

# Revised Definition of “Waters of the United States”

Tribal and State Webinars  
Webinar 4:  
Exclusions and Other Topics  
April 12, 2023



# Tribal and State Webinar Series

- March 22, 2023: Overview
- March 30, 2023: Relatively Permanent Standard
- April 5, 2023: Significant Nexus Standard
- **April 12, 2023: Exclusions and Other Topics**

See <https://www.epa.gov/wotus/2023-rule-revised-definition-waters-united-states-training-presentations> for prior webinar recordings. Please email [wotus-outreach@epa.gov](mailto:wotus-outreach@epa.gov) for additional information.

# Presentation Outline

- Final Rule Framework
- Paragraph (a)(2) Impoundments
- Exemptions vs. Exclusions
- Exclusions from the Definition of “Waters of the United States”
- Questions and Answers



# Rule Status and Litigation Update

- On March 19, 2023, the U.S. District Court for the Southern District of Texas granted a motion preliminarily enjoining the 2023 final rule in Idaho and Texas.
- On April 12, 2023, the U.S. District Court for the District of North Dakota granted a motion preliminarily enjoining the 2023 final rule in 24 additional States.
- The agencies are reviewing the decisions and their options.

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

# Final Rule Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds, streams, and wetlands that do not fall within (a)(1) – (a)(4)



**\*NOTE:** The categories of jurisdictional waters listed on this slide are shorthand categories that are being used for efficiency. See the final regulatory text at 33 CFR 328.3(a) and 40 CFR 120.2(a) for the full text of the categories.

# Final Rule Framework

## Exclusions

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):  
Pre-2015 exclusions, modified  
in the final rule

(b)(3) – (b)(8):  
Pre-2015 “generally non-  
jurisdictional features,” added  
to the final rule as exclusions

**\*NOTE:** The categories of exclusions that are listed on this slide are shorthand categories that are being used for efficiency. See the final regulatory text at 33 CFR 328.3(b) and 40 CFR 120.2(b) for the full text of the categories.

# Jurisdictional Category: (a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- However, waters determined to be jurisdictional under paragraph (a)(5), and that are subsequently impounded, do not retain their jurisdictional status under this (a)(2) impoundments provision. Such waters may still be determined to be jurisdictional under another rule category.



# Jurisdictional Category: (a)(2) Impoundments

Paragraph (a)(2) impoundments include:

- (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under this rule’s definition at the time the impoundment was created, and
- (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of this rule, regardless of the water’s jurisdictional status at the time the impoundment was created.





# Jurisdictional Category: (a)(2) Impoundments

The following resources\* may be particularly helpful when making a determination that an impounded water was one of the “waters of the United States” based on the 2023 Rule’s definition when the impoundment was created:

- Aerial photographs
- Topographic maps, including from [USGS](#)
- Soil surveys, including from [NRCS](#)
- State/Tribal/local maps depicting aquatic resources
- [USFWS National Wetlands Inventory maps](#)
- Planning, engineering, and design documents

\*Historic resources will be the focus when determining if a water meets this criterion.

# Jurisdictional Category: (a)(2) Impoundments

Paragraph (a)(2) waters also include impoundments of waters that at the time of assessment are jurisdictional under paragraph (a)(1), (a)(3), or (a)(4) of the 2023 Rule regardless of the water's jurisdictional status at the time the impoundment was created.

- A water that is impounded may not meet the 2023 Rule's jurisdictional criteria at the time the water was originally impounded, but the water may meet the 2023 Rule's jurisdictional criteria at the time of the assessment.
- Aquatic resources generally can evolve over time as environmental conditions change, or due to human-caused changes.

# Jurisdictional Category: (a)(2) Impoundments

Impoundments of waters that are determined to be jurisdictional under paragraph (a)(5) and that are subsequently impounded **do not categorically retain their jurisdictional status** as “waters of the United States” under the paragraph (a)(2) impoundments category.

- Impoundments of paragraph (a)(5) waters would need to be assessed for jurisdiction in their current state under paragraph (a)(1), (a)(3), (a)(4), or (a)(5) of the 2023 Rule.



