



Civil & Environmental  
Consultants, Inc.

# Aggregates and the Clean Water Act:

## Navigating the Changing Landscape in Regulations



Since the inception of the Clean Water Act in 1972, there have been several changes to the definition of waters within the U.S. That's left many companies uncertain as to whether a stream, wetland, or body of water on their property is regulated by the federal government, state government, local government, or some other governing entity.

The [Clean Water Act](#) has been heavily litigated with cases going all the way to the Supreme Court, which, unfortunately, didn't make it much clearer with its "nexus" ruling in [Rapanos v. United States](#).

### Rapanos v. United States

John Rapanos, a landowner in Michigan, wanted to develop a piece of property. It turned out, however, that the property had been designated as a wetland. When the U.S. EPA launched civil and criminal enforcement actions, the case went to the Supreme Court.

The court ruled in favor of Rapanos. The majority was split on how to define government jurisdiction in this case. The Clean Water Act (Act) says the government can regulate any discharge into "navigable waters." Four of the Justices wrote that the Act protects wetlands with continuous surface connections to water that is navigable. Justice Anthony Kennedy, however, wrote that there only needs to be a "[significant nexus](#)" with such waters.

There was never any solid understanding of what constitutes a nexus. The lack of clarity has frustrated other judges, landowners, and regulators who have all struggled to apply the ruling consistently.

## Application Varies

Regulatory interpretation and application relative to the Act varies from region to region and even among project managers within the Corps of Engineers. This variability has left the regulated public without any clear understanding of whether a body of water on their property is regulated. Is it regulated? If so, who regulates it?

## The 2015 Clean Water Rule

Under the Obama administration, the [Clean Water Rule of 2015](#) essentially extended jurisdiction to cover nearly any water body in the U.S. It took jurisdiction over even the most remote wetland that didn't have a direct connection to a stream, and small headwater streams that only flowed after rainfall.

## The Navigable Waters Protection Rule of 2020

The Trump administration repealed the 2015 Clean Water Rule and replaced it with the [Navigable Waters Protection Rule of 2020](#). That rule defined WOTUS to include four specific categories of waters and defines 12 specific categories that were excluded from federal regulation to make it easier for the regulated public to understand whether a body of water on their property was indeed subject to federal regulation.

## What's Next?

On June 9, 2021, the U.S. EPA and the Department of the Army [announced](#) their intent to repeal the Navigable Waters Protection Rule and revise the definition of WOTUS, again.

On August 30, 2021, an order was issued by Judge Rosemary Márquez (appointed by President Obama) of the U.S. District Court for the District of Arizona in the Pascua Yaqui Tribe, et al. v. United States Environmental Protection Agency, et. al. case vacating the Navigable Waters Protection Rule.

On September 3, 2021, U.S. EPA and the Corps of Engineers [announced](#) that they were halting implementation of the Navigable Waters Protection Rule and interpreting WOTUS consistent with pre-2015 regulatory regime. It is unclear at this time if the agencies intend to continue with rulemaking to repeal the Navigable Waters Protection Rule. New twists on the WOTUS roller coaster have been particularly frequent recently.

## How the Clean Water Act Has Changed: Industry Impacts

Operators looking to acquire new property for expansion of their operations or start up new operations must consider the aquatic resources that exist on those properties that may be impacted.

Streams, wetlands, certain ponds, and other bodies of water may be subject to regulation. Also, operators need to be aware of requirements for active operations. For example, if a company is mining through a body of water as part of their mining operations, or they are constructing facilities or structures that require the discharge of dredge or fill material into the water, they will need to permit accordingly.

While the use of water in their operations may be subject to regulation, operators also need to be cognizant that discharge of dredge or fill material from mining operations or construction of facilities to support mining operations into aquatic resources that exist on their properties may also be subject to regulatory approvals.

## Defining Water Bodies

Anything identified within a property that meets the definition of WOTUS — whether that is a perennial stream or a wetland that's adjacent to a perennial stream — would be subject to federal regulation under the Clean Water Act. In particular, [Section 401](#) and [Section 404](#) of the Act requires permitting from the Corps of Engineers and the state before you can place dredge or fill material into those water bodies.

When compared to the pre-2015 regulatory regime and the 2015 Clean Water Rule, the Navigable Waters Protection Rule reduced the scope of waters that were subject to federal regulation. That was beneficial to operators. For example, many states do not have state-specific regulations for isolated wetlands or small ephemeral streams. So, in the past, where they would have had to go to the Corps of Engineers or the state certification agency to get permits to impact those wetlands that do not have a connection to a larger stream or small ephemeral streams, under the Navigable Waters Protection Rule they potentially no longer needed a permit.

As a result of the August 30, 2021, order for the U.S. District Court for the District of Arizona, interpretation of the definition of WOTUS is once again subject to the significant nexus concept established in the pre-2015 regulatory regime.

## **Navigable Water Protection Rule Opened Up More Land for Use**

Where the 2015 rule put nearly any water body on a property under federal regulation, the exemptions under the Navigable Waters Protection Rule open up the possibility of land use not possible under the prior ruling. For example, land that was deemed not suitable for mining activity or ancillary support facility activities under the Clean Water Rule might now be open to exploration and development under the 2020 Navigable Waters Protection Rule due to the reduced or eliminated permitting burden. The scope of what is defined as WOTUS on their properties has been significantly reduced.

