



## **CWA Section 404 Assumption**

## **Jurisdictional Determinations Technical Work Group**

# **WHITE PAPER**

**January 2019**

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*This white paper is solely a product of the volunteer technical work group members and should not be considered an ADEQ decision document.*

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# 1 Introduction

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In April 2018, Arizona Governor Ducey signed Senate Bill 1493 into law, granting the state the authority to develop rules to assume the Section (§) 404 dredge/fill program consistent with the Clean Water Act (CWA). The Arizona Department of Environmental Quality (ADEQ) formed seven Technical Working Groups (TWGs) to assist ADEQ in considering a program to assume CWA § 404 permitting for Arizona. These TWGs are made up of volunteers from the public and private sector with a general knowledge of the Section 404 permitting process. The purpose of the Jurisdictional Determination (JD) TWG was to focus on the process by which ADEQ might make jurisdictional determinations under a state-assumed program, recognizing that the scope of “Waters of the United States” regulated by the CWA is being determined at the federal level. This white paper represents the opinions of the JD TWG.

ADEQ feels that it has proven its ability to improve permit processing times and desires to align CWA programs across the state. Therefore, the agency is considering state assumption of the dredge and fill program established in CWA § 404. ADEQ also feels that it has demonstrated its process and customer service improvement capabilities over recent years and intends to incorporate these capabilities into the CWA § 404 permitting process.

## 2 Current State

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The CWA protects “navigable waters,” which it defines as “the Waters of the United States, including the territorial seas” (33 USC § 1362(7)). The U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA), which both implement permit programs under the CWA, adopted definitions of the phrase “Waters of the United States” in (inter alia) 1986, 1988, and 2015. The 2015 definition of “Waters of the United States” remains under litigation in several courts around the country, and its application is currently enjoined in 28 states, including Arizona. Meanwhile, EPA and the Corps have proposed repeal of the 2015 definition and in December 2018 released a proposed new regulatory definition for Waters of the United States.

### 2.1 Types of Waters of the United States

Because the 2015 definition of “Waters of the United States” is currently enjoined in Arizona, the governing definitions in this state are the 1986 (Corps) and 1988 (EPA) definitions of that term, as modified by the guidance adopted by the Corps and EPA following the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006). See EPA/Corps, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States and Carabell v. United States* (December 2008) (the “Rapanos Guidance”).

Pursuant to the pre-*Rapanos* definitions of “Waters of the United States,” the term includes:

1. All 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

2. All interstate waters including interstate wetlands
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters
  - a. Which are or could be used by interstate or foreign travelers for recreational or other purposes
  - b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce
  - c. Which are used or could be used for industrial purposes by industries in interstate commerce
4. All impoundments of waters otherwise defined as Waters of the United States under this definition
5. Tributaries of waters identified in paragraphs (1) through (4) of this section
6. The territorial sea
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) of this section
8. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not Waters of the United States.
9. Waters of the United States also do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the CWA, the final authority regarding CWA jurisdiction remains with EPA.

The Rapanos Guidance effectively modifies portions of the above definitions, specifically sections 1 (traditional navigable waters), 5 (tributaries) and 7 (adjacent wetlands). Some key concepts expressed in the Rapanos Guidance with respect to jurisdiction over those types of waters are explained briefly in the balance of this Section 2.1.<sup>1</sup> Other portions of the 1986/88 definitions quoted above (interstate waters, other waters affecting interstate commerce, impoundments of jurisdictional waters, and the territorial seas) are not directly affected by the Rapanos Guidance; however, the SWANCC Joint Memorandum (see footnote 1) notes that it is “uncertain whether there remains any basis for jurisdiction” over the category of “other waters” identified in section 3 of the above definitions. See 68 Fed. Reg. at 1996.

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<sup>1</sup> In addition to the Rapanos Guidance, the agencies also issued guidance in the form of a Joint Memorandum following the Supreme Court decision in *Solid Waste Association of Northern Cook County v. United States*, 531 U.S. 159 (2001) (“SWANCC”). See 68 Fed. Reg. 1995 (January 15, 2003) (the “SWANCC Joint Memorandum”). The SWANCC Joint Memorandum addresses the jurisdictional status of isolated, intrastate, non-navigable waters and the impact of the SWANCC decision on other parts of the definition of “Waters of the United States.” The Rapanos Guidance (footnote 19) explicitly notes that it is not intended to address SWANCC and does not affect the SWANCC Joint Memorandum.

Some key concepts from the Rapanos Guidance and the SWANCC Joint Memorandum are discussed briefly below.

### 2.1.1 Traditional Navigable Waters

Per the Rapanos Guidance, traditional navigable waters (TNWs) are those waters defined under 33 C.F.R. § 328.3(a)(1) (and also in EPA regulations at 40 C.F.R. § 230.3(s)(1)) and include “[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.” The Rapanos Guidance interprets the scope of (a)(1) waters (i.e., TNWs) to include: (1) waters subject to Sections 9 or 10 of the Rivers and Harbors Act) (as defined in 33 C.F.R. Part 329); (2) waters determined to be navigable-in-fact by federal court decisions (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN); (3) waters currently being used for commercial navigation (including commercial water-borne recreation); (4) waters historically used for commercial navigation (including commercial water-borne recreation); and (5) waters susceptible to being used in the future for commercial navigation (including commercial water-borne recreation).

TNWs designated by the Corps to date within the State of Arizona consist of the following:

- Roosevelt Lake
- Gila River, Powers Butte to Gillespie Dam
- Gila River, Coolidge Dam to Winkelman
- Gila River, Ripsey 1 to Ripsey 2 (near Kearny)
- Santa Cruz River, Tubac gage station to Continental Gage station
- Santa Cruz River, Roger Rd WWTP to Pima/Pinal county line
- Lake Pleasant
- Virgin River
- Colorado River Mainstem, Lake Mead to Lake Powell, including Lake Mead and Lake Powell
- Colorado River Mainstem, Hoover Dam to State International Boundary

### 2.1.2 Relatively Permanent Non-Navigable Tributaries of TNWs

Relatively permanent non-navigable tributaries<sup>2</sup> of TNWs (commonly referred to as relatively permanent waters (RPWs)) are considered jurisdictional under the Rapanos Guidance and consist of non-navigable tributaries of TNWs that typically flow year-round or have continuous flow at least seasonally (typically at least 3 months), along with adjacent wetlands that have a direct surface connection with such tributaries.

