

# Corps Regulatory Program – Recent Changes

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**US Army Corps of Engineers  
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# Program of Change

2021 Nationwide Permits

Navigable Waters Protection Rule (NWPR)

401 Water Quality Certification Revisions



# 2021 Nationwide Permits (NWP)

- Became effective March 15, 2021
  - Modified 12 existing NWPs
    - 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51 & 52
    - The 2017 versions expired March 14, 2021
  - Established 4 new NWPs
    - 55 – Seaweed Mariculture
    - 56 – Finfish Mariculture
    - 57 – Electric Utility Line & Telecommunications\*
    - 58 – Water & Other Substance Utility Lines\*
- \* - Separated from NWP 12 now only for Oil & Natural Gas





# 2021 Nationwide Permits (NWP's)

- New expiration date for 16 (12 modified & 4 new) NWP's is March 14, 2026.
- Multiple changes to be consistent w/ Navigable Waters Protection Rule (NWPR)
  - Removed definitions of Ephemeral & Intermittent Streams
  - Modified definitions of “ordinary high-water mark” & “perennial stream”
  - Eliminated references to quantifying stream bed losses in linear feet



# 2021 Nationwide Permits (NWP)

- All Waters of the US (WOTUS) losses to be in acres, not linear feet
  - Linear feet still important in SWF for use of TXRAM, mitigation calculation, etc.
- Loss of waters – permanent adverse effects to WOTUS w/ project that has regulated discharge
  - Filled
  - Flooded
  - Drained
  - Hydrologically modified
  - Excavated



# 2021 Nationwide Permits (NWP)

- General Condition 23 mitigation requirement changed relative to stream loss.
  - If loss exceeds 0.03 acre of stream AND the action triggers the need for a PCN, mitigation is required
  - If loss exceeds 0.1 acre of wetland AND the action triggers the need for a PCN, mitigation is required



# 2021 Nationwide Permits (NWPPs)

- Corps action has resulted in 2 sets of active NWPPs
- Differing definitions in terminology, mitigation thresholds, PCN triggers, etc.
- Also have 4 sets of Regional Conditions (RCs) in SWF area of responsibility
  - 2017 TX RCs & 2017 LA RCs
  - 2021 TX RCs & 2021 LA RCs



# Transitioning w/ 2021 NWP's

- Validity of previous authorizations under 2017 NWP's that were modified by 2021 NWP's
- Grandfathering provision at 33 CFR 330.6(b)
  - If activity qualifies under reissued/modified 2021 NWP, original NWP verification letter will continue to be valid until March 18, 2022, unless DE identified a different expiration date in verification letter.
  - If activity does not qualify under reissued/modified 2021 NWP, project proponent would have 12 months (up to March 15, 2022) to complete authorized activity as long as activity is under construction or under contract to commence construction





# 2021 Nationwide Permits (NWP's)

- Actions now ongoing to finalize modification & replacement of remaining 40 2017 NWP's by their expiration date of March 18, 2022.
- Changes were included in the 2020 proposal to these 40 NWP's but were not finalized.
  - Potential for additional revisions to occur.
- Another set of RCs is being reviewed for these 40 NWP's.



# Waters of the US

## Rules, Rules and More Rules

1. Former Rule - 1986 regulations w/ 2000s Rapanos guidance
2. Clean Water Rule - 2015 Obama Rule – repealed 2019.
3. “Step 1 rule (see #1 above w/ minor modifications) – 2019 - 2020
4. Navigable Waters Protection Rule (NWPR)\* - 2018 Trump Rule – signed 1/2020 – effective 6/22/2020 (including Colorado)

\* - Numerous lawsuits pending concerning the rule



# NWPR - Waters of the U.S.

- 33 CFR 328.3

- (a) **Jurisdictional** waters.

- (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb & flow of tide;
  - (2) Tributaries;
  - (3) Lakes and ponds as well as impoundments of jurisdictional waters; and
  - (4) Adjacent wetlands.



# NWPR – Non-Waters of the U.S.

- 33 CFR 328.3
  - (b) **Non-jurisdictional** waters.
    - (1) Waters or water features that are not identified in paragraphs (a)(1) through (4) of this section;
    - (2) **Groundwater**, including groundwater drained through subsurface drainage systems;
    - (3) Ephemeral features, including **ephemeral streams**, swales, gullies, rills, and pools;
    - (4) Diffuse stormwater **run-off** and directional **sheet flow over upland**;





# NWPR – Non-Waters of the U.S.

- (5) **Ditches** that are not paragraph (a)(1) or (2) waters, & those portions of ditches constructed in paragraph (a)(4) waters that do not satisfy conditions of para. (c)(1) Adjacent Wetlands;
- (6) **Prior converted cropland**;
- (7) Artificially **irrigated areas**, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;
- (8) **Artificial lakes and ponds**, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, **constructed or excavated in upland** or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet conditions of paragraph (c)(6) Lakes, Pond & Impoundments;



# NWPR – Non-Waters of the U.S.

- (9) **Water-filled depressions constructed or excavated in upland** or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- (10) **Stormwater control features constructed or excavated in upland** or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- (11) **Groundwater recharge, water reuse, and wastewater recycling structures**, including detention, retention, and infiltration basins and ponds, constructed or excavated **in upland** or in non-jurisdictional waters; and
- (12) **Waste treatment systems**.





# No longer waters





# Not waters (never were)







??????

**Not obvious**



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# Channelized Non-JD Surface Water



This type of feature includes non-jurisdictional ditches or ephemeral streams which are not themselves jurisdictional but can provide a **channelized surface water** connection for upstream perennial or intermittent waters in a typical year.



# Tributary

- *Tributary* means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (a)(1) of this definition in a **typical year** either directly or through one or more waters identified in paragraph (a)(2)-(a)(4) of this definition. A tributary must be perennial or intermittent in a **typical year**.
  - Perennial/intermittent flow continuously during certain times of year and MORE than in direct response to precipitation
  - Ephemeral tributaries flow in DIRECT response to precipitation



# Adjacent Wetland

- *Adjacent wetland* means wetlands that:
  - (i) abut, meaning to touch at least at one point or side of, a paragraph (a)(1) through (3) water;
  - (ii) are inundated by flooding from a paragraph (a)(1) through (3) water in a **typical year**;
  - (iii) are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature; or
  - (iv) are physically separated from a paragraph (a)(1) through (3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a **direct hydrologic surface** connection through or over that structure in a **typical year**.





# Typical Year

- When precipitation & other climatic variables are within normal periodic range (e.g., seasonally, annually) for geographic area of applicable aquatic resource based on rolling 30-year period
  - Provides a predictable framework to appropriately interpret data when determining the jurisdictional status of certain waterbodies.
  - Applies to some of the requirements for the following categories of waters:
    - (a)(2) -Tributaries;
    - (a)(3) -Lakes and ponds, and impoundments of jurisdictional waters; and
    - (a)(4) -Adjacent wetlands

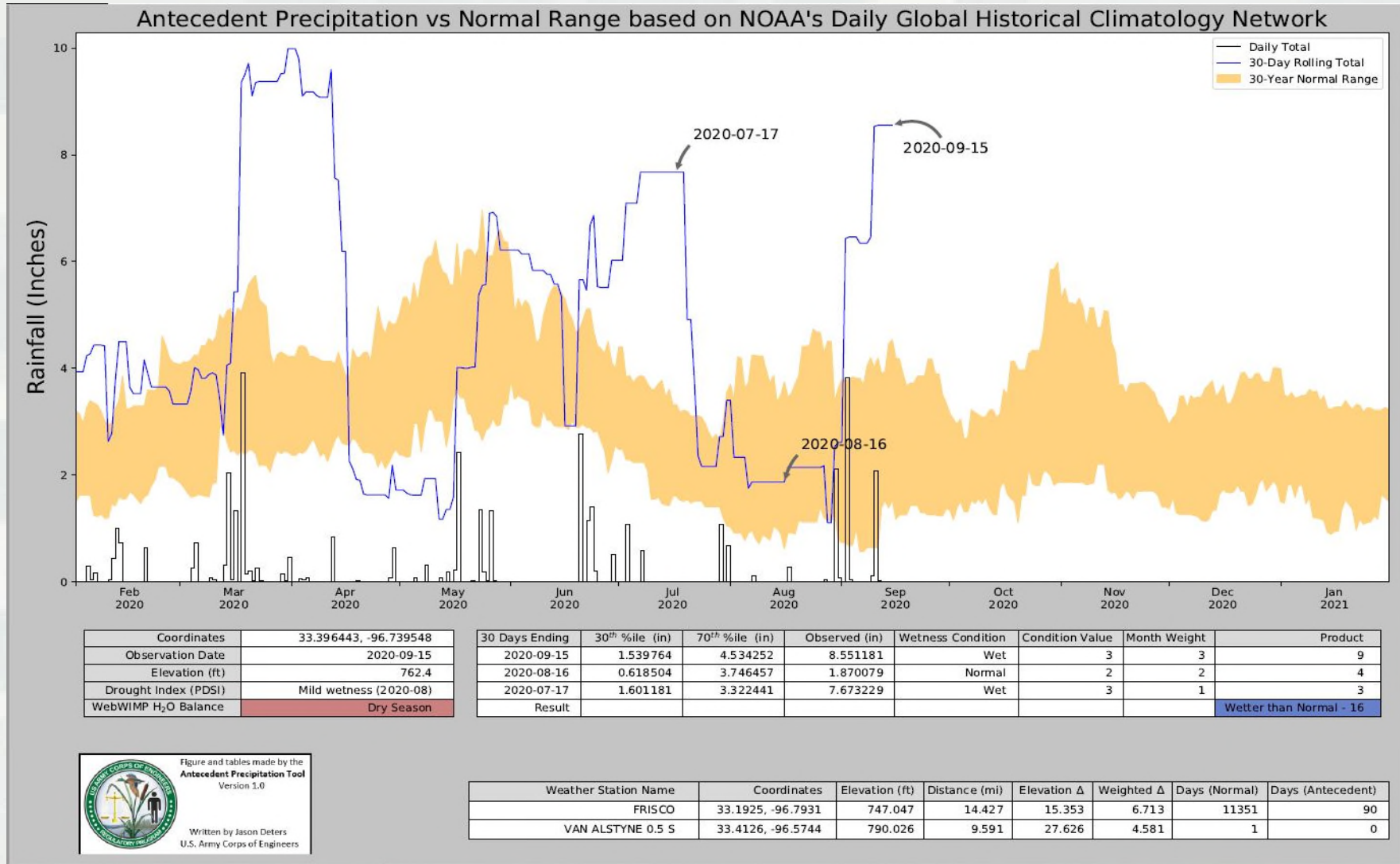


# Antecedent Precipitation Tool

- Developed by the Corps.
- Assesses rainfall data from preceding 30 years.
- Automated & provides consistent methodology.
- Includes information from the Web-based Water-Budget Interactive Modeling Program & Palmer Drought Severity Index.
- Uses recommended parameters contained in NWPR's preamble.



# Antecedent Precipitation Tool



# Application of Typical Year

- In addition to the APT, should also consider:
  - range of climatic variables
  - data available through remote tools, and
  - direct on-site observations.
- **Use professional judgment and a weight of evidence approach when considering precipitation normalcy along with other available data sources.**





# Application of Typical Year

- May be applied to determine if a water or feature is not jurisdictional (e.g., an ephemeral stream)
  - Perennial/intermittent flow does not have to occur every year, only in a typical year, w/ some regularity
  - A portion of wetland only has to flood during a typical year 1 time in the assessed period.
- **CAUTION:** Application of typical year to determine adjacent wetland not the same as determining tributary flow status
- Permanent, artificial hydrology sources can affect determination (e.g. wastewater)



# 401 Water Quality Certification

- EPA issued new regulations effective 9/11/20
- Entities must request **pre-filing meeting** w/ Certifying Authority (CA)
  - 30-day time limit to hold meeting
- After pre-filing efforts, copy of WQC application/request to be provided to CA **&** permit/license agency
  - If no 404 application pending/ Corps, WQC submittal may be returned



# 401 Water Quality Certification

- Corps to establish “reasonable time” for WQC decision to be rendered or considered waived
  - Standard is 60 days
- After receipt of 401 WQC, Corps must notify EPA in 5 days for neighboring jurisdiction review
- Corps to enforce 401 WQC conditions
- Direct questions concerning 401 process, information & data needs to Cas
- EPA in process of revising rule – Federal Register notice released June 2, 2021



# Corps Regulatory Program Information

- *National Regulatory Program Home Page:*  
<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>
- *Fort Worth District Regulatory Home Page:*  
<https://www.swf.usace.army.mil/Missions/Regulatory>
- Fort Worth District (817) 886-1731 – Regulator of the Day
- *If this program assisted you, please help us improve our services by completing the survey on the following website:* <http://per2.nwp.usace.army.mil/survey.html>



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# Questions?

