

Clean Water Act: Section 404 Overview

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Clean Water Act (CWA) of 1972

- The CWA regulates the discharge of pollutants into Waters of the United States (WOUS).
- More specifically, Section 404 of the CWA regulates the discharge of dredged or fill material into WOUS.
- WOUS include oceans, rivers, streams, and wetlands.



Jurisdictional Determinations (JD's)

- JD's are utilized to determine USACE authority prior to Section 404 permitting regarding a specific project.
- Aquatic resources are evaluated for connections to Traditional Navigable Waters (TNW's).
 - ▶ TNWs' are defined as “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide” (Rapanos v. United States & Carabell v. United States).
- Wetlands and tributaries to TNW's are jurisdictional, providing that they meet specific criteria outlined in the Rapanos case and Regulatory Guidance Letter (RGL) No. 08-02
<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>



Making Determinations

- Submittals for JD requests include two forms of delineations
 - Office Delineation: maps evaluating soils, hydrology, and National Wetland Inventory maps are used when an individual is unable to conduct a site visit.
 - Field Delineation: most office data is used as secondary information. Conducting site visits requires the individual to collect data such as soils, plants, and hydrology.
- These site visits are crucial for understanding current conditions and boundaries relative to the site. They also alleviate potential questions of connection with a full site evaluation.



Identifying Connections

- **Relatively Permanent Waters (RPW's)**
 - ▶ These consist of non-navigable tributaries that flow directly or indirectly into TNW's. Such tributaries are considered RPW's when flow is year-round or seasonally (Three Months).
 - ▶ This does not include ephemeral tributaries that only flow during events of precipitation. Such waters require a significant nexus determination to be completed by the USACE Project Manager (PM).



Typical Relatively Permanent Water



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Relatively Permanent Water



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Connections continued...

- Wetlands directly abutting RPW's are considered WOUS.
 - ▶ Abutting can be defined as sharing a continuous surface connection with an RPW or TNW.
 - ▶ Man-made structures may sever jurisdiction for the consideration of the aquatic resource being abutting adjacent. However, road culverts do not sever jurisdiction.



Abutting Wetlands



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Abutting Continued



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Significant Nexus

- “The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike, or similar feature)” (Rapanos v. United States & Carabell v. United States).
- While roads separate waters, they are mostly constructed with culverts, which provides the physical connection and does not require a significant nexus.
- Structures constructed prior to the CWA, with no physical connection, would require a significant nexus. However, structures built after the CWA’s establishment of jurisdiction does not sever jurisdiction.