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<sup>2</sup> Under the December 2008 Rapanos Guidance, a “tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water.” Different definitions for “tributary” are included in subsequent rules, as discussed below.

### 2.1.3 Non-Navigable, Not Relatively Permanent Tributaries and Their Adjacent Wetlands

Under the Rapanos Guidance, non-navigable, not relatively permanent tributaries, and their adjacent wetlands are jurisdictional only if they have a significant nexus with a downstream TNW. This requires the Corps to conduct a significant nexus evaluation as part of an Approved Jurisdictional Delineation (AJD) for such waters as discussed in Section 2.2.3. This category is used to evaluate many of the ephemeral washes that occur across Arizona. Under the Rapanos Guidance, the Corps employs a two-step process when performing an AJD to determine whether a non-navigable, not relatively permanent tributary constitutes a water of the U.S. First, the Corps determines whether an Ordinary High-Water Mark (OHWM) is present; if it is, the Corps then determines whether the feature has a significant nexus with a downstream TNW.

### 2.1.4 Isolated, Intrastate, Non-Navigable Waters (including Wetlands)

Geographically isolated waters are not jurisdictional under the CWA solely based on use by migratory birds, as the EPA and Corps had asserted was the case prior to *SWANCC*. Moreover, as noted above, the agencies have recognized that the *SWANCC* decision called into question the basis for asserting jurisdiction over “other waters” with a potential impact on interstate commerce (category 3 of the 1986/88 definitions) and will not attempt to assert jurisdiction on this basis without project-specific approval from EPA and Corps Headquarters. See *SWANCC* Joint Memorandum, 63 Fed. Reg. at 1996.

### 2.1.5 Features Considered Not Jurisdictional Under the Rapanos Guidance and SWANCC Joint Memorandum

Jurisdiction is not asserted over watercourses that do not exhibit an OHWM as described below. In addition, the Rapanos Guidance directs agencies to generally not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) and ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

In addition, as noted in the previous section, jurisdiction is generally not asserted over isolated, intrastate, non-navigable waters pursuant to the *SWANCC* Joint Memorandum.

Finally, numerous exemptions typically recognized under the 1986/88 definitions of Waters of the United States presumably still apply today (e.g., waste treatment systems; prior converted cropland; features identified by the agencies as generally non-jurisdictional (see, e.g., 51 Fed. Reg. 41206, 41217 (November 13, 1986), as well as the exclusions section of the 2015 definition of “Waters of the United States”).

## 2.2 Jurisdictional Determinations

In Arizona, the Corps is currently authorized to make determinations regarding the applicability of the CWA on a property, commonly referred to as “jurisdictional determinations.” 33 C.F.R. § 320.1(a)(6). Two forms of jurisdictional determinations are available for identifying the presence or absence of Waters of the United States, including wetlands, on a property in Arizona: preliminary jurisdictional

determinations (PJDs) and approved jurisdictional determinations (AJDs). The state assumption statute mandates that the state offer both types of jurisdictional determinations. A.R.S. § 49-256.01(C)(5).

### 2.2.1 Ordinary High-Water Mark

An integral part of PJDs and AJDs is the identification of the presence or absence of an OHWM, and its location if one is present. Corps regulations define the term “ordinary high-water mark” for purposes of determining the lateral extent of CWA jurisdiction (33 C.F.R. § 328.4(c)) as follows (33 C.F.R. § 328.3(e)):

“The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

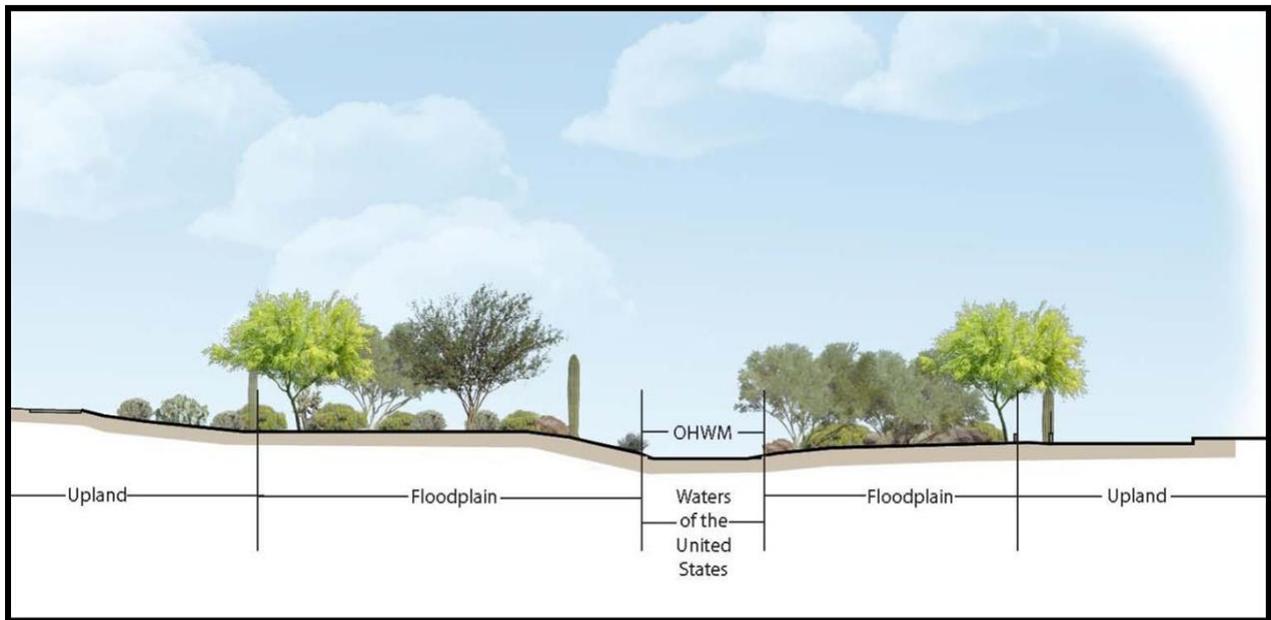


Illustration courtesy of Katie LaBelle and Jack Moody

The Corps has published several manuals and guidance for the delineation of OHWM and wetlands that it applies when making jurisdictional determinations in Arizona. These sources are pertinent whether the requested determination is a PJD or an AJD:

- Field Guide to OHWM Determinations in the Arid West (August 2008)  
[https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/FinalOHWMManual\\_2008.pdf](https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/FinalOHWMManual_2008.pdf)
- Updated Datasheet for Identification of the OHWM in the Arid West (July 2010)  
[https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/UpdatedDatasheetforIDOHWMM\\_ERDC\\_2010.pdf](https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/UpdatedDatasheetforIDOHWMM_ERDC_2010.pdf)

- Ordinary High Flows and the Stage-Discharge Relationship in the Arid West (July 2011)  
[https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/RegionalSupplements/AridWest\\_OrdinaryHighFlows\\_State-Discharge.pdf](https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/RegionalSupplements/AridWest_OrdinaryHighFlows_State-Discharge.pdf)
- Wetland Delineation Manual (January 1987). Wetlands Research Program Technical Report Y-87-1.  
[https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/WetlandRef/wetland\\_delineation\\_manul1987.pdf](https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/WetlandRef/wetland_delineation_manul1987.pdf)
- U.S. Army Corps of Engineers. 2008. Regional supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0). ERDC/EL TR-08-28. Vicksburg, MS: U.S. Army Engineer Research and Development Center.  
[https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/RegionalSupplements/AridWestSupplementV2\\_092008.pdf](https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/RegionalSupplements/AridWestSupplementV2_092008.pdf)
- A Guide to Ordinary High-Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States (August 2014). ERDC/EL TR-14-13. Vicksburg, MS: U.S. Army Engineer Research and Development Center.  
<https://usace.contentdm.oclc.org/utis/getfile/collection/p266001coll1/id/7645>
- Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.0) Environmental Laboratory U.S. Army Corps of Engineers (May 2010).  
[https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/RegionalSupplements/west\\_mt\\_finalsupp\\_v2.pdf](https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/RegionalSupplements/west_mt_finalsupp_v2.pdf)
- RGL 16-01 (Appendix 1 – in lieu of a cover letter, PJD or AJD) (Appendix 2 – PJD Form)  
<https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll9/id/1256>
- RGL 05-05, *Ordinary High Water Mark Identification*  
<https://www.mvr.usace.army.mil/Portals/48/docs/regulatory/RGL%2016-01%20Files/RGL%2016-01.pdf?ver=2016-11-08-114929-523>

### 2.2.2 Preliminary Jurisdictional Determinations (PJD)

In accordance with Regulatory Guidance Letter (RGL) 16-01 and 33 C.F.R. § 331.2, a PJD identifies aquatic resources within a property and assumes that any such resource is a regulated Waters of the United States without any further analysis. A PJD treats all aquatic resources “that would be affected in any way by the permitted activity on the parcel as jurisdictional” for purposes of permitting (e.g., impact calculation, mitigation obligations, resource impact analysis, etc.). RGL 16-01, § 4(a)(3). In Arizona, aquatic resources are typically identified through determination of whether there is an OHWM present, or whether the area constitutes a wetland. A PJD is a non-binding, relatively quick method that may allow projects to obtain permit authorization; an applicant may make an informed, voluntary decision

that it is in his or her best interest not to request and obtain an AJD. In the case of tributaries possessing an OHWM, a PJD *assumes* there is a significant nexus with a TNW and that the tributary is therefore jurisdictional. A PJD is “preliminary” in the sense that an applicant can later seek an AJD if necessary or appropriate during permitting or appeals processes. RGL 16-01, § 4. The current OHWM identification process is outlined in the Corps guidance documents listed in Section 2.2.1 above; the current PJD process is outlined in RGL 16-01.

Basic components of a PJD submittal to the Corps include the following and can be submitted with or without a permit application (a PJD or AJD request submitted without an accompanying permit application is referred to as a “stand-alone” request).

- Request for Corps Jurisdictional Determination form (RGL 16-01, Appendix 1) or cover letter containing the same information as called for on that form.
- PJD Form (RGL 16-01, Appendix 2)
- Figures per Corps’ mapping standards
  - State map
  - Vicinity map
  - Topographic map with boundary of area surveyed
  - Floodplain map (optional)
- Delineation Forms (optional)
  - OHWM Characteristics Table (Based on July 2010 Reference) (Note: single channel system)
  - OHWM Datasheet (August 2008 Reference, Appendix B) (Note: geomorphological approach)
- Delineation Figures on Aerial background with the “Preliminary (RGL 16-01) Section 404 Jurisdictional Delineation, U.S. Army Corps of Engineers, Los Angeles District” Label
- Ground Photos (i.e., upstream and downstream photographs)

In the case of a wetland delineation, additional information is required, following the Corps Wetland Delineation Manual and Datasheets referenced above.

PJDs issued by the Corps are preliminary and non-binding; the Corps is “making no legally binding interpretation of any type regarding whether jurisdiction exists over the particular aquatic resource in question.” RGL 16-01, § 4. Parties that secure PJDs may later elect to seek an AJD with respect to the same areas. *Id.* Corps PJDs are not appealable, either administratively or judicially. 33 C.F.R. § 331.2. This would also be true under a state-assumed 404 program, *see* A.R.S. 49-256.01(D).