# Exemptions

- Certain discharges of pollutants are exempt from Clean Water Act permitting requirements under the statute or EPA regulations.
- Exemptions are codified in the Clean Water Act or elsewhere in EPA's regulations and are **not influenced by the definition of "waters of the United States."**

vs.

# Exclusions

- Certain waters are excluded from the definition of "waters of the United States" under the 2023 Rule.
- Exclusions are **codified under paragraph (b) in regulatory text** in the definition of "waters of the United States," not in the Clean Water Act.

# Exemptions

Some exempt activities under section 404(f) of the Clean Water Act include:

- Normal farming, silviculture and ranching activities
- Construction of irrigation ditches or maintenance of irrigation or drainage ditches
- Construction or maintenance of logging roads



*See 33 CFR 323.4 for more examples of statutory exemptions. The Clean Water Act also exempts a number of activities from permitting or from the definition of “point source,” under section 402 of the Act, including agricultural storm water and irrigation return flows. See 33 U.S.C. 1342(l)(2), 1362(14).*

# Exclusions

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

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**\*NOTE:** The categories of exclusions that are listed on this slide are shorthand categories that are being used for efficiency. See the final regulatory text at 33 CFR 328.3(b) and 40 CFR 120.2(b) for the full text of the categories.

# Exclusions

- Paragraph (a)(1) waters, which include traditional navigable waters, the territorial seas, and interstate waters, are not subject to the exclusions in the 2023 Rule.
- Even if a paragraph (a)(1) water meets the terms of an exclusion, the water is not excluded and will be considered jurisdictional as a paragraph (a)(1) water.

# **(b)(1) Exclusion: Waste Treatment Systems**

“Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.”





# (b)(1) Exclusion: Waste Treatment Systems

## Implementation:

- Excluded waste treatment systems do not sever upstream jurisdiction.
- The exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed.
- A waste treatment system that ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion and could be deemed jurisdictional if it otherwise meets the 2023 Rule's definition of "waters of the United States."



## **(b)(2) Exclusion: Prior Converted Cropland**

“Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.”

# **(b)(2) Exclusion: Prior Converted Cropland**

## **Implementation**

- The prior converted cropland exclusion encompasses prior converted cropland designated by USDA, and no additional areas. Areas USDA has not so designated are not eligible for this Clean Water Act exclusion.
- The final rule exclusion for prior converted cropland only covers **wetlands**.
- Wetlands can be covered under the prior converted cropland exclusion if they meet USDA's longstanding definition of prior converted cropland.