Significant Nexus



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Significant Nexus



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Significant Nexus



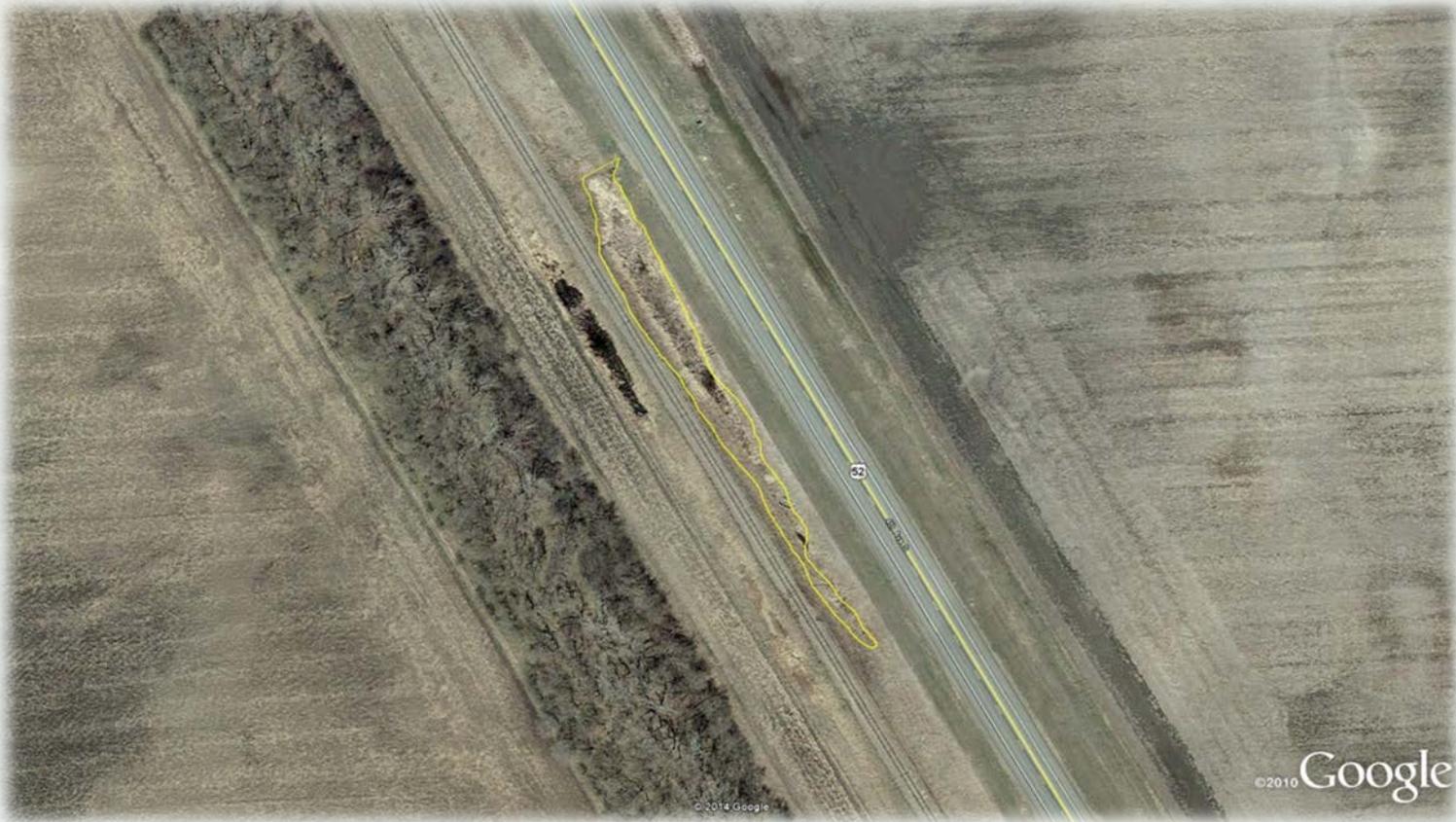
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Ditches? Preamble?

- Preamble waters- artificial wetlands, irrigation, ditches, ponds or lakes, ornamental bodies, and water filled depressions created in dry land.
- Artificial ditches are not generally considered WOUS. This determination is made on a case-by-case basis.
- Jurisdictional:
 - ▶ Abut an RPW
 - ▶ Drain a special aquatic site (including wetlands)
- Non-jurisdictional:
 - ▶ Drain uplands and only uplands with no direct connection to RPW's

