



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

TRAINING ON EXCLUSIONS FOR STATES AND TRIBES

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Navigable Waters Protection Rule State and Tribal Series

The webinars from this series will be available on EPA's website:

<https://www.epa.gov/nwpr>

Today's Presentation

- Exclusions
- Jurisdictional determination process
- Implementation memoranda
- Aquatic resource mapping
- Questions and answers

Exclusions vs. Exemptions

- An *exclusion* eliminates certain waters from the definition of “waters of the United States.” Excluded waters are not jurisdictional as a “water of the United States.”
- Statutory *exemptions* are discharges that are exempt from Clean Water Act (CWA) permit requirements. A permit is not needed to perform an activity that is subject to an applicable statutory exemption in a jurisdictional water.
- Section 404(f) of the CWA describes those exemptions of discharges of dredged/fill material associated with certain activities. The Navigable Waters Protection Rule (NWPR) does not address activity exemptions under section 404(f), including those for normal farming, ranching, and silviculture activities as part of an established operation.
- 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.

Exclusions Overview

33 CFR 328.3(b) and 40 CFR 120.2(2) (referred to in this presentation as “paragraph (b)” of the NWPR)

- Codify twelve exclusions to provide clarity and regulatory certainty.
- Paragraph (b)(1) excludes from the definition of “waters of the United States” all waters that are not (a)(1), (a)(2), (a)(3), or (a)(4) waters.
- Specifically identify categories of waters in (b)(2) through (b)(12) that are excluded.
- Waters and features that are excluded under paragraph (b) cannot be determined to be jurisdictional under any of the categories under paragraph (a).
 - Note that the exclusion for ditches does not apply to waters identified in paragraph (a)(1) or (a)(2) or when a ditch is constructed in waters identified in paragraph (a)(4) that satisfy the conditions of paragraph (c)(1).

Exclusions Overview

- Many exclusions reflect longstanding agency practice.
- Two exclusions that have been included in regulatory text for decades are now defined for the first time in the NWPR for CWA purposes: “prior converted cropland” and “waste treatment systems”
- Paragraph (b) refers to “waters” and “features” that are non-jurisdictional and excluded from the definition of “waters of the United States.” This presentation collectively refers to all waters and features as “waters.”

Section 328.3 (b) Overview

- (b)(1) Waters or water features that are not identified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4)
- (b)(2) Groundwater
- (b)(3) Ephemeral features
- (b)(4) Diffuse stormwater run-off and directional sheet flow
- (b)(5) Ditches that are not waters identified in paragraph (a)(1) or (2), and those portions of ditches constructed in waters identified in paragraph (a)(4) that do not satisfy the conditions of paragraph (c)(1)
- (b)(6) Prior converted cropland

Section 328.3 (b) Overview

- (b)(7) Artificially irrigated areas
- (b)(8) Artificial lakes and ponds
- (b)(9) Water filled depressions
- (b)(10) Stormwater control features
- (b)(11) Groundwater recharge, water reuse, and wastewater recycling structures
- (b)(12) Waste treatment systems

Exclusion Considerations

- Some exclusions refer to “upland.” The definition of “upland” is in the NWPR at paragraph (c)(14).
 - 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) of this section, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.
- Some exclusions refer to waters constructed or excavated in upland or in non-jurisdictional waters. For these exclusions, the waters must have been constructed or excavated wholly in upland or non-jurisdictional waters for the exclusion to apply.
 - When an excluded water is constructed or excavated wholly in upland/non-jurisdictional waters the mere interface with a jurisdictional water does not make the excluded water jurisdictional.

Exclusion Considerations

- Some excluded waters can provide a connection between upstream waters and downstream jurisdictional waters sufficient to maintain jurisdiction of upstream waters. Excluded waters remain non-jurisdictional even if they provide a sufficient connection between upstream and downstream jurisdictional waters.
- A typical year assessment may be necessary 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.

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

- Waters not enumerated in paragraphs (a)(1) through (a)(4)
- If a water does not meet a (b)(2) through (b)(12) exclusion, and that water is not an (a)(1) through (a)(4) water, the water is excluded from the definition of “waters of the United States” as a (b)(1) exclusion.

(b)(1) Waters or water features continued...