**Table 1: Current PJD Benefits and Issues**

Current Benefits	Current Issues
<ul style="list-style-type: none"> <li>● Guidelines for PJDs and determination of OHWM available from the Corps</li> <li>● Based on field indicators</li> <li>● No charge to the applicant for the Corps to review PJDs</li> <li>● Established process</li> <li>● Available technical resources online</li> <li>● Local Corps office understands local riparian and ephemeral systems</li> <li>● Offers an expedited option to an AJD</li> <li>● No EPA review required</li> <li>● Pre-application meetings are readily available upon request</li> <li>● Water Resources Development Act allows certain types of applicants (typically high-volume public entities like Arizona Department of Transportation (ADOT)) to fund or partially fund Corps positions, resulting in timely processing of applications by the funding entity</li> <li>● Current wetland delineation process is clearly defined, based on plant, soil, and hydrologic determinations and accepted by most stakeholders, with definitive guidance readily available (1987 wetland field guide with arid west supplement, plant wetland indicator lists, and data forms available online)</li> <li>● National Wetland Training Institute provides classes to train wetland delineators using Corps federal guidance with a certificate provided</li> </ul>	<ul style="list-style-type: none"> <li>● Based on concession of jurisdiction rather than significant nexus with a TNW; may result in applicants treating resources as jurisdictional that are not, just to avoid delays</li> <li>● Determinations are subjective (may differ among Corps PMs to some degree)</li> <li>● Lack of public awareness regarding (1) availability of Corps guidance and expectations and (2) access to regulators</li> <li>● Lack of any mandatory timeframes, resulting in inconsistent processing times among Corps project managers</li> <li>● No easy way of finding previous PJD locations</li> <li>● National Wetlands Inventory maps published by United States Fish and Wildlife Service (USFWS) are often used as aids in wetland delineations, however, can be misleading because USFWS identification of wetlands is not based on Corps regulatory definition</li> <li>● The field definition of hydric soils in the arid Southwest is problematic</li> </ul>

### 2.2.3 Approved Jurisdictional Determinations (AJD)

In contrast to a PJD, an AJD is a formal process resulting in a written Corps document determining the presence or absence of Waters of the United States and the boundaries of those waters within a parcel. 33 C.F.R. § 331.2. The AJD represents the “definitive official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel and the official identification of the geographic jurisdictional aquatic resources on a parcel.” RGL 16-01, § 3. Like PJDs, requests for AJDs may be submitted along with a permit application, or in advance of any such application (the latter representing “stand-alone” AJD requests).

In the case of many aquatic features in Arizona (e.g., non-navigable tributaries that are not relatively permanent, such as ephemeral washes), preparing an AJD first requires the Corps to determine whether the feature in question possesses an OHWM, using the guidance listed in Section 2.2.1 above. If it does, then the Corps will determine whether the feature has a significant nexus with a downstream TNW pursuant to the Rapanos Guidance discussed above (Sections 2.1.1. through 2.1.5). A significant nexus exists if the feature or features (e.g., washes) significantly affects the physical, chemical or biological integrity of the downstream TNW. *Id.* The term “significant nexus” has never been defined; the Rapanos Guidance (p. 11) merely identifies it as an effect on a TNW that is likely to be “more than speculative or insubstantial.” A significant nexus evaluation generally consists of the following:

- An assessment of the flow characteristics and functions of the tributary itself, in combination with the functions performed by any wetlands adjacent to the tributary to determine if they have more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of TNWs
- A consideration of hydrologic factors such as
  - Volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
  - Proximity to the TNW
  - Size of the watershed
  - Average annual rainfall
  - Average annual winter snowpack
  - Any intervening barriers to flow between the feature and the nearest downstream TNW
- A consideration of ecological factors such as
  - The ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to TNWs
  - The ability of the tributary and its adjacent wetlands (if any) to provide aquatic habitat that supports biota of a TNW
  - The ability for adjacent wetlands to trap and filter pollutants or store flood waters that would otherwise reach TNWs
  - The ability to maintain water quality in TNWs

Currently, before finalizing an AJD based on a significant nexus assessment, the Corps will provide the proposed AJD to EPA for a 15-calendar-day review. In the review period, EPA can determine whether to take the proposed determination as a special case under the terms of a 1989 Memorandum of Agreement (MOA) between the Corps and EPA that allows EPA (rather than the Corps) to make a jurisdictional determination in some cases.<sup>3</sup>

The elements of a submittal package for an AJD request are similar to that for PJDs (e.g., Request for Corps Jurisdictional Determination form (RGL 16-01, Appendix 1) or cover letter requesting review, aerial photographs with aquatic resource mapping, ground photographs, etc.), excluding components specific to PJDs (such as the PJD form, Appendix 2 to RGL 16-01), but the AJD request also requires the following:

- A significant nexus analysis describing the relationship between the subject aquatic resources and the nearest downstream TNW
- A completed AJD form for each aquatic resource (Appendix B from the Rapanos Guidance)
- A table for the evaluated features which can be uploaded

Unlike PJDs, AJDs may be appealed administratively within the Corps (33 C.F.R. Part 331), and final Corps decisions may be appealed judicially as final agency actions pursuant to the Administrative Procedures Act. *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016). AJDs also would be considered appealable agency actions if the state assumes the § 404 program. See A.R.S. § 49-256.01(D).

For Arizona, the notion of “significant nexus” would be somewhat less significant under the 2015 definition of Waters of the United States (not currently applicable in Arizona). Under that definition, a significant nexus analysis is required only for: (1) waters within the 100-year floodplain of a TNW or interstate water; (2) waters within 4000 feet of the OHWM of a TNW, interstate water, jurisdictional impoundment or jurisdictional tributary; and (3) 5 specific types of waters, none of which are likely to be found in Arizona (prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands).

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<sup>3</sup> MOA Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act (1989), available at: <https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act>. Pursuant to a 1979 Attorney General opinion (43 Op. Att’y. Gen. 1979), EPA (rather than the Corps) has the ultimate authority to construe the term “navigable waters” under the CWA. The 1989 MOA provides that for purposes of the Section 404 program, the Corps will make jurisdictional determinations unless EPA identifies a project or area as a “special case” where it, rather than the Corps, will make the jurisdictional determination.