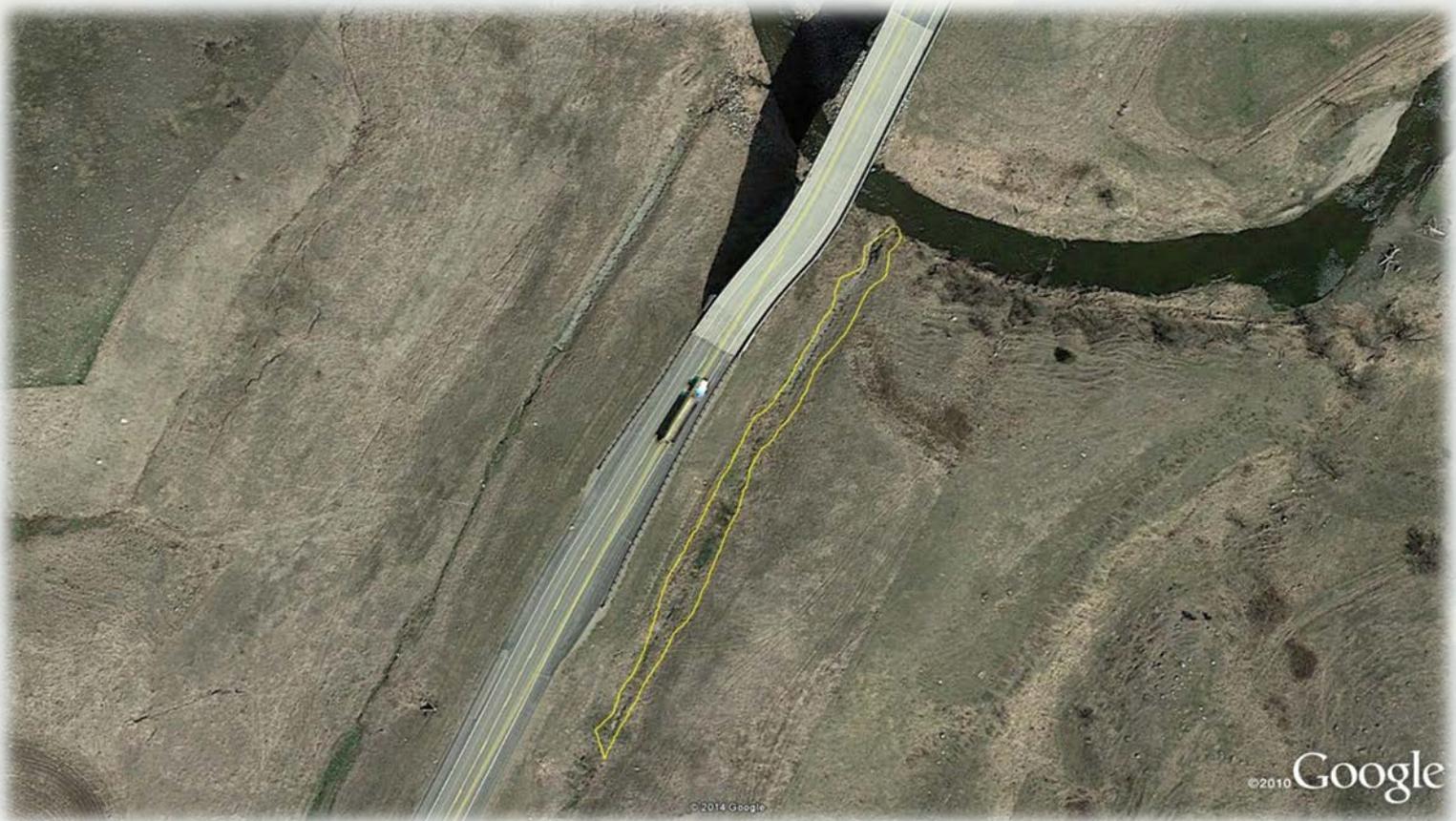


Preamble



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Preamble



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Isolated Waters

- Current guidance indicates that USACE does not have jurisdiction over isolated wetlands.
- These include waters surrounded by uplands with no immediate adjacency or abutting features.
- Once waters are determined to be isolated, they must receive concurrence from EPA in a 21 day coordination period.



Isolated Wetlands (Prairie Potholes)



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Jurisdictional Determination Forms

- Two types of JD forms
 - ▶ Preliminary JD
 - ▶ Approved JD
- Preliminary JD
 - Non-binding, written indications that there may be waters of the United States within a review area.
 - ▷ Applicants can utilize this JD in order to set aside questions of jurisdiction to expedite permitting processes.
 - ▷ Due to this being “preliminary” the applicant can request an approved JD at a later date if it becomes necessary.
 - ▷ Signed concurrence from the applicant is returned to the USACE. If the applicant does not agree, they can request an approved JD to be completed.



JD Forms continued

- Approved JD
 - An official Corps determination that jurisdictional “waters of the United States,” or “navigable waters of the United States,” or both, are either present or absent on a particular site.
 - Completed for any naturally isolated wetlands, for coordination with the EPA (21 days).
 - ▷ If EPA does not concur within 21 days, USACE continues forward and issues the JD.
 - Can immediately be appealed through the Corp’s administrative appeal process set out at 33 CFR Part 331.



Section 404 Permits

- Individual Permits
- Nationwide Permits



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Permit Applications

- Department of Army Form 4345
- NDDOT and Consultant short-form
- Code of Federal Regulations 33, Chapter II, §325.1 (c):
 - ▶ Applicants for all individual DA permits must use the standard application form (ENG Form 4345, OMB Approval No. OMB 49-R0420). Local variations of the application form for purposes of facilitating coordination with federal, state, and local agencies may be used.
 - ▶ Certain activities have been authorized by general permits and do not require submission of an application form but may require separate notification.



Content of Applications

- Complete description of activity
 - Drawings, sketches, or plans sufficient for public notice
- Location
- Scheduling of the activity
- Names and addresses of adjoining property owners
- Location and dimensions of adjacent structures
- List of authorizations required by other federal, interstate, state, or local agencies
 - ▶ Approvals
 - ▶ Denials



Nationwide Permits (NWP)

- NWP's- “ are a type of general permit and represent DA authorizations that have been issued by the regulation (33 CFR 330) for certain specified activities nationwide 33 CFR, Chapter II, §325.6.
- Timeline for NWP
 - ▶ Permit must be reviewed and a decision reached by USACE within 45 days.
 - Incomplete applications requiring more information restart the clock once information is received.



