

Arkansas Environmental Federation *54th Annual Convention*

October 6, 2021 (Virtual)

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Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

Updates on Section 404

WOTUS: *The long arc of history ...*

1980s

WOTUS Defined

40 CFR 230.3(s)

33 CFR 328.3(a)

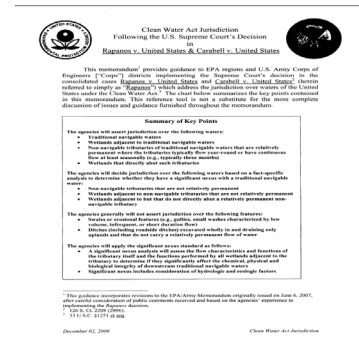
2001-2006

Judicial Review

- SWANCC
- *Rapanos*
- Post-*Rapanos*

2008

Corps' Guidance



2015

Obama Rule



2020

Trump Rule: The 2 Step



WOTUS: *The more recent past ...*

- *Pascua Yaqui Tribe v. U.S. Env't'l Protection Agency*, No. CV-020-00266-TUC-RM, Doc. 99, Order (Aug. 30, 2021)
 - Granted EPA/USACE voluntary remand of NWPR (Trump Step 2)
 - Vacated NWPR (Trump Step 2)
 - Considering remand and vacatur of Trump Step 1

- EPA/Corps: “In light of this order, the agencies have halted implementation of the [NWPR] and are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.” (September 3, 2021).

“I told you so”

Some Parting Thoughts: Surrendering to the Science

DRAFT
DO NOT CITE OR QUOTE

EPA/600/R-11/098B
September 2013
External Review Draft

Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence

NOTICE

THIS DOCUMENT IS A PRELIMINARY DRAFT. It has not been formally released by the U.S. Environmental Protection Agency and should not be construed to represent Agency policy. It is being circulated for comment on its technical accuracy and policy implications.

Office of Research and Development
U.S. Environmental Protection Agency
Washington, DC

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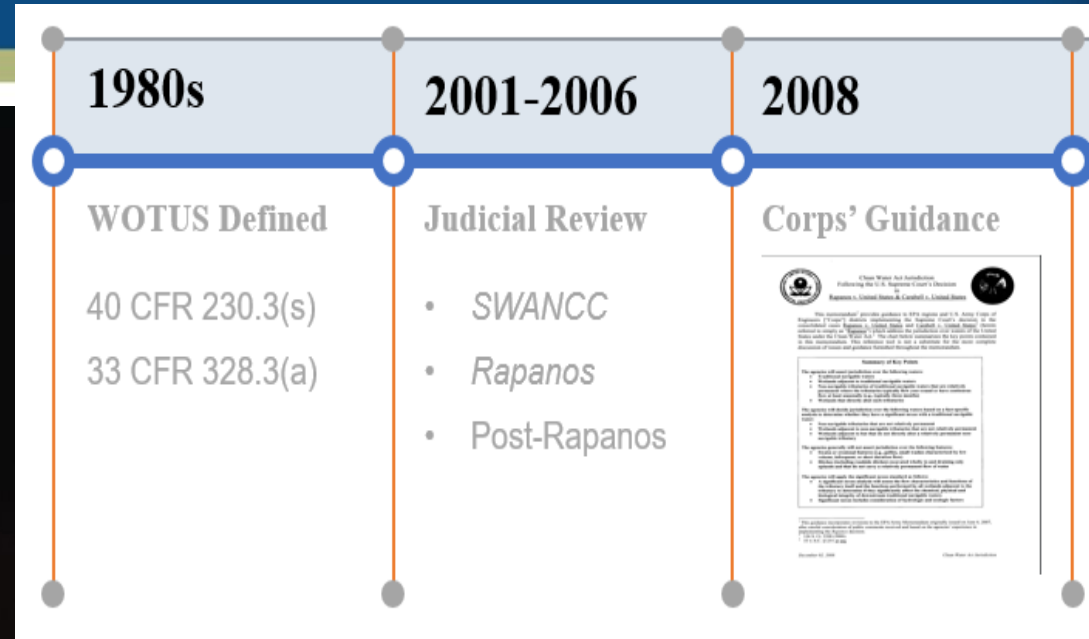


Sometimes the Facts Get in the Way

➤ According to the Agencies:

- “Between June 22, 2020 and April 15, 2021, the Corps made approved jurisdictional determinations under the NWPR of 40,211 aquatic resources, and found that 76% were non-jurisdictional.” Order at p. 9:15-18.
- “The Agencies have identified 333 projects that would have required Section 404 permitting under the CWA prior to the NWPR but no longer do.” Order at p. 9: 18-20.
- “In New Mexico and Arizona, nearly every one of over 1,500 streams assessed under the NWPR were found to be non-jurisdictional—a significant shift from the status of streams under both the Clean Water Rule and the pre-2015 regulatory regime.” Order at p. 9:21-23

WOTUS: *The here and now ...*



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

WOTUS: *Into the looking glass ...*



The Biden Rule???????????????

- Executive Order 13390 (Jan. 20, 2021)
 - Must replace NWPR
- Intent to Revise WOTUS (Jun. 9, 2021)
- Notice of Public Meetings re: WOTUS (Aug. 3, 2021)

August 18, 2021

August 23, 2021

August 25, 2021

August 31, 2021

Section 404: A New Sheriff? A New Boogeyman?

Act 285 of 2021 authorized DEQ to seek and accept delegation of the Section 404 Clean Water Act program



The End

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