatic consultations can cover multiple activities





# National Historic Preservation Act compliance

- Section 106 consultation required for regulated activities that might affect historic properties listed, or eligible for listing, in the National Register of Historic Places
- Corps uses Appendix C and interim guidance documents
  - ▶ Follows time frames in Advisory Council's 800 regulations
- Programmatic agreements can cover multiple activities



# E.O. 13690

- Flood hazards and floodplain values are public interest review factors (33 CFR 320.4(I))
  - ▶ Consider requirements of E.O. 11988 when evaluating permit applications
  - ▶ 100-year floodplain – base flood for evaluating adverse effects on occupation and modification of floodplains
- Vast majority of §404 permit applicants are private landowners using private funds
- USACE regulations state the primary responsibility for land use decisions lies with Tribal, state, and local governments



David Olson  
Regulatory Program Manager  
Headquarters, U.S. Army Corps of Engineers  
[David.b.olson@usace.army.mil](mailto:David.b.olson@usace.army.mil)  
202-761-4922