Here's another example. Let's say an operator is looking at a 400-acre piece of property with a large perennial stream and its associated tributaries and wetlands. No matter how small the wetlands or feeder tributaries, or how remote the wetland is from streams or floodplains, all of the features of that 400 acres would have been subject to federal regulation under the 2015 rule.

Under the Navigable Waters Protection Rule, a large proportion of those features might no longer be subject to federal regulation. So, any of the isolated wetlands that are not adjacent or abutting large streams or not in the flood plains of larger streams may be exempt. Ephemeral streams that only flow immediately after rainfall might constitute a large portion of the property but are also no longer subject to federal regulations under the Navigable Waters Protection Rule.

The specific and clear exemptions stated in the Navigable Waters Protection Rule made more properties subject to use without going through permitting hurdles. It's also made it easier to get permits in some cases, reducing the time, expense, and mitigation costs necessary under the 2015 rule. For example, some operators could to get a general permit instead of an individual permit.



## How Civil & Environmental Consultants, Inc. Helps Clients Navigate the Changes

The first step for operators in the process is identifying whether the water body is indeed a regulated body. That's where we come in. [Civil & Environmental Consultants, Inc.](#) (CEC) would go out and look at the properties and identify what water bodies are present and meet the regulatory definition either of a wetland or a stream or any of the categories of water bodies that are subject to regulation under the Clean Water Act.

CEC has deep experience in interpreting past and current rules. We also have relationships with regional regulators and understand how they interpret and implement current regulations and guidance. We know what information we need to deliver and how to tell the story of the property to achieve the best possible outcome for the operators.

Because of the lack of overall clarity in the Act and the way it's being defined over time, there can be significant differences in how different regions or project managers with the Corps of Engineers will interpret things. Some may be very strict in accordance with the language of the Act while others may be more lenient in interpreting the intent of regulations within the Act. It helps to work with a company that knows who interprets things each way.

### Preliminary vs. Approved Jurisdictional Determination

Here's an example. There are two processes that you can go through with the Corps of Engineers to get a determination of what is classified as WOTUS. There's a process called a preliminary jurisdictional determination (PJD), which is a non-binding determination that the Corps will issue. What that will say is essentially that the water bodies on the site are subject to federal regulation without real specificity. It's non-binding, so it's also not a final action and is subject to change. It can be used for permitting purposes, however. You can use that PJD to go to the Corps of Engineers to apply for permitting for fill activities within water bodies that are classified as WOTUS.

If a water body does not meet specific inclusions or exclusions defined in the applicable rule, the Corps of Engineers generally does not accept it under the PJD process anymore. They require what is called an approved jurisdictional determination (AJD).

An AJD is a final action that can be appealed. It carries a five-year valid period from the time the Corps of Engineers issues an AJD that features are federally regulated waters or exempt from regulation under the Clean Water Act.

In many cases, regulators are leaning more heavily on the AJD than the PJD as they have in the past under prior rules.

As a result of the August 30, 2021, order for the U.S. District Court for the District of Arizona, some Corps of Engineers Districts have put a temporary hold on processing AJD requests and will only issue PJDs. However, U.S. EPA and the Corps of Engineers have indicated that AJDs issued prior to the August 30, 2021, order will remain valid for the five-year period from the date they were issued and can be used for permitting actions.

Again, it's important to work with someone who has experience in dealing with the Corps of Engineers in different jurisdictions and understands the way rules are evaluated.



## **The Ruling Roller Coaster**

Over the years, determining what is subject to federal regulation when it comes to water bodies has been something like a roller coaster. The laws have been interpreted differently over time. The Supreme Court introduced further ambiguity. Even as new regulations were passed to make it clearer, different regions and different individuals within government offices have interpreted the rules differently.

It's created a complex and unequal playing field. Depending on where your property is and who is reviewing it, you don't know whether your property is subject to regulation. Operators are left trying to navigate murky waters with results that can vary depending on variables outside their control.

To say there's a degree of uncertainty is an understatement. Just trying to understand where things are in the regulatory landscape has been extremely difficult for operators. The frequently changing regulations can severely impact operations — many of which take years of planning and permitting. For example, an operator may have received a regulatory interpretation in accordance with previous regulations and associated guidance. Then the rules change or a different person is reviewing the rules and that regulatory interpretation or permit may no longer be valid. It can throw operators for a regulatory

loop. One day you have the right permit, the next day you don't, or you don't even need the permit anymore because the water body is no longer subject to regulation.

CEC's seasoned professionals have weathered the twists and turns of the roller coaster ride and are well positioned to help you navigate the current regulatory environment.

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## **Creating an Efficient Pathway to the Best Possible Outcomes**

At CEC, we are always looking at projects in the current landscape to create the most efficient and appropriate permitting pathway to accomplish the end goal. Our regional expertise and strong relationships with regional regulators are invaluable in crafting the story of the project necessary to achieve regulatory approval for our operator clients.

Each project is unique. We help operators understand what's needed to achieve the best possible outcome and help them make it happen.

If you'd like more information about our company, Civil & Environmental Consultants, Inc. (CEC), or about navigating the Clean Water Act for your property, contact us today.



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