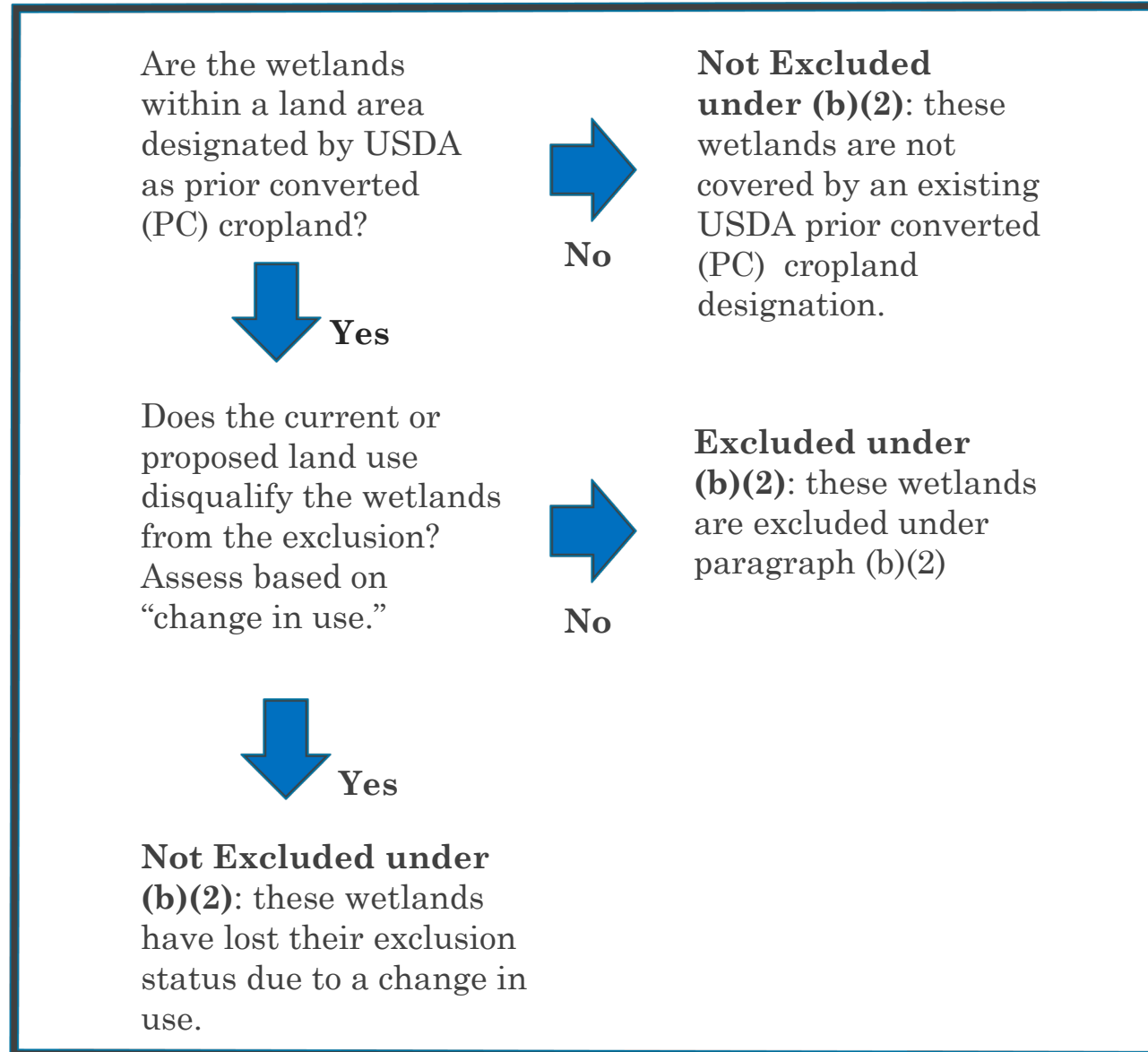
# (b)(2) Exclusion: Prior Converted Cropland

## Implementation

Prior converted cropland loses its exclusion status if there is a “change in use” – meaning the area is no longer available for the production of an agricultural commodity.



# (b)(2) Exclusion: Prior Converted Cropland



## **(b)(3) Exclusion: Certain Ditches**

“Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water.”



# (b)(3) Exclusion: Certain Ditches

## Implementation

When assessing the jurisdictional status of a ditch, the agencies will evaluate the entire reach of the ditch to determine if it has relatively permanent flow, consistent with the reach approach used for tributaries.

- The agencies will assess the flow characteristics of a particular ditch reach at the farthest downstream limit of the ditch reach (*i.e.*, the point the ditch enters a higher order in the network).
- Where data indicate the flow characteristics at the downstream limit is not representative of the entire reach of the ditch, the flow characteristics that best characterize the entire ditch reach will be used.

## **(b)(3) Exclusion: Certain Ditches**

### **Implementation**

Questions have sometimes arisen regarding the distinctions between ditches and human-altered natural streams and rivers.

- Alteration or modification of a natural stream or river for flood control, erosion control, development, agriculture, and other reasons does not convert the stream or river to an excluded ditch.
- A stream or river that has been channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, is not a ditch.
- A stream that has banks stabilized through use of concrete or rip-rap (e.g., rocks or stones) is not a ditch.

In these instances, the altered or modified streams and rivers are not ditches and would also not satisfy the exclusion for ditches because they are not “excavated wholly in and draining only dry land.”



