



The Navigable Waters Protection Rule: Definition of “Waters of the United States”

OVERVIEW TRAINING FOR STATES AND TRIBES

JUNE 9, 2020

Today's Presentation

- Background and overview - Navigable Waters Protection Rule: Definition of “Waters of the United States”
- Discussion of programmatic effects of the final rule
- Questions and answers

Upcoming Presentations in State and Tribal Series

June 16: Typical Year

June 23: Tributaries, Ditches, Flow Regime, and Assessment

June 30: Adjacent Wetlands, Lakes, Ponds, and Impoundments

July 7: Exclusions and More

“Waters of the United States” and the Clean Water Act

- “Waters of the United States” (WOTUS) is a threshold term in the Clean Water Act and establishes the scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States including the territorial seas.”
- The Clean Water Act does not define WOTUS; Congress left further clarification to the agencies.
- The EPA and the Department of the Army (Army) have defined WOTUS by regulation since the 1970s.

Key Overall Changes under NWPR

Key changes from the 2019 Rule:

- Four categories of jurisdictional waters and twelve categories of excluded waters/features.
- No standalone interstate waters category.
- No case-specific significant nexus analysis.
- Key changes for:
 - Tributary
 - Adjacent wetlands
 - Ditches
 - Lakes, Ponds and Impoundments
 - New definitions

(a)(1) Territorial seas and traditional navigable waters (TNW):

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 and flow of the tide.

Key changes from the 2019 Rule:

- Combines the categories of traditional navigable waters and territorial seas.
- No substantive changes to definition of TNW.



Traditional navigable waters include those waters used for interstate commerce, like Lake Winnebago in Wisconsin.

(a)(2) Tributaries:

- Contributes surface water flow to an (a)(1) water in a typical year, either directly or through one or more (a)(2)-(4) waters. A tributary must be **perennial or intermittent** in a typical year.
- Does not lose its jurisdictional status if it **contributes surface water flow** to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream).
- The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of the definition.



Tributaries include those perennial or intermittent streams that flow in response to snowpack melt, like Hayes Creek in Colorado that contributes surface flow to the Crystal River.

Key Definitions in the Final Rule

Perennial:

- The term *perennial* means surface water flowing continuously year-round.

Intermittent:

- The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts).

Ephemeral:

- The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall).

Snowpack:

- The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (*e.g.*, in northern climes or mountainous regions).

Definition of “Typical Year”

The term *typical year* means: “when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.”

“Typical year” is a key concept for establishing jurisdiction based on surface water flow between a relatively permanent body of water (*i.e.*, a perennial or intermittent surface water channel, a standing body of open water) and TNWs, and between wetlands and other jurisdictional waters.

Application of the typical year concept ensures that the hydrologic flows and surface water connections necessary to establish jurisdiction are characterized based on normal climatic conditions (*i.e.*, neither too wet or too dry).

(a)(3) Lakes and ponds, and impoundments of jurisdictional waters:

- The term means **standing bodies of open water** that contribute surface water flow to an (a)(1) water in a typical year either directly or through one or more (a)(2)-(4) waters.
- Does not lose its jurisdictional status if it **contributes surface water flow** to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream).
- A lake, pond, or impoundment is also jurisdictional if it is **inundated by flooding** from an (a)(1)-(3) water in a typical year.



Lakes, ponds, and impoundments of jurisdictional waters include open bodies of surface water that contribute surface flow to a traditional navigable water, like Christian Pond in Wyoming.

(a)(4) Adjacent wetlands:

The term means wetlands that:

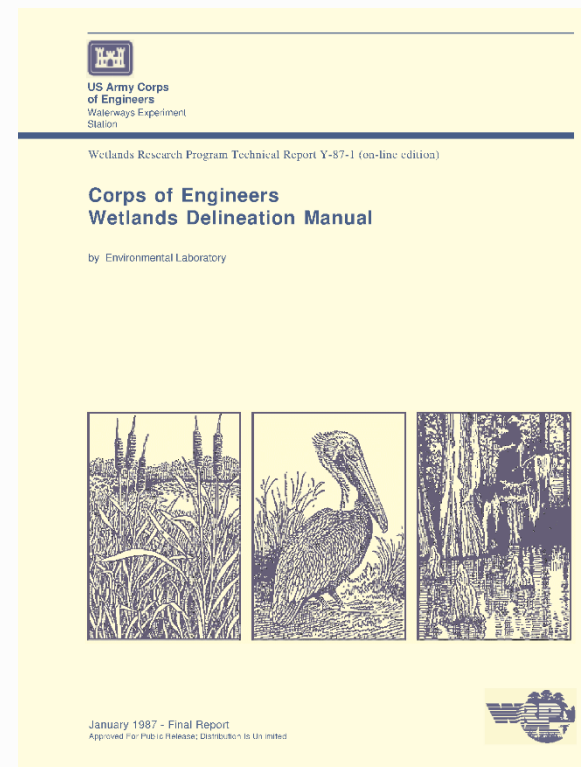
- abut, meaning to touch at least at one point or side of, a paragraph (a)(1)-(3) water;
- are inundated by flooding from a paragraph (a)(1)-(3) water in a typical year;
- are physically separated from a paragraph (a)(1)-(3) water only by a natural berm, bank, dune, or similar natural feature; or
- are physically separated from a paragraph (a)(1)-(3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection in a typical year through a culvert, flood or tide gate, pump, or similar artificial feature.



