



## The Navigable Waters Protection Rule: Definition of "Waters of the United States"

PRESENTED BY ARMY CORPS NEW ENGLAND DISRICT AND EPA REGION 1

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### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

RULE OVERVIEW

## **Navigable Waters**

 The term "<u>discharge of a pollutant</u>" and the term "discharge of pollutants" each means any addition of any pollutant to <u>navigable waters</u> from any point source.

33 USC § 1362(12)

- The term "<u>navigable waters</u>" means the <u>waters of the</u> <u>United States</u>, including the territorial seas
  33 USC § 1362(7)
- The term "waters of the United States" means...

<u>KEY ISSUE</u>: The definition of "Waters of the U.S." determines the extent of federal jurisdiction under the Clean Water Act.

## **NWPR: Overview**

### a) Jurisdictional waters (4 categories)

### b) Non-jurisdictional waters (12 categories)

### c) Definitions

## **WOTUS under NWPR**

### (a) Jurisdictional Waters – 4 categories

- 1) Territorial seas and traditional navigable waters
- 2) Tributaries
- 3) Lakes and ponds, and impoundments of jurisdictional waters
- 4) Adjacent wetlands

### (b) Non-Jurisdictional Waters – 12 categories

- 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

## Key Changes under NWPR

#### Key changes from the previous regulation:

- 4 categories of jurisdictional waters: combines categories of traditional navigable waters and territorial seas
- Interstate waters are no longer categorically jurisdictional.
- No more case-by-case (significant nexus) determinations of jurisdiction
- Tributaries must be perennial or intermittent all ephemeral streams are non-jurisdictional
- Lakes, ponds and impoundments must contribute surface water to traditional navigable waters in a typical year
- Wetlands must be directly abutting a TNW, tributary, lake, pond or impoundment to be jurisdictional as adjacent

#### New terms defined in paragraph (c):

- Perennial, Intermittent, Ephemeral
- Typical Year
- Prior Converted Cropland, Waste Treatment System

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

JURISDICTIONAL WATERS: TNWs

# (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 previous regulation:

- 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.

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

JURISDICTIONAL WATERS: TRIBUTARIES

## (a)(2) Waters: Tributaries

### Defined in paragraph (c)(6):

- A river, stream, or similar naturally occuring surface water channel that contributes surface water flow to an (a)(1) water in a typical year either directly or through one or more (a)(2), (3), or (4) waters.
- A tributary must be perennial or intermittent in a typical year.
- The **alteration or relocation** of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition.
- A tributary 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, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.



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.

• The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

### Tributaries: Contribution of Surface Water Flow

A river, stream, or similar naturally occuring surface water channel that <u>contributes surface water flow</u> to an (a)(1) water in a typical year either <u>directly or through</u> one or more:

- (a)(2) tributaries
- (a)(3) lakes, ponds or impoundments of a jurisdictional water
- (a)(4) adjacent wetlands

### Typical Year (c)(13):

• 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."

### Tributaries: Perennial or Intermittent Flow

#### A tributary must be perennial or intermittent in a typical year.

#### Perennial (c)(8):

• The term *perennial* means: "surface water flowing <u>continuously year-round"</u>.

#### Intermittent (c)(5): :

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

#### Ephemeral (c)(3): :

• The term *ephemeral* means: "surface water flowing or pooling <u>only in</u> <u>direct response to precipitation</u> (*e.g.*, rain or snow fall).

The rule does not specify certain flow volumes or flow duration metrics, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.

## **Intermittent Flow**

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

- Intermittent flows may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous base flow for weeks or months at a time even when it is not raining or has not very recently rained.
- Note that groundwater input is not a requirement in the Rule's definition of "intermittent".
- <u>Snowpack melt and artificial sources such as effluent can also be sources of intermittent flows.</u>

## Snowpack

### Defined in paragraph (c)(10):

The term *snowpack* is defined as "<u>layers</u> of snow that accumulate over <u>extended periods of time</u> in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions)."

• **"Extended periods of time"** refers to more than merely a single snowfall event or periodic events with repeated snowmelts after each occurrence, but rather <u>recurring snow</u> <u>events which result in an accumulation of multiple layers of</u> snow in certain geographic regions, or at high elevations.

