



IDEQ Use Attainability Analysis Rulemaking - Public Meeting

Clean Water Act Jurisdiction Determinations

Presented by the U.S. Environmental Protection Agency on May 19, 2015



Topics Covered Today

History behind Clean Water Act (CWA) jurisdictional determinations

- Shared definition of “waters of the U.S” under CWA § 402 and CWA § 404
- Court decisions having local and nationwide impacts

How and when are jurisdictional determinations made?

- Data used, factors to consider
- Triggers for doing jurisdictional determinations

NOTE: This presentation reflects today’s rules, policy, and guidance only. The proposed “Clean Water Rule” (clarifying protection under the Clean Water Act for streams and wetlands) is not part of today’s discussion.

2 Agencies, 1 Common Charge

Under the CWA, certain discharges into waters of the United States need a permit.



U.S. Environmental Protection Agency CWA § 402

Regulates the discharge of pollutants other than dredged/fill material from a point source into **waters of the U.S.**

Pollutant: dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste.



US Army Corps of Engineers

U.S. Army Corps of Engineers CWA § 404

Regulates the discharge of dredged/fill material from a point source into **waters of the U.S.**

Fill material: material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water.

Waters of the United States

“Navigable waters”



“waters of the U.S., including the territorial seas”

CWA § 502(7), 33 U.S.C. § 1362(7)

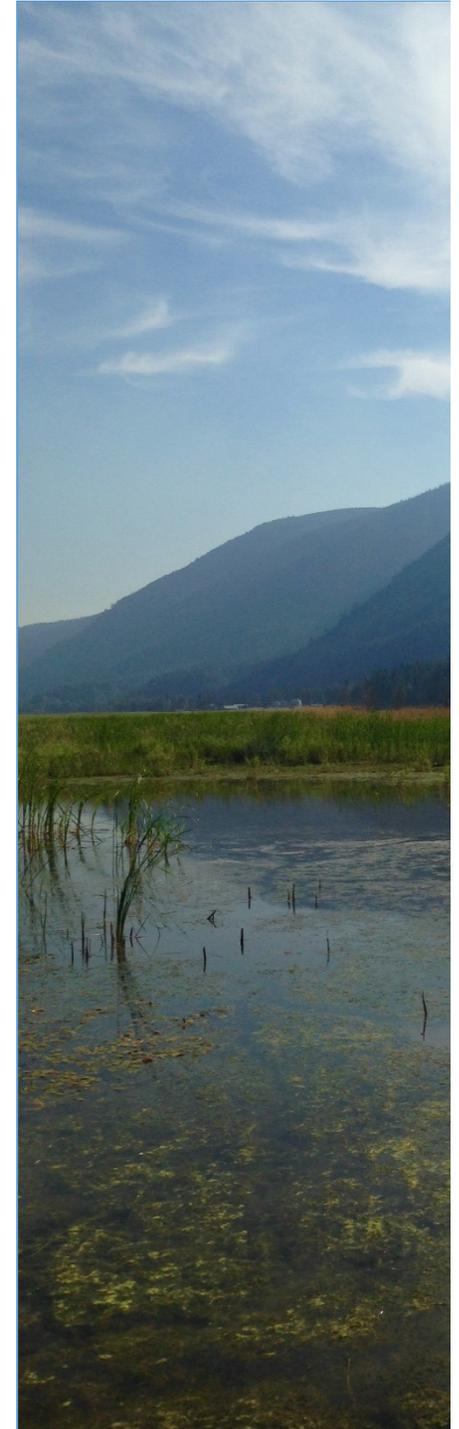


1. Traditionally navigable waters,
2. Waters that cross state boundaries, including wetlands,
3. Waters within a state that have an interstate commerce connection,
4. Impoundments of these waters,
5. Tributaries of these waters,
6. Territorial seas, and
7. Wetlands adjacent to these waters.

40 CFR 122.2, 40 CFR 230.3, 33 CFR 328.3

Adjacent: bordering, contiguous or neighboring.

Impoundment: part of a water that is ponded/flooded due to a dam or barrier downstream.