NDDOT NWP's

- 3 most commonly used NWP's by NDDOT:
 - NWP 3 – Maintenance
 - NWP 14 – Linear Transportation Projects
 - NWP 23 – Approved Categorical Exclusions
- Impacts to WOUS above .5 acre requires an individual permit (except NWP 23)



Nationwide 3 – Maintenance

- Repair, rehabilitation, or replacement of previously authorized structure
- Emergency Repair- damaged by storms, floods, fires, or other discrete events.
- Pre-construction notification (PCN)
 - ▶ Only required for activities in paragraph (b) – removal of accumulated sediments
- Minor deviations of the structure's configuration are authorized and include:
 - Material changes;
 - Construction techniques;
 - Requirements of other regulatory agencies; and
 - Code changes or safety standards



Nationwide 3

- Temporary structures, fills, and work associated with conducting the maintenance activity is also authorized under NWP 3.
 - ▶ When utilizing temporary structure or fills, appropriate measures must be in place to maintain normal flows and minimize flooding to the maximum extent possible. Such fills must also consist of materials and be placed in a manner of which they will not erode.
- A few examples of NDDOT Non-reporting NWP 3:
 - ▶ Signs – code/safety changes as part of other regulatory agency regulations.
 - ▶ Minor (spot) widening – material change/code or safety standards.
 - ▶ Paving – No discharge in WOUS



Nationwide 14 – Linear Transportation Projects

- Authorizes construction of:
 - ▶ Roads
 - ▶ Highways
 - ▶ Railroads
- Losses to WOUS must not exceed ½ acre
- Temporary fills are authorized



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Nationwide 14

- PCN
 - ▶ Required prior to commencing the activity if: (1) the loss of WOUS exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands.
- Impacts exceeding 1/10-acre require mitigation.
- Each water resource is viewed as a single and complete project
- Three forms of compensatory mitigation
 - Permittee Responsible Mitigation
 - Mitigation Banks
 - In-lieu Fee Programs



Nationwide 23 – Approved Categorical Exclusions

- Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department
- No significant impact to the environment
- .5 acre threshold for an individual permit may not apply (per water resource) – District Engineer discretion to elevate to IP
- Federal agencies included in NWP 23:
 - Bureau of Reclamation (BOR)
 - Federal Highway Administration (FHWA)
 - United States Coast Guard (USCG)
- Section 7 and Section 106 completed between FHWA and NDDOT



Nationwide 23

- Preconstruction notification is required for specific activities despite the project being categorically excluded.
 - ▶ RGL 05-07 (c)
 - (3) – Construction of bicycle and pedestrian lanes, paths, and facilities
 - (7) – Landscaping
 - (9) – Emergency repairs
 - (12) – Improvements to existing rest areas and truck weigh stations.
 - ▶ RGL 05-07 (d) – All activities
 - Modernization of highways
 - Safety improvements
 - Bridge rehabilitation
 - Fringe parking facilities
 - Constructions of weigh stations
 - Disposal of excess ROW
 - Changes of access control
 - Construction of bus storage and maintenance facilities
 - Rehabilitation of existing rail and bus buildings
 - Construction of bus transfer facilities
 - Construction of rail storage
 - Acquisition of land for hardship of protective purposes



Individual Permits (IP)

- Impacts greater than ½ -acre no longer meet Nationwide criteria (unless it is Cat. Ex.)
- IP's are much more involved and the process for verification is longer
- Pre-application consultation for major projects is recommended, in order to explore potential alternatives
- During the scoping process for the proposal, there must be an explanation of how impacts to WOUS will be minimized and avoided
 - ▶ Alternatives may minimize impacts to meet NWP criteria



Individual Permit

- **Public notice:**
 - ▶ Applicable Authority
 - ▶ Name and Address of Applicant
 - ▶ Name/title and address of Regulatory PM
 - ▶ Location of the proposed work
 - ▶ Description of proposed activity
 - ▶ Plans and elevation drawing
 - ▶ Statement if it is Cat Ex.
 - ▶ Cultural Statement
 - ▶ Endangered Species Statement
 - ▶ Statement on evaluation factors
 - ▶ Statement that a public hearing could be requested

- **Comments are received and evaluated for prior consideration of authorization.**



NDDOT JD's and permit application issues

- Missing information (permits)
 - ▶ ESA Section 7 and Cultural Resources Section 106 (typically county projects)
- Submitting electronic attachments or links
- Few submittals for JD's have NWI maps only.