Adjacent wetlands include wetlands with manmade structures that allow for a direct hydrologic surface connection to an (a)(1)-(3) water in a typical year, like these wetlands in the Mississippi river Delta region of Louisiana.

Delineating Wetlands

- The final rule retains the longstanding regulatory definition of “wetlands.”
- The agencies will continue to use existing resources, methods, and practices to verify the presence of wetlands and to delineate wetland boundaries (e.g., the Corps’ 1987 Wetland Delineation Manual).
- The delineated boundary of a wetland remains constant, even though certain wetland indicators may not be present year-round due to normal seasonal or annual variability.
- A complex of wetlands with a continuous physical surface connection is delineated as one wetland.



Ditches

The term *ditch* means a constructed or excavated channel used to convey water.

Ditches are jurisdictional where they are:

- TNWs, including those subject to the ebb and flow of the tide (*i.e.*, are (a)(1) waters);
- Either constructed in or relocate a tributary, or are constructed in an adjacent wetland, and satisfy the flow conditions of the tributary definition (*i.e.*, are (a)(2) waters); or
- Constructed in an adjacent wetland and develop wetland characteristics (*i.e.*, are (a)(4) waters).

Ditches are excluded from WOTUS except where they meet the conditions of paragraph (a)(1) or (a)(2) waters (*i.e.*, they are a TNW, or a tributary) or where they were constructed in an adjacent wetland and develop wetland characteristics.

Key changes from the 2019 Rule:

- Codifies that ditches constructed in upland (other than TNWs and rerouted tributaries), certain ditches constructed in wetlands, and ditches with ephemeral flow are not jurisdictional.

Waters/Features Excluded from Final WOTUS Definition [33 CFR 328.3(b)]

- 1) Waters not listed as WOTUS
- 2) Groundwater
- 3) Ephemeral features
- 4) Diffuse stormwater run-off
- 5) Ditches not identified as WOTUS
- 6) Prior converted cropland (PCC)
- 7) Artificially irrigated areas
- 8) Artificial lakes and ponds
- 9) Water-filled depressions incidental to mining or construction activity
- 10) Stormwater control features
- 11) Groundwater recharge, water reuse, and wastewater recycling structures
- 12) Waste treatment systems

Waters/Features Excluded from Final WOTUS Definition [33 CFR 328.3(b)]

Prior converted cropland (PCC):The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

- Key change from proposal: Retains the abandonment principle to determine when an area is no longer prior converted cropland, but the preamble contains additional discussion about activities that constitute “agricultural purposes.”
- Key change from 2019 Rule: Only uses the abandonment principle.
- Corps and NRCS have rescinded the 2005 MOA; will be replaced with new MOA including EPA.

Waters/Features Excluded from Final WOTUS Definition [33 CFR 328.3(b)]

Waste treatment systems: The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

- No change from proposal; defines components of the exclusion in reg text which is different from 2019 Rule.

Key Elements of Exclusions

Upland:

- The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.
- Features constructed or excavated in upland or in non-jurisdictional waters must be constructed/excavated wholly in upland or non-jurisdictional waters to meet applicable exclusions.

Exclusions needing to be in upland or in non-jurisdictional waters:

- (b)(8) Artificial lakes and ponds
- (b)(9) Water-filled depressions incidental to mining or construction activity
- (b)(10) Stormwater control features
- (b)(11) Groundwater recharge, water reuse, and wastewater recycling structures
- (b)(12) Waste treatment systems

Key Elements of Exclusions

Exclusions as surface water connections:

- Certain excluded features may convey surface water flow to a downstream jurisdictional water in a typical year, thereby serving as a connection for upstream and downstream jurisdictional tributaries, lakes, ponds, and impoundments. This does not include groundwater or diffuse stormwater runoff/overland sheet flow.
- Excluded features that convey surface water flow between jurisdictional waters in a typical year do not become WOTUS themselves.

CWA Programs and the NWPR

CWA Programs Evaluated in Rulemaking

- Section 303: Water Quality Standards
- Section 303(d) and Total Maximum Daily Loads (TMDLs)
- Section 311: Oil Spill Prevention, Preparedness, and Response
- Section 401: Water Quality Certifications
- Section 402: NPDES Permitting
- Section 404: Dredged and Fill Permitting
- Financial Assistance Programs

Section 303 Water Quality Standards

- All states and 46 tribes currently have approved federal water quality standards under CWA section 303(c).
- Typically written broadly to apply to types of waters, and flexible enough to cover different interpretations of the definition of “waters of the United States.”
- States and tribes may adopt standards under state or tribal law for waters that are not “waters of the United States,” but they would not be in effect for CWA purposes.