## **Ephemeral vs. Intermittent**

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

**Direct Response**: flow solely caused by <u>individual precipitation events</u>

- Ephemeral flow may occur simply because it is raining or has very recently rained or it has recently snowed and the snow has melted.
- Ephemeral flow can be the result of a small, brief storm event, one long storm event producing rainfall for several days without pause, or several back-to-back storms.

**Continuous Flow**: occurring more than in direct response to precipitation.

"Seasonal" Flow = Continuous Flow

 Seasonal flow may be the result of weeks- or months-long accumulation of precipitation in the form of snowpack that melts slowly over time or an elevated groundwater table that provides baseflow to the channel bed.

### Tributaries: Altered or Relocated Tributaries

The alteration or relocation of a tributary does not modify its jurisdictional status as long as it <u>continues</u> to satisfy the flow conditions of the definition.

 Contributes surface water flow to an (a)(1) water
Perennial or intermittent flow (In a typical year)

### Tributaries: Non-Jurisdictional Connections

A tributary <u>does not lose its jurisdictional status</u> if it contributes surface water flow to a downstream jurisdictional water in a typical year <u>through the</u> <u>following features</u>:

- A channelized non-jurisdictional surface water feature (e.g., ephemeral stream, non-jurisdictional ditch)
- A subterranean river
- A culvert, dam, tunnel, or similar artificial feature
- A debris pile, boulder field, or similar natural feature

### Non-Jurisdictional Connections: Channelized Non-Jurisdictional Surface Water Feature



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

### Non-Jurisdictional Connections: Subterranean River

A subterranean river is a <u>natural</u> <u>channel</u> that <u>temporarily flows</u> <u>underground</u> as a channelized river or stream, maintaining the same or very nearly the same flow volume underground and at the downstream point where it returns to the surface.

Similarly, urban areas can have <u>artificial buried underground</u> <u>tunnel systems</u> that act in the same way.



### Non-Jurisdictional Connections: Culvert, Dam, Tunnel or Similar Artificial Feature

A culvert, dam, tunnel, or other similar artificial feature can convey surface water flows from upstream jurisdictional waters to downstream jurisdictional waters. If those surface water flows are conveyed in a typical year, jurisdiction of the upstream waters is not severed.

![](_page_19_Picture_2.jpeg)

### Non-Jurisdictional Connections: Debris Pile, Boulder Field or Similar Natural Feature

Natural features can also <u>convey surface</u> <u>water flows</u> from upstream jurisdictional waters to downstream jurisdictional waters. If those flows are conveyed in a <u>typical</u> <u>year</u>, jurisdiction of the upstream waters is not severed.

![](_page_20_Picture_2.jpeg)

Photo: Stream with debris pile.

### **Connections that Sever Jurisdiction**

The following connections sever jurisdiction upstream:

- Stream channel breaks that <u>do not contribute surface water</u> flows to downstream jurisdictional waters <u>in a typical year</u>.
  - These stream breaks may only convey surface water flows during precipitation events that generally do not occur in a typical year (e.g., 10-, 25-, 50-, 100- or 500-year storms or floods).
- Surface stream channels that <u>disappear underground</u> and become part of the <u>groundwater</u> aquifer.
  - They never reconnect with the downstream tributary system (other than possibly via groundwater) and as such are not jurisdictional.

### Tributaries: Are Ditches Tributaries?

• The term *tributary* includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch <u>satisfies the flow conditions</u> of this definition.

#### Ditch is defined in paragraph (c)(2):

- The term ditch means a <u>constructed</u> or <u>excavated channel</u> used to convey water.
- Ditches are **not** a standalone category of jurisdictional waters.

![](_page_22_Picture_5.jpeg)

Ditches are jurisdictional where they are:

- (a)(1) waters = Traditional Navigable Waters
- (a)(2) waters = Either constructed in or relocate a tributary, or are constructed in an adjacent wetland, and satisfy the flow conditions of the tributary definition

#### OR

 (a)(4) waters = Constructed in an adjacent wetland and develop wetland characteristics

### As an (a)(1) water if it meets the conditions of:

#### Territorial sea

#### • Traditional Navigable Water (TNW)

- TNWs, including those subject to the ebb and flow of the tide (*i.e.*, are (a)(1) waters);
- 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.