(b)(1) Examples where the requirements of the exclusion have been met:

- Wetlands connected to a tributary by a non-jurisdictional ditch
- Isolated wetlands that do not meet the “adjacent wetlands” definition and are not (a)(1) waters
- Upland areas
- Intermittent and perennial losing streams that do not contribute surface flow directly or indirectly to (a)(1) waters in a typical year
- Natural lakes and ponds that are not (a)(1) waters that lack a direct or indirect surface water connection to (a)(1) waters in a typical year and are not inundated by flooding from an (a)(1), (a)(2), or (a)(3) water in a typical year
- Impoundments originally constructed in jurisdictional waters but that no longer contribute surface flow directly or indirectly to an (a)(1) water in a typical year and which are not themselves (a)(1) waters.
- Underground or buried portions of a channel network (including culverts)

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

- Groundwater, including shallow subsurface water.
- Groundwater drained through subsurface drainage systems, such as tile drains used in agriculture that collect groundwater.
- Groundwater cannot serve as a connection between upstream waters and downstream jurisdictional waters sufficient to support jurisdiction of upstream waters.
- The exclusion does not apply at the point at which groundwater is expressed at the surface, such as where groundwater discharges to the channel bed and becomes baseflow in intermittent or perennial streams.
- Subterranean rivers or tunnels, culverts, and structures that bury a portion of a channel network are not groundwater.

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

- “Ephemeral” is defined at paragraph (c)(3).
 - The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).
- Includes downstream waters that become ephemeral due to upstream artificial features such as dikes or dams or man-made manipulation such as water transfers or pumping.
- Channelized ephemeral features do not sever jurisdiction of an upstream relatively permanent water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.



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

- The exclusion requires these waters be located in upland.
- Does not convey channelized surface flow.
- Cannot serve as a connection between upstream waters and downstream jurisdictional waters.
- (b)(4) Examples where the requirements of the exclusion have been met:
 - Non-channelized flow over upland
 - Sheet flow over upland from a lake, pond, impoundment, or wetland to a jurisdictional water
 - Directional sheet flow over upland during storm events



(b)(5) Ditches

- (b)(5): Ditches that are not waters identified in paragraph (a)(1) or (a)(2), and those portions of ditches constructed in adjacent wetlands that do not satisfy the adjacent wetlands definition
- “Ditch” is defined at paragraph (c)(2)
 - The term *ditch* means a constructed or excavated channel used to convey water
- Excluded ditches do not sever jurisdiction of an upstream relatively permanent water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.



(b)(5) Ditches continued...

The (b)(5) exclusion is not applicable to:

- Ditches that are an (a)(1) or (a)(2) water.
- Ditches constructed within the boundaries of (a)(4) wetlands at the time of construction where:
 - The ditches that have perennial or intermittent flow, contribute flow to an (a)(1) water in a typical year, and are not themselves wetlands.
 - The ditches contain wetlands within the boundaries of the (a)(4) wetland.

(b)(5) Ditches continued...

- Excluded ditches will typically be excluded using the (b)(5) exclusion unless they serve as a component of another excluded water.



(b)(6) Prior Converted Cropland

- Prior converted cropland (PCC) is defined for purposes of the CWA at (c)(9).
 - The term *PCC* means that 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 PCC made by the Secretary of Agriculture. An area is no longer considered PCC for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, 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 at least once in the immediately preceding five years. For the purpose of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.
- The NWPR definition of PCC is more expansive than the USDA Food Security Act (FSA) definition of PCC.
- “Agricultural purposes” includes land use that makes the production of an agricultural product possible, including but not limited to grazing and haying.

(b)(6) Prior Converted Cropland continued...

- A determination of PCC may include the certified PCC designation from the USDA, but the agencies may independently evaluate the PCC exclusion:
 - If a PCC designation has not been completed pursuant to the FSA, the agencies can evaluate whether the PCC exclusion applies for purposes of the CWA based on the definition of PCC in the NWPR.
 - For example, if an area was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible prior to December 23, 1985, and has not been abandoned, the exclusion applies to wetlands for the CWA, even in the absence of an FSA PCC designation.

(b)(6) Prior Converted Cropland continued...

- “Abandoned” PCC has not been used for, or in support of, agricultural purposes at least once in the immediately preceding five years.
- “Abandonment” determinations may be based on a review of all source material, relevant information from USDA and other federal, state and tribal agencies, as well as other information from the landowner/operator.
- “Abandoned” PCC is not necessarily subject to CWA jurisdiction; it must first have wetlands that meet the definition of (c)(16) and then be evaluated under paragraphs (a) and (b).
- Under the final rule, a change in use analysis will no longer be used to evaluate whether the prior converted cropland exclusion applies.

(b)(7) Artificially irrigated areas...

- (b)(7) 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...

- (b)(8): Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6)
- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- Includes diverse range of artificial lakes and ponds.
- Exclusion applies even if the waters have a surface water connection to a downstream jurisdictional water in a typical year or if they are inundated by flooding from an (a)(1) through (a)(3) water in a typical year.

(b)(8) Artificial lakes and ponds continued...

- Includes artificial lakes and ponds created by impounding non-jurisdictional waters.
- Impoundments that were originally constructed in jurisdictional waters but no longer contribute surface water flow directly or indirectly to an (a)(1) water in a typical year and that are not themselves (a)(1) waters are excluded under (b)(1).



(b)(9) Water-filled depressions...

- (b)(9): Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purposes of obtaining fill, sand, or gravel
- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- The exclusion is specific to certain mining or construction activities to qualify for the (b)(9) exclusion.
- Exclusion does not apply where the specific construction or mining activities have permanently ceased.

(b)(10) Stormwater control features ...

- (b)(10): Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off
- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- Exclusion applies to stormwater control features that convey, treat, infiltrate, or store stormwater runoff.
- An overall stormwater management system may utilize otherwise jurisdictional waters, such as (a)(2) tributaries, as part of the overall system. These otherwise jurisdictional waters are not excluded under (b)(10).

(b)(10) Stormwater control features continued...

- Exclusion applies even if the waters have a surface water connection to a downstream jurisdictional water in a typical year or are inundated by flooding from an (a)(1) through (a)(3) water in a typical year.
- Excluded stormwater control features with channelized surface water flows do not sever jurisdiction of an upstream relatively permanent water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.

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

- (b)(11): Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters
- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- Excluded waters do not sever jurisdiction of an upstream relatively permanent water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.

(b)(12) Waste Treatment Systems

- “Waste treatment system” is defined at (c)(15)
 - 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).
- Exclusion applies only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments.
- If a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, the exclusion no longer applies.

(b)(12) Waste Treatment Systems continued...

- Impoundments of jurisdictional waters that are used for waste treatment systems are considered (b)(12) exclusions as long as the waters are used for the purpose of conveying or retaining, concentrating, settling, or reducing, or removing pollutants, either actively or passively, from wastewater.
- Excluded waste treatment systems do not sever jurisdiction of an otherwise upstream jurisdictional water so long as they convey channelized surface water flow to a downstream jurisdictional water in a typical year.
- The exclusion applies where a waste treatment system is modified over time but continues to be used for a waste treatment purpose.
- Documentation, such as a 402 permit, can help to determine if the water meets the exclusion.
- The construction of new waste treatment systems in jurisdictional waters require a 404 permit if there is a discharge of dredged or fill material.

(b)(12) Waste Treatment Systems continued...

- (b)(12) Examples where the requirements of the exclusion have been met:
 - Cooling ponds created to serve as part of a cooling water system with a valid state or federal permit constructed in waters of the United States
 - Tidal waters that are part of a waste treatment system
 - Wetlands that develop within a waste treatment system
 - Intermittent and perennial ditches that are part of a waste treatment system

Jurisdictional Determination Process

Jurisdictional Determinations (JDs)

- JD means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 CFR 331.2)
- All JDs are in writing and are identified as either preliminary or approved.
- JDs are typically made at the request of the landowner or project proponent.
- EPA can also decide the extent of CWA jurisdiction for a variety of purposes, but EPA's jurisdictional decisions are not approved JDs as defined and governed by the Corps regulations at 33 CFR 331.2.

Preliminary vs. Approved Jurisdictional Determinations (JDs)

PRELIMINARY

- Merely advise a property owner “that there may be waters of the United States on a parcel”
- Not appealable
- Applicant may request an AJD at any time

APPROVED

- Typically valid for 5 years
- Definitively “stat[e] the presence or absence” of such waters
- Appealable
- Include a basis of jurisdiction with the document, providing the indicators that support the approved JD
- Information used to support an approved JD should be accurate and reliable

NWPR Approved JD Form

The NWPR interim approved JD form was designed to serve as the basis of jurisdiction.

- The instructions for completing the NWPR approved JD form can be found in the *“Interim Approved Jurisdictional Determination Form User Manual...”*

NWPR and Pre-existing AJDs

- The possessor of a valid AJD may request that the Corps reassess a parcel and issue a new AJD before the five-year expiration date.
- The NWPR does not invalidate an AJD that was issued before the rule was effective. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL 05–02, or the recipient of such an AJD requests that a new AJD be issued.

JD Resources

- Corps Regulations at 33 CFR 331.2
- Corps Jurisdictional Information Website:
https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/
- Corps Regulatory Guidance Letter (RGL) 16-01:
<https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1256>
- Corps' Jurisdictional Determinations and Permit Decisions Public Interface: <https://permits.ops.usace.army.mil/orm-public>
- EPA's CWA Approved Jurisdictional Determination website:
<https://watersgeo.epa.gov/cwa/CWA-JDs/>

Next Steps

Implementation Memos

The agencies are working on several joint memoranda 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

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:

CWAwotus@epa.gov or to the Corps at:

USACE_CWA_Rule@usace.army.mil.

Thank You