**Table 2: Current AJD Benefits and Issues**

Current Benefits	Current Issues
<ul style="list-style-type: none"> <li>• No charge to the applicant for the Corps to review AJDs</li> <li>• Pre-application meetings readily available upon request</li> <li>• Allows for determination of “no jurisdiction” or no Waters of the United States on the property.</li> <li>• Strong technical expertise on the part of the Corps</li> <li>• Clear and generally consistent process with guidance available online</li> <li>• Opportunity for EPA review, limited to determinations based on significant nexus analysis or isolation</li> <li>• Not required if a PJD will suffice</li> <li>• Water Resources Development Act allows certain types of applicants (typically high-volume public entities like ADOT) to fund or partially fund Corps positions, resulting in timely processing of applications by the funding entity</li> <li>• Current wetland delineation process is clearly defined, based on plant, soil, and hydrologic determinations and accepted by most stakeholders, with definitive guidance readily available (1987 wetland field guide with arid west supplement, plant wetland indicator lists, and data forms available online)</li> <li>• National Wetland Training Institute provides classes to train wetland delineators using Corps federal guidance with a certificate provided</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of mandatory timeframes results in lengthy and uncertain (0.5-1.5 years) process to evaluate significant nexus</li> <li>• “Significant nexus” occurrence is incompletely defined by law and practice, so Waters of the United States determinations may be inconsistent, particularly in complex, ephemeral systems</li> <li>• Lack of guidance, access, expectations available to smaller-volume or one-time permittees</li> <li>• Long turn-around and review times for small-volume and one-time permittees</li> <li>• Lack of access to previously completed AJDs</li> <li>• National Wetlands Inventory maps published by USFWS are often used as aids in wetland delineations, however, can be misleading because USFWS identification of wetlands is not based on Corps regulatory definition.</li> <li>• The field definition of hydric soils in the arid Southwest is problematic.</li> </ul>

### 3 Recommended Program Characteristics

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The recommended program characteristics of a state JD process include the following.

- Establishment of timeframes for review of PJDs and AJDs. Maximum 15 calendar days administrative completeness review (or at the pre-application meeting)
  - 30 calendar days substantive review for a PJD
  - 60 calendar days substantive review for an AJD
  - Possible extended time for large/complex determinations (similar to current longer Aquifer Protection Permit processing timeframes for “complex” applications)
- During administrative review ADEQ would notify the requester if their determination is large/complex
- All customers directed to available, clear online guidance with equal access
- Transparency; previously competed JDs available (unless landowner objects) on a shared resource map (like eMaps)
- Short list of key considerations in determining significant nexus.
- Clear, science-based criteria for assessing significance of impact to hydrologically connected TNW
- The process for securing an AJD becomes so simple and repeatable that there is little pressure to seek a PJD to save time
- Repository of forms, resources, previous JDs with a disclaimer on prior approvals
- Repeatable, defensible process to determine lateral and upstream limits of jurisdiction (e.g., presence of at least two characteristics of an OHWM)
- Comprehensive program management to streamline permitting
- Provide protection for valuable aquatic resources
- Low or no cost to applicant
- ADEQ develops list of areas where no jurisdictional waters exist (e.g., closed basins), obviating need to seek individual jurisdictional determinations on parcels in those areas. This process should be accompanied by an opportunity for public review and comment.
- Offer pre-submittal meeting on JDs, with potential for administrative completeness determination on the spot
- No EPA review of PJDs
- If EPA is to have any role in reviewing AJDs, that role needs to be clearly identified in the ADEQ/EPA MOA, needs to occur early in the process, and must occur in a timely fashion (e.g. no more than the

15 days EPA currently has to review Corps AJDs, with failure to respond in that time deemed to be acceptance)

- Annual training for continuity between employees
- Appeal process for AJDs in case of disagreement (AJDs are appealable agency actions, per A.R.S. § 49-256.01(D))
- ADEQ will on request accept and renew existing Corps AJDs completed prior to state assumption (as called for in A.R.S. § 49-256.01(E))
- ADEQ §404 staff have local experience and skill sets commensurate with Corps technical staff
- Once issued AJDs would be valid for longer than 5 years

## 4 Gap Identification

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Current gaps between the current state and a future Arizona program were identified as follows:

1. Consistent application of the Waters of the United States lateral boundaries (OHWM) and upstream limits to reduce interpretation and subjectivity
2. Ensure all Corps JD data is transferable and adoptable during assumption process
3. Knowledge (of guidance) and awareness and access gap between high-volume customers and small-volume or one-time applicants
4. Identify TNWs within AZ to facilitate significant nexus analysis review
5. Clear guidance to allow for consistent PJD and AJD request submittals
6. Establish timelines for agency processing
7. Provide previous delineations online with dates
8. Promote in-state training programs
9. AJDs only valid for 5 years

## 5 Gap Closure

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Gap closure options for the JD process gaps identified in Section 4 are as follows:

1. Consistency gap options
  - Establish criteria for OHWM characteristics appropriate to Arizona ecology
  - Develop a baseline threshold for the existence of jurisdiction
  - Encourage pre-application meetings for consistency

- Use existing Corps technical manuals (current interpretations) as appropriate and relevant to Arizona
- 2. Transfer of Corps JD data for existing and pending determinations in format of greatest utility to ADEQ (should be addressed in ADEQ/Corps MOA)
- 3. Knowledge gap options: Fill knowledge gap with a public awareness communication campaign re: availability of guidance and resources online to allow equal availability
- 4. Corps to identify process it follows for new TNW identification to avoid inconsistency in TNW identification between Corps and ADEQ. Corps-ADEQ MOA to call for agency coordination prior to TNW identification
- 5. Submittal guidance gap: Develop PJD and AJD submittal consistency requirements
  - Develop science-based criteria for identifying significant impacts to hydrologically connected TNWs appropriate to Arizona ecology
- 6. Processing timeline gap: Develop a realistic acceptable maximum duration for the JD review and approval process
- 7. Make previous JDs available in a searchable GIS format online (landowner ability to opt out) with a disclaimer that new JDs are subject to current conditions (eMaps)
- 8. Training gap options
  - Implement standardized training for new ADEQ staff,
  - Hire staff with local experience equivalent or above that of the Corps,
  - Request in-state training from National Wetland Institute or the Corps to cover delineation of OHWM and adjacent wetlands using existing federal definitions and guidance.
- 9. Evaluate options for determining the expiration time of AJDs based on changed conditions

## 6 Additional Program Considerations

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During the discussion of the items for which ADEQ seeks to assume responsibility, a number of suggestions and observations emerged that did not fit well into the previous sections. Also, consensus was not reached by the TWG on all of these suggestions and observations. Nevertheless, the TWG felt it was important that ADEQ be aware of these working group discussions as the 404 assumption public input process moved forward.