![](_page_24_Picture_6.jpeg)

### As an (a)(2) water if it meets the flow conditions:

- <u>Perennial or intermittent</u> surface water flow in a typical year <u>AND</u>
- Contributes surface water flow to a jurisdictional water in a typical year, AND
  - Relocates a tributary,
  - Was **constructed** in a tributary,

#### <u>OR</u>

• Was constructed in an **adjacent** wetland

![](_page_25_Picture_8.jpeg)

Construction in progress. Natural tributary on the left. Relocated ditch on the right. Natural tributary to be filled in after construction.

#### As an (a)(4) water if it is constructed in an adjacent wetland:

- If it meets the definition of both "wetlands" under paragraph (c)(16) and "adjacent wetlands" under paragraph (c)(1).
- <u>Only the portion or portions of the ditch</u> that meets the definition of "adjacent wetland" are jurisdictional.
- May contribute less than perennial or intermittent flow to a paragraph (a)(1) water in a typical year
  - Downstream portion could also be jurisdictional as a tributary as long as it contributes flow to another downstream WOTUS in a typical year and meets the flow conditions of the tributary definition.

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

JURISDICTIONAL WATERS: LAKES AND PONDS AND IMPOUNDMENTS OF JURISDICTIONAL WATERS

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

#### Defined in paragraph (c)(6):

- The term <u>lakes and ponds, and impoundments of</u> jurisdictional waters 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), (3), or (4) waters
- A lake, pond, or impoundment of a jurisdictional water 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, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.
- A lake, pond, or impoundment is also jurisdictional if it is inundated by flooding from an (a)(1)-(3) water in a typical year.

![](_page_28_Picture_5.jpeg)

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.

### Lakes, Ponds and Impoundments: Standing Bodies of Open Water

The term lakes and ponds, and impoundments of jurisdictional waters means <u>standing bodies of open water</u> that contribute surface water flow to an (a)(1) water in a typical year either directly or through one or more (a)(2), (3), or (4) waters:

- Some lakes and ponds are <u>naturally formed</u> through a variety of events, including fluvial, glacial, tectonic, and volcanic activity.
- Lakes, ponds, and impoundments can be <u>man-made features</u> constructed for industrial and agricultural uses, power generation, domestic water supply, or for aesthetic or recreational purposes.
- Lakes, ponds, and impoundments <u>can also be subsequently modified</u> to change surface elevation, depth, and size.

# When are Lakes, Ponds and Impoundments Jurisdictional?

#### As an (a)(1) water if they are a TNW or territorial sea

<u>OR</u>

### As an (a)(3) water if:

They <u>contribute surface water flow to an (a)(1) water</u> in a typical year either directly or indirectly through one or more (a)(2), (3), or (4) waters or through channelized non-jurisdictional features,

#### <u>OR</u>

• They are <u>inundated by flooding</u> from an (a)(1), (2), or (3) water in a typical year.

Note that impoundments must be <u>impoundments of</u> <u>jurisdictional waters</u> to meet the (a)(3) criteria above.

### Lakes, Ponds and Impoundments: Contribute Surface Water Flow

The term lakes and ponds, and impoundments of jurisdictional waters means standing bodies of open water that <u>contribute surface water flow to an (a)(1)</u> <u>water</u> in a typical year

- Either directly or indirectly through one or more (a)(2), (3), or (4) waters
- Lakes, ponds and impoundments do not lose their jurisdictional status if they contribute surface water flow to an (a)(1) water through
  - Channelized non-jurisdictional surface water features
  - A culvert, dike, spillway, or similar artificial feature,

#### <u>OR</u>

- A debris pile, boulder field, or similar natural feature
- In a typical year

## Impounded Wetlands

#### Impoundments of wetlands are jurisdictional as "impoundments of jurisdictional waters" if:

1. The wetlands being impounded meets paragraph (c)(1) - the definition of "adjacent wetlands" and

#### <u>OR</u>

2. Meet the conditions of paragraph (a)(3) - <u>the lakes, ponds,</u> <u>and impoundments</u> of jurisdictional waters category.

#### NOTE:

- If an adjacent wetland is impounded and now meets the definition of paragraph (c)(6), it is jurisdictional as an (a)(3) water.
- If an adjacent wetland is impounded and continues to meet the definition paragraph (c)(1), it would remain jurisdictional as an (a)(4) wetland.

### **Exclusions that Sever Jurisdiction of Upstream Waters**

Lakes, ponds, and impoundments of jurisdictional waters upstream of excluded features are not jurisdictional if;

- The <u>excluded feature is not channelized</u> (e.g., diffuse stormwater runoff/directional sheet flow);
- The excluded feature <u>does not convey surface water flow to</u> <u>an (a)(1) water</u> (e.g., connected through groundwater); or
- The excluded feature <u>does not convey surface water</u> flow to an (a)(1) water <u>in a typical year</u> (e.g., flow is only conveyed in the 100-year storm event).

### **Certain Excluded Lakes and Ponds**

The NWPR identifies certain artificial lakes and ponds that are excluded under paragraph (b)(8):

 <u>Artificial lakes and ponds</u>, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, <u>constructed or excavated in upland or in non-jurisdictional</u> <u>waters</u>, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6).

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

JURISDICTIONAL WATERS: ADJACENT WETLANDS

## (a)(4) Adjacent wetlands:

#### Defined in paragraph (c)(1):

- Abut, meaning to touch at least at one point or side of, an (a)(1)-(3) water;
- Are inundated by flooding from an (a)(1)-(3) water in a typical year;
- Are physically separated from an (a)(1)-(3) water only by a natural berm, bank, dune, or similar natural feature;

![](_page_36_Picture_5.jpeg)

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.

<u>OR</u>

Are physically separated from an (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 between the wetlands and the (a)(1)-(3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.

## What are Wetlands?

#### **Definition of <u>Wetlands</u> has not changed:**

 Defined in paragraph (c)(16) as 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.

#### Rule adds a definition for <u>Upland</u>:

 Defined in paragraph (c)(14) as any land area that <u>under normal</u> <u>circumstances does not satisfy all three wetland factors</u> (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in the definition of "wetlands", and <u>does not lie below the ordinary high water mark or the</u> <u>high tide line of a jurisdictional water</u>.

### Adjacent Wetlands: Definition of Adjacent

Adjacent wetlands means wetlands that:

- Abut, meaning to touch at least at one point or side of, an (a)(1)-(3) water;
  - Change from previous definition of adjacent (bordering, contiguous or neighboring)

![](_page_38_Picture_4.jpeg)

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.

#### <u>OR</u>

 Are inundated by flooding from an (a)(1)-(3) water in a typical year;

### Adjacent Wetlands: Physical Separation

Adjacent wetlands can also be wetlands that are <u>physically</u> <u>separated</u> from an (a)(1)-(3) water only by a:

• Natural berm, bank, dune, or similar natural feature;

OR

- Artificial dike, barrier, or similar artificial structure
  - Artificial structure must allow for a **direct hydrologic surface connection** between the wetlands and the (a)(1)-(3) water **in a typical year**,
  - Direct hydrologic surface connection 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.

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

EXCLUSIONS: NON-JURISDICTIONAL WATERS

## **Exclusion vs Exemptions**

- An <u>exclusion</u> eliminates certain waters from the definition of "waters of the United States." Excluded waters are not jurisdictional as WOTUS.
  - The CWA also excludes certain discharges from the definition of "point source"; these discharges do not require NPDES permit coverage. The NWPR does not address these NPDES exclusions.
- <u>Exemptions</u> are discharges that are exempt from Clean Water Act (CWA) permit requirements.
  - Section 404(f) of the CWA describes those exemptions of discharges of dredged/fill material associated with certain activities, including those for normal farming, ranching, and silviculture activities as part of an established operation.
  - The NWPR does not address statutory activity exemptions under section 404(f).
- <u>Exclusion = Resource</u> which is not regulated.
- <u>Exemption = Activity</u> which is not regulated.
- A permit is not needed to perform an exempt activity in a jurisdictional water.

## **Exclusions Overview**

#### Many exclusions listed in paragraph (b) reflect longstanding agency practice

• <u>Prior converted cropland</u> and <u>Waste treatment systems</u> are defined in NWPR for the first time for CWA purposes

### Waters and features listed in paragraph (b) cannot be determined to be jurisdictional under any of the categories in paragraph (a)

- Note that the exclusion for ditches does not apply to (a)(1) or (a)(2) waters or when a ditch is constructed in (a)(4) waters that satisfy the conditions of paragraph (c)(1) adjacent wetlands.
- <u>A typical year assessment may be necessary</u> for some waters in order to conclude the water is excluded.

Point source discharges of pollutants into excluded waters may still be subject to NPDES permitting if the excluded water conveys the pollutant to a downstream jurisdictional water.

### Key Elements of Exclusions: Features Constructed in Upland

#### Upland is defined in paragraph (c)(14) of NWPR

- The term upland means any land area <u>that under normal circumstances</u> <u>does not satisfy all three wetland factors</u> (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) and <u>does not lie</u> <u>below the OHWM or the HTL</u> of a jurisdictional water.
- Features constructed or excavated in upland or in non-jurisdictional waters must be <u>constructed/excavated wholly in upland</u> or nonjurisdictional 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

**Connections between upstream waters and downstream jurisdictional waters maintain jurisdiction of upstream waters.** 

- Some <u>excluded waters can provide a connection</u> between upstream waters and downstream jurisdictional waters sufficient to maintain jurisdiction of upstream waters.
  - This <u>does not include connections via groundwater or diffuse</u> <u>stormwater runoff/overland sheet flow</u>.
- Excluded waters remain non-jurisdictional even if they provide a sufficient connection between upstream and downstream jurisdictional waters.
- Example: Tributaries may flow through a channelized nonjurisdictional surface water feature (e.g., ephemeral stream, non-jurisdictional ditch)

## (b)(1) Waters or water features that are not identified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4);

- Categorically excludes all waters not listed as WOTUS in paragraph (a)
- Clarifies that a feature is not jurisdictional just because it is not explicitly excluded in paragraph (b).

## (b)(2) Groundwater, including groundwater drained through subsurface drainage systems;

- <u>Excludes groundwater</u>, including groundwater drained through subsurface drainage features.
- The agencies have never interpreted WOTUS to include groundwater

## (b)(3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools

- <u>Ephemeral streams and ephemeral features</u> are not WOTUS under NWPR.
- Ephemeral features <u>may serve as connections</u> between upstream relatively permanent waters and downstream jurisdictional waters
- Ephemeral is defined in the rule as: surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

## (b)(4) Diffuse stormwater run-off and directional sheet flow over upland;

- <u>Diffuse run-off and directional sheet flow over upland</u> are excluded.
- These features <u>cannot serve as connections</u> to enable upstream perennial and intermittent waters to be jurisdictional.

#### (b)(5) Ditches not identified as WOTUS in paragraph (a);

- Ditches that are not (a)(1) waters = TNW
- Ditches that are not (a)(2) waters = Tributary
- Those portions of ditches constructed in (a)(4) waters that do not satisfy the conditions of paragraph (c)(1) = Adjacent Wetlands
- Approach balances exclusion with need to preserve jurisdiction over tributaries and adjacent wetlands.
- Under Rapanos ditches excavated wholly in uplands, draining only uplands, and having less than relatively permanent flow were generally excluded.

![](_page_47_Picture_7.jpeg)

The ditch exclusion includes many roadside ditches as well as many farm ditches.

#### (b)(6) Prior converted cropland - Defined in paragraph (c)(9) as:

- Any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making <u>production of</u> <u>an agricultural product</u> 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 <u>area is abandoned and has reverted to</u> <u>wetland</u> as defined in paragraph (c)(16) of this section.
- Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes <u>at least once in the immediately</u> <u>preceding five years</u>.
- 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.

### (b)(6) Prior converted cropland (PCC):

- Key change from previous regulation: Only uses the abandonment principle and no longer considers "change in use"
- USDA: Agricultural purposes include land use that makes the production of an agricultural product possible, including but not limited to grazing and haying.
- Preamble contains additional discussion about activities that constitute "agricultural purposes": including, but not limited to, idling land for conservation uses (e.g., habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought.
- Conservation practices and programs also are conducted "for or in support of agricultural purposes" and are appropriate to maintain the prior converted cropland exclusion.
- Corps and NRCS have rescinded the 2005 MOA; will be replaced with new MOA including EPA.

#### (b)(7) Artificially irrigated areas;

 Excludes artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

#### (b)(8) Artificial lakes and ponds;

• Excludes artificial lakes and ponds, including <u>water storage reservoirs and</u> <u>farm, irrigation, stock watering, and log cleaning ponds</u>, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are <u>not impoundments of jurisdictional waters</u> that meet the conditions of paragraph (c)(6) of this section;

## (b)(9) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters;

 Excludes water-filled depressions constructed or excavated in upland or in non-jurisdictional waters <u>incidental to mining or construction activity</u>, and pits excavated in upland or in non-jurisdictional waters for the purpose of <u>obtaining fill</u>, sand, or gravel;

#### (b)(10) Stormwater control features;

- Excludes stormwater control features <u>constructed or excavated in upland</u> or non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off.
- Exclusion helps to avoid disincentives to environmentally beneficial practices such as green infrastructure for controlling stormwater.

## (b)(11) Groundwater recharge, water reuse, and wastewater recycling structures;

- Excludes groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, <u>constructed or excavated in upland or in non-jurisdictional waters</u>.
- Exclusion helps to avoid discouraging, or creating barriers to, water reuse and recycling projects.

#### (b)(12) Waste treatment systems – Defined in paragraph (c)(15):

- The term waste treatment system includes <u>all components</u>, <u>including lagoons and treatment ponds</u> (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).
- Waste treatment systems have been excluded from the definition of WOTUS since 1979. The final rule defines waste treatment systems and the components of the exclusion in the regulation for the first time.

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

TYPICAL YEAR

## **Definition of "Typical Year"**

#### Defined in paragraph (c)(13):

- The term *typical year* means: "when precipitation and other climatic variables are within the <u>normal periodic range</u> (*e.g.*, seasonally, annually) for the <u>geographic area</u> of the applicable aquatic resource based on a <u>rolling thirty-year period</u>."
- "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).
- When determining whether climatic conditions are typical, the period of time examined may be a year, or a shorter or longer time period, depending on factors relevant to the water resource of interest.

## **"Typical Year" Application**

- 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;

<u>AND</u>

- (a)(4) Adjacent wetlands
- May also be applied to determine if a water or feature is not jurisdictional (e.g., an ephemeral stream).

## **Determining "Typical Year"**

• "Typical year" will generally be determined by:

- Normal precipitation conditions based on the <u>three 30-day</u> <u>periods</u> preceding the observation date.
- For each period, a <u>weighted condition value</u> is assigned by determining whether the 30-day precipitation total falls within, above, or below the 70th and 30th percentiles for totals from the same date range over the preceding 30 years.
- A determination of "normal," "wetter than normal," or "drier than normal" is made <u>based on the condition value sum</u>.
- Other accurate and reliable measurements of normal precipitation and other climatic conditions may be considered when scientifically warranted.

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

PROGRAMMATIC IMPACTS

### **CWA Programs Affected by NWPR**

- 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

### The Navigable Waters Protection Rule: Definition of "Waters of the United States"

IMPLEMENTATION

#### **Determining contribution of flow downstream:**

- May use, for example, USGS maps, state and local maps, aerial photography, or other remote sensing information or models that have been verified to be reliable to assess a feature's flow path.
- A trace analysis in a Geographic Information System (GIS), can be used to trace the flow path from a user selected point on a map, downstream along the stream network until the network ends. The USGS StreamStats application incorporates such a tool called the "Flow (Raindrop) Path," available at: <u>https://streamstats.usgs.gov/ss/</u>.