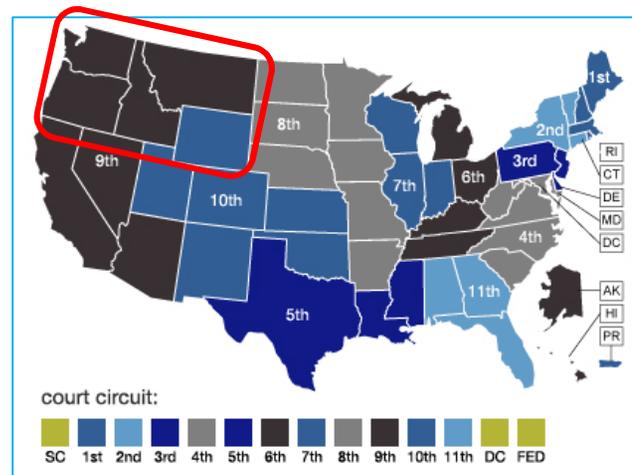


Key Court Decisions Impacting Idaho

- ***Headwaters, Inc. v. Talent Irrigation District* (9th Circuit, 2001)**

Irrigation canals that receive water from natural streams and lakes, and divert water to streams and creeks, are connected as "tributaries" to those other waters.

Binding on the U.S. Army Corps of Engineers, Northwestern Division, in the geographic jurisdiction of the U.S. Court of Appeals for the 9th Circuit (Washington, Oregon, Idaho, Montana).



- ***Rapanos v. United States and Carabell v. United States* (Supreme Court, 2006)**

Splintered decision addressing whether a wetland or tributary is a water of the U.S. Two standards emerge: 1) Justice Scalia's plurality opinion setting forth "relative permanence" and "continuous surface connection" as the standard for determining CWA jurisdiction; 2) and Justice Kennedy's concurrence setting forth "significant nexus" as the standard for determining CWA jurisdiction.

2008 Joint EPA-Corps *Rapanos* Guidance

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters (TNW)
- Wetlands adjacent to TNWs
- Non-navigable tributaries of TNWs that are relatively permanent, where the tributaries typically flow year-round or have continuous flow at least seasonally.
- Wetlands that directly abut such relatively permanent tributaries

Always Jurisdictional

A tributary can be natural, man-altered, or man-made.

Must carry flow directly or indirectly into a TNW.

2008 Joint EPA-Corps *Rapanos* Guidance

Jurisdiction is decided based on a fact-specific analysis to determine whether there is 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

Possibly Jurisdictional

A significant nexus analysis assesses the hydrologic and ecologic functions to determine if they significantly affect the chemical, physical and biological integrity of downstream navigable waters.

2008 Joint EPA-Corps *Rapanos* Guidance

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

- Swales or erosional features (for example: 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

Generally Not Jurisdictional

NOTE: Non-jurisdictional features may still serve as a confined surface hydrologic connection or “point source”, subject to CWA § 402.

Resources for Jurisdictional Determinations

- Corps Regulatory Guidance Letters
- 2008 Joint EPA-Corps *Rapanos* Guidance
- Maps, plans, plots, plats submitted by a § 404 applicant
- USGS National Hydrography Data (NHD)
- USGS quad maps
- USDA NRCS Soil Survey
- USFWS National Wetlands Inventory
- FEMA/FIRM maps
- Aerial photography
- **Field inspection**

Wetland Delineation Factors

- Hydric soils
- Wetland vegetation
- Hydrology
- Adjacent to, abutting a tributary

Tributary Factors

- Ordinary high water mark
- Frequency of flow (not quantity)
- Navigable, non-navigable
- “Relevant reach”
- Downstream hydrologic connection

Time-intensive, but often the surest way to verify jurisdiction.



When are Jurisdictional Determinations made?

Jurisdictional determinations are generally not done in advance of a regulatory action.



- Reviews “isolated” and “significant nexus” jurisdictional determinations made by the Corps for CWA § 404 permits, per the 2008 Joint EPA-Corps *Rapanos* Guidance.
- Analyzes the presence of waters of the U.S. for § 404 violations (unauthorized discharges) referred to the EPA by the Corps.
- Applicant applies for a § 402 NPDES permit:



Presumption made that there is a discharge of pollutants to waters of the U.S.



**US Army Corps
of Engineers**

- Primary agency to make jurisdictional determinations under CWA § 404, with oversight by EPA.
- Responding to tip/complaint about an unauthorized § 404 discharge.
- Applicant applies for a § 404 permit:



Jurisdiction is evaluated prior to permit issuance, to verify both the proposed action and location are regulated.

Contact Information



Tracy DeGering

Aquatic Resources Unit (CWA § 404)

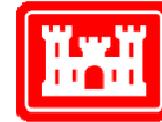
Idaho Operations Office

950 W. Bannock St.

Boise, ID 83702

(208) 378-5756

degering.tracy@epa.gov



**US Army Corps
of Engineers**

Greg Martinez

Project Manager

Boise Regulatory Office

720 E. Park Boulevard, Suite 245

Boise, ID 83712

(208) 433-4465

greg.j.martinez@usace.army.mil

References

EPA: <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>

USACE: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf