

Summary Of Changes in Federal Regulations Pertaining to Jurisdictional Determinations:

As of 9/20/2021, BME Associates has heard from the USACE on the status of regulations and how they will proceed with jurisdictional determinations. The Environmental Protection Agency and U.S. Army Corps of Engineers are in receipt of the U.S. District Court for the District of Arizona's August 30, 2021 order vacating and remanding the Navigable Waters Protection Rule in the case of Pascua Yaqui Tribe v. U.S. Environmental Protection Agency. In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime (Rapanos) until further notice.

Under these regulations a few things have changed, the first being that ephemeral streams as well as some ditches are jurisdictional. Based on 1986 regulations, the preamble indicates that "non-tidal drainage and irrigation ditches excavated on dry land," are generally not considered waters of the U.S. The language of the preamble maintains the flexibility for District Engineers to regulate these features on a case by case basis. Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the Clean Water Act, because they are not tributaries or they do not have a significant nexus to traditionally navigable waterways. For ditches to generally be non-jurisdictional under Rapanos, all three qualifications must be met: constructed in uplands, draining only uplands, and have less than relatively permanent flow. Anything which does not meet these may be considered jurisdictional.

Furthermore, adjacent wetlands will be jurisdictional. The term "adjacent" is defined as bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." Examples of adjacent wetlands are ones which are abutting, have an unbroken surface or shallow sub-surface connection to jurisdictional water, proximity to jurisdictional water is "reasonably close," the determination "supports the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters," etc.

In summary, wetlands considered adjacent to jurisdictional waters for various reasons, as well as tributaries with ephemeral flow and some ditches, will now be regulated under Rapanos. Any wetland delineation report previously submitted which has not yet received a jurisdictional determination will be evaluated under these regulations. For further explanation and inquiries on how this may affect your project, please reach out to Martin Janda or myself at BME Associates. We will continue to stay educated on current regulations and are happy to assist with any questions.

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