#### **Determining perennial or intermittent flow:**

- May use a combination of the best available mapping sources, including the NHD\* or local maps, as well as other remote tools and datasets such as aerial photographs, NRCS hydrologic tools and soil maps, NOAA snow maps, desktop tools that estimate the discharge sufficient to generate intermittent or perennial flow, or modeling tools.
- Site visits may be needed to perform on-site observations of hydrology or collect indicators of perennial or intermittent flow.
- Where available, streamflow duration assessment methods (SDAMs) that use physical and biological indicators to determine the flow duration class of a stream reach in a single site visit may be used.

\* As described in the Resource and Programmatic Assessment for the final rule, the agencies note that NHD at High Resolution does not distinguish intermittent from ephemeral features in most parts of the country and may not accurately identify on-the-ground flow conditions.

Determining surface flow and surface water connections that occur in a typical year:

- The agencies have developed an Antecedent Precipitation Tool (APT) that collects NOAA precipitation from nearby weather stations and compares precipitation from the time period of interest with precipitation data from the past 30 years, that may be used to determine whether precipitation conditions fall within the normal range.
- Other data sources and tools that may be used to inform whether hydrologic flows or surface water connections occur under normal climatic conditions include: drought indices, water-budget models, snow telemetry data, continuous flow monitor data, physical and biological indicators of typical flow conditions, or remote sensing data and hydrologic models.

#### **Determining adjacency:**

- A variety of remote tools and resources may be used to inform a wetland jurisdictional determination, including, federal, state and local maps, aerial photography and satellite imagery.
- 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).
- Natural berms, banks, dunes, or similar natural features that physically separate wetlands from jurisdictional waters may in certain instances be identified through on-site observations or remotely using aerial photography and satellite imagery, or other remote sensing information.
- Artificial structures that allow for a direct hydrologic surface connection (*e.g.*, through a culvert, tide gate, pump, or similar artificial feature) may in certain instances be identified through on-site observations or remotely usin construction design plans, permitting data, state and local information, or levee or drainage district information.

#### **Determining inundation by flooding:**

- May use a combination of remote tools and datasets such as USGS stream gage records, recurrence intervals of peak flows, wetland surface water level records, flood records, aerial photography and satellite imagery, or inundation modeling techniques and tools.
- The Corps' Hydrologic Engineering Center's River Analysis System (HEC-RAS) software allows users to perform inundation mapping and create inundation depth datasets. The HEC-RAS software is available for download at: <u>https://www.hec.usace.army.mil/software/hec-ras/</u>.
- Site visits may be needed to perform on-site observations of hydrology or field-based indicators of recent inundation (*e.g.,* the presence of water marks, sediment and drift deposits, water-stained leaves, or algal mats).

## **Implementation Memos**

The agencies are working on <u>several joint memoranda</u> to help facilitate implementation of the final rule:

- Elevation and Coordination Procedures for Certain Determinations under the Clean Water Act
- Memorandum to the Field on Exemptions from Regulation under Section 404(f)(1)(C) of the CWA for the Construction or Maintenance of Irrigation Ditches and for the Maintenance of Drainage Ditches
- Memorandum to the Field Concerning Implementation of the Navigable Waters Protection Rule, Section 404 of the Clean Water Act and the Food Security Act (FSA) of 1985

## **Aquatic Resource Mapping**

### The agencies are engaging with DOI on an interagency effort to advance aquatic resource mapping:

- USGS and USFWS are participating in light of their expertise with NWI and NHD
- EPA and Army have been discussing using the existing datasets as a starting point for mapping the nation's aquatic resources, including both WOTUS and non-jurisdictional waters
- Datasets currently have technical limitations that present significant challenges for use as standalone tools to determine the full scope of CWA jurisdiction and for creating geospatial datasets of jurisdictional waters
- EPA and Army believe the most efficient way to address their regulatory needs is to better align their efforts with DOI's existing processes and national mapping capabilities
- EPA and the Army are collaborating with DOI to better identify WOTUS through the development of a decision support system

## **Next Steps**

- NWPR went into effect 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
- Issuance of joint memoranda

# Questions and Answers