## 6.1 Fee Considerations

ADEQ needs to prepare for the costs associated with JDs and consider that this is currently something for which the Corps does not charge.

## 6.2 Outreach and Education Program

Outreach and education may be needed for the public. Demonstrations could include regional workshops that present the program requirements, listen to stakeholder input, and walk through web-based tools. These activities will expend staff time without an obvious source of revenue (enterprise fees).

## 6.3 Jurisdictional Determinations in Enforcement

Many public complaints are the result of a lack of understanding of the program or definitions of Waters of the United States. Personnel will need to spend time responding to calls that are not project-related with general questions or complaints that need to be investigated. In an enforcement action there may be a question of jurisdiction. Again, these activities will expend staff time without an obvious source of revenue.

## 6.4 Status of Jurisdictional Determination as a License or a Permit

### 6.4.1 JDs: Permits or Licenses

A jurisdictional delineation is a determination made as to the presence (or the potential presence, in the case of a PJD) or absence of Waters of the United States based on the federal definition. ADEQ's definition of a "license" in A.R.S. § 41-1001(12), encompasses the "whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law . . .". In some cases, an AJD or PJD will precede (or even accompany) a permit application, but in other cases there may be no permit application associated with a particular AJD or PJD (because no waters are present, a project is designed to avoid any waters identified, or a project does not proceed for some other reason (e.g., economic considerations)). In those cases, it may not be clear that the AJD or PJD is considered a license that is subject to ADEQ's licensing time frames (A.R.S. § 41-1072 *et seq.*). The working group believes that ADEQ's issuance of PJDs and AJDs should be subject to time frames. If ADEQ concurs that there is uncertainty regarding the status of some JDs as licenses, it could consider seeking to amend the 404 statute to clarify that all JDs are licenses. Alternatively, ADEQ could identify timeframes outside of the licensing time frames statute pursuant to its authority to "establish procedures . . . to make jurisdictional determinations" (A.R.S. § 49-256.01(C)(5)), if it believes that general grant of authority is sufficient to establish time frames. Time frames established outside of the general licensing time frame statutes may not incorporate all the protections provided in those statutes (e.g., refund of fees for not meeting the time frame); therefore, ADEQ should seek public and stakeholder input in the event it chooses this path.

### 6.4.2 Authority to Charge Fees for JDs

ADEQ currently has authority to charge fees for issuing permits. A.R.S. § 49-104(C)(1). A permit is defined as a written authorization from ADEQ “stating the conditions and restrictions governing a discharge or governing the construction, operation or modification of a facility.” A.R.S. § 49-201(26). Again, it may not be completely clear that an AJD or PJD, especially one that does not lead to issuance of a permit (e.g., because no jurisdictional waters are present), would qualify as a permit under this definition. If ADEQ concurs that uncertainty exists, and if it intends to charge fees for issuing PJDs and AJDs (refer to Section 6.1), then it may wish to seek to clarify in statute that JDs are permits (or that it otherwise has authority to charge fees for issuing such JDs).

### 6.4.3 Appealable Agency Actions

AJDs (but not PJDs) are appealable agency actions. A.R.S. § 49-256.01(D). As such, they are appealable to an administrative law judge pursuant to A.R.S. § 41-1092 *et seq.*, with that judge making a recommended decision to ADEQ and the ADEQ Director making the final administrative decision. However, if some or all AJDs are considered “permits” (see previous paragraph), then the appeal arguably would go to the Water Quality Appeals Board pursuant to A.R.S. § 49-323. ADEQ should evaluate this issue and provide clarity on the avenue for appealing AJDs in any final program rules if the state assumes the program.

## 6.5 Non-Assumption

Although it was not part of ADEQ’s charge to the working group, numerous discussions took place that questioned whether full or partial assumption by the State was clearly warranted or advantageous. The workgroup felt it might be useful to ADEQ that these comments be summarized for inclusion in the white paper.

These discussions centered on such questions as:

- Are ADEQ’s potential administrative permitting process improvements worth the additional expense of developing the technical capability for determining, reviewing and enforcing the jurisdictional limits of the CWA?
- Does performing JDs imply a jurisdictional applicability of the State over other CWA programs?
- Will the 2018 EPA proposed rule, creating a much simpler definition of Waters of the United States, create less benefit for permittees? In other words, by reducing the revenue from JDs will the cost burden (in fees) of maintaining a state program fall heavier on the remaining permittees (who still require JDs and permits) with no equivalent improvement in service?
- Will ADEQ assumption result in an increased overall effort for completing JDs by effectively splitting the § 404 program between the Corps (Colorado River and Tribal lands) and ADEQ for projects that

cross these boundaries? Other states that have assumed the § 404 program already had state program requirements for wetland or stream protection programs so that state assumption reduced the need for JDs from two agencies (state and federal) to one (state). In the case of Arizona, ADEQ § 404 assumption appears to increase, rather than reduce, the number of agencies involved. (It might be possible to at least partially address this concern in the ADEQ/Corps MOA by identifying one agency to take the lead in preparing the JD for this class of projects, with the other agency in a review role).

- Will planned or unplanned changes in the definition of Waters of the United States create or reduce the staffing needs of ADEQ through changing JD complexity? CWA JDs have been a time-consuming and controversial part of the Corps regulatory mission, made even more difficult by the numerous court rulings and agency rule changes generated, even as the JD workgroup deliberated. There is no suggestion that, in the near term, litigation over the applicability of the CWA will decrease. This suggests that the State could be taking on an endless encumbrance of legal contention, policy revisions and the resources they demand.

Several members of the group stated a belief that many, if not all, of the difficulties with the JD process in Arizona could be resolved by open and constructive negotiation between ADEQ, the Corps, EPA and stakeholders. In particular, more formal recognition of the unique hydrology and ecology of the state by the national agencies could make CWA § 404 permitting more tailored to the unique waters of Arizona. Clarity and consistency on the specific criteria used by the Corps in making JDs and screening tools could also help applicants negotiate the time-consuming and costly process of § 404 permitting and AJD processing.

All of these considerations were drivers for these conversations and resulted in a range of opinion among the workgroup members on the wisdom of assumption of the § 404 program. Requesting that the Corps continue to perform JDs while ADEQ assumes all other authority (i.e., permitting, enforcement, etc.) over the § 404 program in assumable waters, was not part of the workgroup charge and therefore was not discussed in detail; despite this, there seem to be some advantages to the State of avoiding the burden of JDs, if that is possible and the Corps were willing to retain that obligation without accompanying permitting authority. In summary, it was not a consensus of the JD workgroup that full assumption of the § 404 program was clearly in the best interest of the State.

## 6.6 Jurisdictional Inventory

It has been recommended by some TWG members that ADEQ develop an inventory of drainage features that establish a starting point for a jurisdictional determination. It is also recommended that this inventory be subject to public review and comment. This would establish a dataset where landowners could be assured that the extent of jurisdictional Waters of the United States is not more than the identified features, though it could be less than the identified features. Project sites that include a feature from the inventory would have the option to (a) assume that the feature(s) is a Waters of the United States and work with ADEQ to define the lateral limits of the OHWM or (b) initiate a full AJD analysis to determine jurisdictional status. This option has the advantage of clarity and repeatability.

Applicants would have surety of areas within their project site that are not Waters of the United States. The length of time a state-wide inventory would be valid is another consideration, as is the burden on ADEQ in developing the inventory.

## 6.7 Screening Tool

It has been recommended by some TWG members that ADEQ develop a screening tool that allows applicants to determine in a stepwise fashion whether or not Waters of the United States occur within the project area. Rather than expending the time, effort and expense to map drainage features that occur in the project area along with the lateral limits of jurisdiction (OHWM), applicants would start an analysis from the downgradient limit(s) of the largest feature(s) that leave the site. Screening would have the goal of determining early in the process if there is clearly no nexus to a TNW (or if the project includes only isolated waters). For example:

- To the extent consistent with Rapanos Guidance, projects that are situated such that it is clear that there is no or very limited *physical* connection to a TNW would require minimal additional effort and analysis to determine/conclude that Waters of the United States do not occur in the upgradient areas of the project.
- Some projects may require additional analysis, including closer review and evaluation of the potential for the features of the project area to have more than an insubstantial effect on the physical, chemical and biological characteristics of the downgradient TNW.
- Other projects would clearly have a nexus to a TNW and should have the opportunity to move directly to delineating the lateral limits of Waters of the United States that occur in the project area (somewhat similar to a PJD).

## Appendix A: Rapanos Guidance

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Substantive policy outline assuming pre-2015 rule is operative (status quo)

### BACKGROUND

The status quo definition of Waters of the United States is given elsewhere in the white paper and would include all of the existing post-Rapanos, pre-Clean Water Rule guidance issued by the Corps, except as amended by the recommendations of the workgroup that are accepted by ADEQ and approved by EPA.

### POLICY

Except as changed under the approved assumption proposal, the policy of the State of Arizona would be similar to that of the Corps. TNWs and relatively permanent tributaries to TNWs (and wetlands adjacent to both) would be considered jurisdictional. Non-navigable tributaries that are not relatively permanent would be jurisdictional if they have a significant nexus with a downstream TNW. Effects upon the physical, chemical and biological integrity of downstream TNWs would be evaluated. Ordinary high-water marks would indicate the lateral extent of jurisdiction for the 404 program. PJDs would be available if an applicant did not want to have ADEQ engage in a significant nexus evaluation. The recommended program characteristics identified in Section 3 should be implemented under this scenario.

## Appendix B: 2015 Clean Water Rule

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Substantive policy outline assuming Clean Water Rule (CWR) is operative

### BACKGROUND

The final CWR was published in the Federal Register on August 28, 2015. Subsequent court challenges and judicial responses have resulted in the Rule being enjoined in all but 22 states, the District of Columbia, and the U.S. territories. It does not apply in Arizona, which still operates under the Rapanos Guidance.

### POLICY

Assuming that the CWR definition of Waters of the United States becomes law in Arizona, the policy of the State would be that that jurisdiction exists over all TNW and interstate waters, tributaries to TNW, impoundments of waters otherwise identified as jurisdictional by the rule and other jurisdictional waters extending up until no bed and bank and OHWM can be distinguished. This includes all man-made or man-altered tributaries, and effluent-dependent waters that do not fall into the rule's exclusions (80 FR 37053, Clean Water Rule). Jurisdiction of adjacent waters include any waters that fit under the floodplain and lateral extent rules or 'neighboring waters' (80 FR 37053, Clean Water Rule). Waters receiving a positive significant nexus test within 100-year floodplains of TNW would also be jurisdictional and require a significant nexus analysis.

ADEQ AJDs that determine the presence or absence of OHWM and bed and banks, the contribution of flow to downstream TNWs or interstate waters, and the presence or absence of significant nexus (for those waters where a significant nexus is still required to assert jurisdiction), would be the only method to conclusively determine the presence or absence of jurisdictional waters on a property. ADEQ PJDs would remain a voluntary acceptance by the applicant of jurisdiction and immediate progression to a 404 permit if identified waters were going to be impacted. Excluded waters (not Waters of the United States) would not require a 404 permit. Again, PJDs would be available if jurisdiction was acceded by the applicant and all recommendations made by the white paper (Section 3) should be considered for an ADEQ 404 program under this scenario.

## Appendix C: 2018 Proposed Rule

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Substantive policy outline assuming the 2018 Revised “Waters of the United States” proposal becomes applicable in Arizona

### BACKGROUND

On February 28<sup>th</sup>, 2017, the President of the United States issued an Executive Order (E. O. 13778) directing the EPA and the Army (the agencies) to review and rescind or revise the 2015 Clean Water Rule. On March 6<sup>th</sup>, 2017, EPA began a two-step process of repealing the Clean Water Rule and replacing it with a new rule, which was to be written in consultation with the States and that would be consistent with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

In beginning the consultation, the agencies presented the States with several ways of defining Waters of the United States that they feel meet the plurality opinion. The State of Arizona responded with an opinion on how the Plurality opinion would apply to waters within its borders.

“The Executive Order on reviewing the Waters of the United States rule directs both EPA and the Department of the Army to consider interpreting the term “navigable waters” in a manner consistent with Justice Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Two of the main tenets of this opinion are that Waters of the United States must be “relatively permanent waters”, and that wetlands must have a “continuous surface connection” to a relatively permanent water to be considered a Waters of the United States.

Arizona believes that relatively permanent waters in Arizona include perennial and seasonal waters. Seasonal waters include any waters that flow at any time during the year as a result of factors other than storm flow. Seasonal waters that flow only as a result of storm events would not be included. Similarly, wetlands would only be considered a Waters of the United States if they have a continuous connection to a Waters of the United States, and the connection is at least seasonal.”

- - *State of Arizona Input on Proposed Revision to the Definition of “Waters of the United States” Final Rule*, 80 Fed. Reg. 37,052, 6/16/17, *Ducey to Pruitt*, (emphasis added)

In response to public input and internal analysis, the agencies announced a proposed rule on December 12, 2018, with a pre-Federal Register template posted on the EPA website. As of the date of this white paper, a Federal Register posting has not occurred. The announced proposed process would include a 60-day comment period. A final rule would be written and distributed at an unspecified time after that.

The proposed rule presents a significant departure from both the 1986/88 definitions and the *Rapanos* Guidance. Under the 2018 proposal, all traditional navigable waters (as defined in the *Rapanos* Guidance) would be Waters of the United States by rule. Tributaries considered jurisdictional would be limited to those that provide flow to a TNW on a perennial or intermittent basis in a typical year.

Ephemeral streams and washes that conveyed or ‘held surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)’ would be non-jurisdictional. The State’s interest in the definition of ‘seasonal’ waters as intermittent was one of several alternative approaches on which the agencies seek comment in the preamble to the proposal.

‘Adjacent wetlands’ would also be re-defined by the 2018 proposed rule. Following the *Rapanos* plurality, adjacent wetlands are defined those abutting or having a direct hydrologic surface connection to a regulated water (TNW, regulated tributary, regulated ditch, regulated lake or pond, or regulated impoundment of a water of the U.S.)

Ditches and many other man-made conveyance features are also excluded from Waters of the United States, unless they qualified as tributaries by being constructed in a tributary or an adjacent wetland, or as TNWs. Tributary canals would be included in Waters of the United States, as would effluent-dependent streams that could be characterized as jurisdictional tributaries.

Following the *Rapanos* plurality opinion, ‘Ecological connections alone would not provide a basis for including physically isolated wetlands within the phrase “the Waters of the United States,”’ thus obviating the need for a significant nexus analysis, as it is presently conducted. A hydrological evaluation would be required to determine the jurisdictional status of wetlands lying close to regulated surface waters (as noted above, a wetland would need to abut or have a direct hydrologic surface connection to a regulated water in order to be regulated as an adjacent wetland). ‘Shallow subsurface connections’ by way of relatively permanent groundwater would not, in itself, constitute a hydrological nexus; although, this connection was encouraged for public commentary. Isolated wetlands, not connected by jurisdictional tributaries, would be non-jurisdictional.

Lakes and ponds that are TNWs would be jurisdictional, as would lakes and ponds supplying perennial or intermittent flow in a typical year to TNWs or to jurisdictional tributaries of TNWs.

Impoundments of waters otherwise regulated under the proposal would themselves be considered jurisdictional, reflecting past agency practice that impounding a regulated water does not change its jurisdictional status. The handling of breaks in jurisdiction (e.g., interrupted streams) are not clearly detailed in the proposed rule and the agencies are requesting input in the public comments.

## **POLICY**

It is important to remember that this suggestion is based upon a pre-publication (Federal Register), proposed rule. As of the date of this white paper, a Federal Register posting has not occurred. The 2015 Clean Water Rule changed significantly between the proposed and final form. In any case, based upon the unmodified 2018 proposed rule, Waters of the United States would include, in addition to the extant traditional navigable waters (TNWs), all tributaries that contribute flow on a perennial or intermittent basis to TNWs in a typical year. Excluded would be ephemeral streams and washes, rills, gullies and stormwater channels that flow only during rainfall events and lakes and ponds that are not TNWs and do not contribute flow on a perennial or intermittent basis to TNWs or jurisdictional tributaries.

Effluent-dependent waters and interrupted waters will await State input as to how they are considered in the 2018 proposed rule. According to the proposed rule preamble, effluent-dependent waters would be regulated under the proposal if they contribute flow to a TNW on a perennial or intermittent basis in a typical year. A regulated tributary does not lose its regulated status merely because it flows through a natural or man-made break (though if such a break precludes the contribution of perennial or intermittent flow to a downstream TNW, then that may affect the status of the tributary). The agencies seek comment on whether less than intermittent flow in a stretch of a tributary means that upstream areas of that tributary with perennial or intermittent flow would not be regulated. Adjacent wetlands considered Waters of the United States would be confined to those wetlands that abut or have a direct hydrologic surface connection to jurisdictional waters.

Assuming that this definition was adopted, many waters currently defined as Waters of the United States would lose that designation. For the remaining waters, AJDs would consist of an analysis of streams under 'typical' flow conditions and using regionally determined, geomorphological evidence in order to determine whether they contribute flow on a perennial or intermittent basis to a downstream TNW. The agencies have solicited comments on the methods for defining 'typical,' including a 30-year running streamflow record. Significant nexus analysis, as currently practiced, would go away.

Ephemeral washes would not be subject to the 404 program. Adjacent wetlands would require a similar analysis of the surface connection between a jurisdictional water and the candidate wetlands. Absent such a connection, wetlands would not be subject to the 404 program.

The proposal notes the possibility that states may elect to regulate waters not considered jurisdictional under the CWA under a waters of the state program to the extent they deem appropriate. The proposal also discusses assisting the States in providing spatial analysis of waters and other data needed to analyze the flow conditions of waters.

ADEQ PJDs would remain a voluntary acceptance by the applicant of jurisdiction and immediate progression to a 404 permit if identified waters were going to be impacted. The recommended program characteristics identified in Section 3, other than those pertaining to significant nexus, should also be implemented under this scenario.