Section 303(d) and TMDLs

- States are required to assemble and evaluate all existing and readily available water quality-related data and information and to submit to the EPA every two years a list of impaired waters that require TMDLs.
- The agencies evaluated how a change in the scope of CWA jurisdiction could affect existing and future state or tribal CWA section 303(d) lists and TMDL restoration plans.
- Some states may not assess non-jurisdictional waters, and may identify fewer waters as impaired, and therefore develop fewer TMDLs.
- States may continue to apply their own state law-based programs to identify and restore impaired waters, although this would not be required for waters that are not jurisdictional.

Section 311 Oil Spill Prevention, Preparedness, and Response

- In the supporting analyses, the agencies noted that a reduction in jurisdictional waters may reduce the applicability of the section 311 program and the associated Oil Spill Liability Trust Fund (OSLTF).
- The OSLTF is not available to reimburse costs incurred by states or tribes to clean up spills or costs related to business and citizen impacts (e.g., lost wages and damages) for spills affecting waters that are not subject to CWA jurisdiction.
- All states have some form of mechanism for oil spill cleanup reimbursement from responsible parties.
- If there is no longer a reasonable expectation that an oil discharge from a facility could reach a water subject to CWA jurisdiction, then CWA 311 spill prevention and preparedness plan requirements would no longer apply to this facility.

Section 401 Water Quality Certification

- CWA section 401 provides that a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into “waters of the United States” unless the state or tribe where the discharge would originate has granted or waived water quality certification.
- A reduction in jurisdictional waters under the final rule may reduce the number of federal permits and licenses that require a section 401 certification.
- States and tribes may continue to apply state and tribal law and water quality standards to such waters, as authorized and applicable.

Section 402 NPDES Permitting

- Section 402 of the CWA provides that a NPDES permit is required for the discharge of pollutants from any point source to a water of the United States. If a pollutant is conveyed through an ephemeral stream to a jurisdictional water, an NPDES permit may still be required.
- The agencies acknowledge that some existing permits may need to be modified if there is a change in jurisdiction. Any changes to permit conditions would be subject to anti-backsliding and antidegradation requirements.
- The NPDES state program requirements allow authorized states to establish programs that are broader in scope or more stringent than the federal NPDES program. States may therefore impose their own requirements for discharges into features defined as non-jurisdictional under the final rule.

Section 404 Dredged and Fill Permitting

- Where CWA jurisdiction does not apply or would no longer apply for certain waters or features under the revised definition, there would be no section 404 permits required for dredged or fill activities in those waters or features.
- There may be a reduction in demand for mitigation and restoration services under the CWA section 404 permitting program. Depending on a variety of factors, including future dredged and fill activities and permit needs, the amount of mitigation may change under the final rule, in the absence of any similar state, tribal, or local requirements.
- The final rule could affect approved jurisdictional determinations (AJDs) issued under previous regulations. Preliminary jurisdictional determinations (PJDs), however, are merely advisory in nature, make no legally binding determination of jurisdiction, and have no expiration date. A recipient of either determination may request a new PJD or an AJD be issued under this final rule.
- The final rule should not significantly affect the scope of waters over which the Corps retains permitting authority under an assumed CWA section 404 dredged or fill material permit program pursuant to section 404(g).

Financial Assistance Programs

- The principle funding mechanisms of the CWA will be largely unaffected by the revised definition of “waters of the United States.”
- Federal funding available to states and tribes for to build or enhance regulatory (dredged or fill) programs to address changes in scope of “Waters of the U.S.”
 - Wetland Program Development Grants (<https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators>)
 - Section 106 Water Pollution Control Grants (<https://www.epa.gov/water-pollution-control-section-106-grants>)
 - Multi-purpose Grants (<https://www.epa.gov/grants/multipurpose-grants-states-and-tribes>)
- Funding other aspects of state/tribal wetland programs
 - Federal Funding for Wetland Programs non-regulatory (<https://www.epa.gov/wetlands/federal-funding-wetlands>)

Next Steps

- The Navigable Waters Protection Rule will be effective June 22, 2020.
- New implementation tools are being developed and will be publicly available for download on the EPA's website in the near future:
 - Antecedent Precipitation Tool (APT)
 - Regionally-specific SDAMs will be released over time
- The agencies are working on several joint memoranda to facilitate implementation of the final rule.
- Following this webinar series, the agencies are interested in hearing suggestions for other training/guidance from states and tribes.

Questions and Answers

For Further Information

Visit <https://www.epa.gov/nwpr> for more information about the final rule, including the Federal Register notice of the final rule, supporting analyses, and fact sheets.

View the public webcast at -
https://www.youtube.com/watch?v=dt_OoxYU0-M&feature=youtu.be

Additional questions may be directed to the EPA at:
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USACE_CWA_Rule@usace.army.mil.