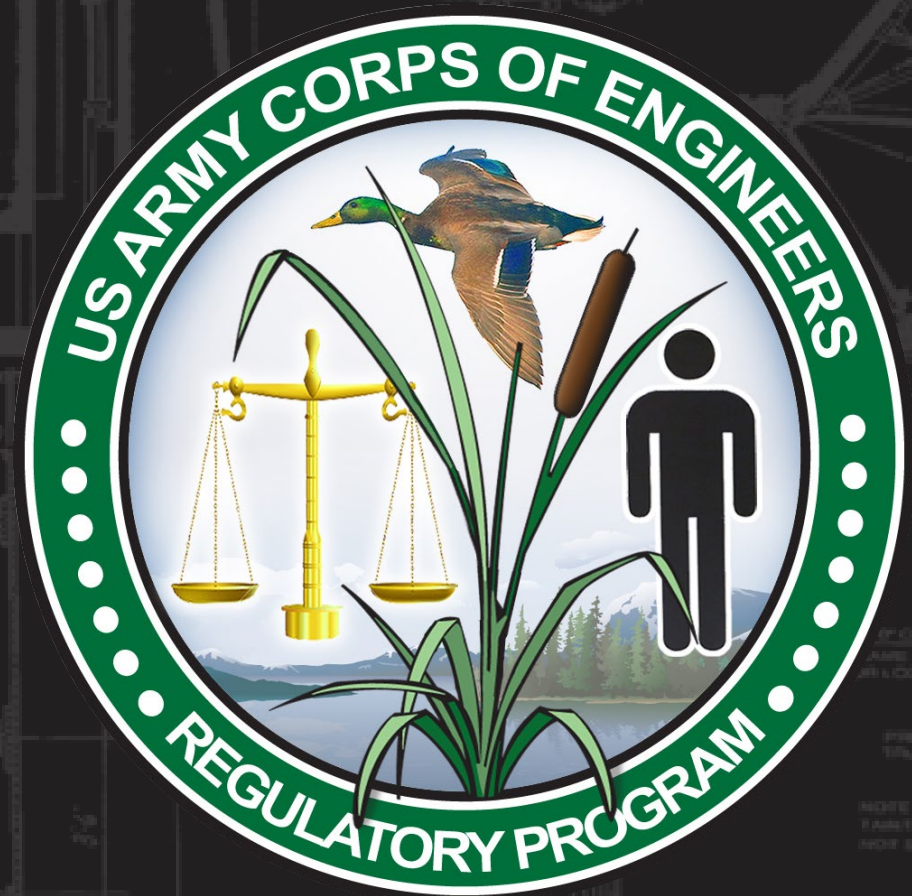


WETLANDS & FEDERAL AUTHORITY

Presented by:
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USACE REGULATORY MISSION

To protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible, and balanced permit decisions.

Purpose

- Protect Navigation
 - Rivers and Harbors Act of 1899.
- Restore and maintain the physical, chemical, and biological integrity of the Nation's aquatic resources.
 - Clean Water Act of 1972.
- Allow reasonable use of private property, infrastructure development, and growth of the economy.



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SECTION 10 RIVERS AND HARBORS ACT

- Requires authorization for any structure or work in, over, under, or affecting the course, location, or condition of any navigable water of the United States.
- Structure: any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, riprap, revetment, jetty, artificial island or reef, permanent mooring structure or vessel, power transmission line, piling, aid to navigation, ...or any other obstacle or obstruction.
 - Work: any dredging or disposal of dredged material, excavation, filling, or other modification.



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SECTION 404 CLEAN WATER ACT

- Requires authorization for the discharge of dredged or fill material into any “waters of the U.S.” (WOUS), including wetlands.
- Discharge of dredged material includes disposal in specified site in WOUS, runoff or overflow from an contained land disposal area, or any addition, including redeposit other than incidental fallback, of dredged or excavated material.
- Discharge of fill material is “effect based” definition: where the material has the effect of 1) replacing the any portion of a WOUS with dry land, or 2) changing the bottom elevation of a WOUS.



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PRE-2015 REGULATORY REGIME (CONSISTENT WITH SACKETT)

Categories of Jurisdictional Waters

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



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(A)(4) – IMPOUNDMENTS

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
 - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.



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(A)(5) – TRIBUTARIES

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
 - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
 - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



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(A)(5) – TRIBUTARIES – RELATIVELY PERMANENT

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
 - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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(A)(7) ADJACENT WETLANDS

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
 - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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(A)(7) ADJACENT WETLANDS

- **Continuous Surface Connection**
- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
- Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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PRE-2015 REGULATORY REGIME: EXCLUSIONS AND GENERALLY NON-JURISDICTIONAL FEATURES

- Regulatory exclusions include:
 - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
 - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features



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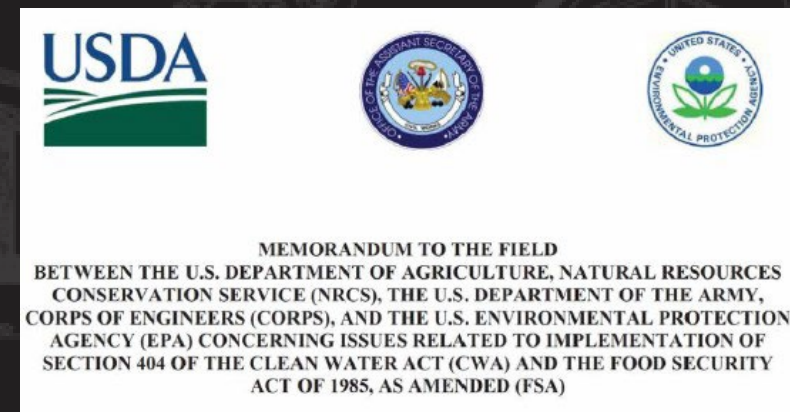
PRE-2015 REGULATORY REGIME: PRIOR CONVERTED CROPLAND

16 DEC 2022 Ag Memo is only *partially* applicable:

1) Continue to rely on PCC determinations from USDA-NRCS. Only wetlands identified within the PCC areas can be excluded (any portion of wetland identified outside of a PCC area does not meet the exclusion). All other aquatic resource types do not meet the PCC exclusion under the CWA.

2) “Abandonment”

Pursuant to 1993 WOTUS regulations (58 FR, 45034), “PC -cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquacultural, grasses, legumes or pasture production.”



16 DEC 2022



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WHAT IS NEEDED?

- Wetland Delineation/Waters Determination Report
 - Identify all aquatic features in the review area (Streams, drainages, wetlands)
 - Wetlands need to be delineated according to the 1987 manual and appropriate regional supplement
- Figures/Maps with review area clearly documented.
- Photographs
- Project Plans
- Application if necessary.
- Submit files via our Regulatory Request System (RRS)



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QUESTIONS?

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Louisville District Webpage:
<https://www.lrd.usace.army.mil/About/Districts/Louisville-District/>

Regulatory Request System (RRS)
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