# **(b)(3) Exclusion: Certain Ditches**

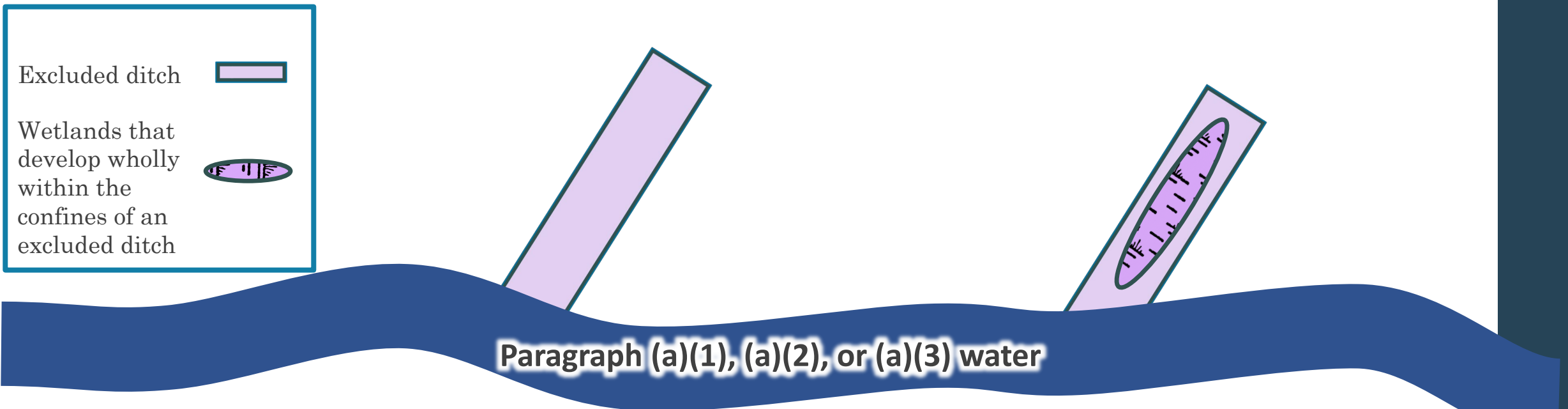
## **Implementation**

Questions have also arisen regarding relocated streams and rivers.

- A stream or river that has been relocated is not a ditch and would also not satisfy the exclusion for ditches because it is not “excavated wholly in and draining only dry land.”
- A stream or river that is relocated should be evaluated as a tributary when it contributes flow directly or indirectly to a paragraph (a)(1) water or paragraph (a)(2) impoundment.
- A stream or river is considered relocated either when at least a portion of its original channel has been physically moved or when the majority of its flow has been redirected.

## (b)(3) Exclusion: Certain Ditches

- An excluded ditch that connects downstream to a jurisdictional water would not be jurisdictional merely because of its downstream connection to the jurisdictional water.
- Wetlands that develop entirely within the confines of an excluded ditch are not jurisdictional.



# (b)(3) Exclusion: Certain Ditches

## Examples of Tools and Resources That May Assist With Identifying Excluded Ditches:

- Historic and current topographic maps, including from [USGS](#)
- Historic and recent aerial photographs
- Local, Tribal, and state records and surface water management plans (such as county ditch or drainage maps and datasets)
- [National Hydrography Dataset \(NHD\)](#) or [National Wetlands Inventory \(NWI\) data](#)
- Agricultural records
- Street maintenance data
- Precipitation records
- Historic permitting and jurisdictional determination records
- Certain hydrogeomorphological or soil indicators, including [NRCS soil surveys](#)
- Wetlands and conservation programs and plans, functional assessments, and monitoring efforts

# (b)(4) Exclusion: Certain Artificially Irrigated Areas

“Artificially irrigated areas that would revert to dry land if the irrigation ceased.”

## Implementation

- The exclusion applies only to the specific land being directly irrigated that would reasonably revert to **dry land** should irrigation cease.



# (b)(5) Exclusion: Certain Artificial Lakes and Ponds

“Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.”

## Implementation

- If a previously excluded feature no longer meets the terms of the exclusion (*e.g.*, if it is no longer used for purposes such as stock watering, irrigation, settling basins, or rice growing), it is no longer excluded.

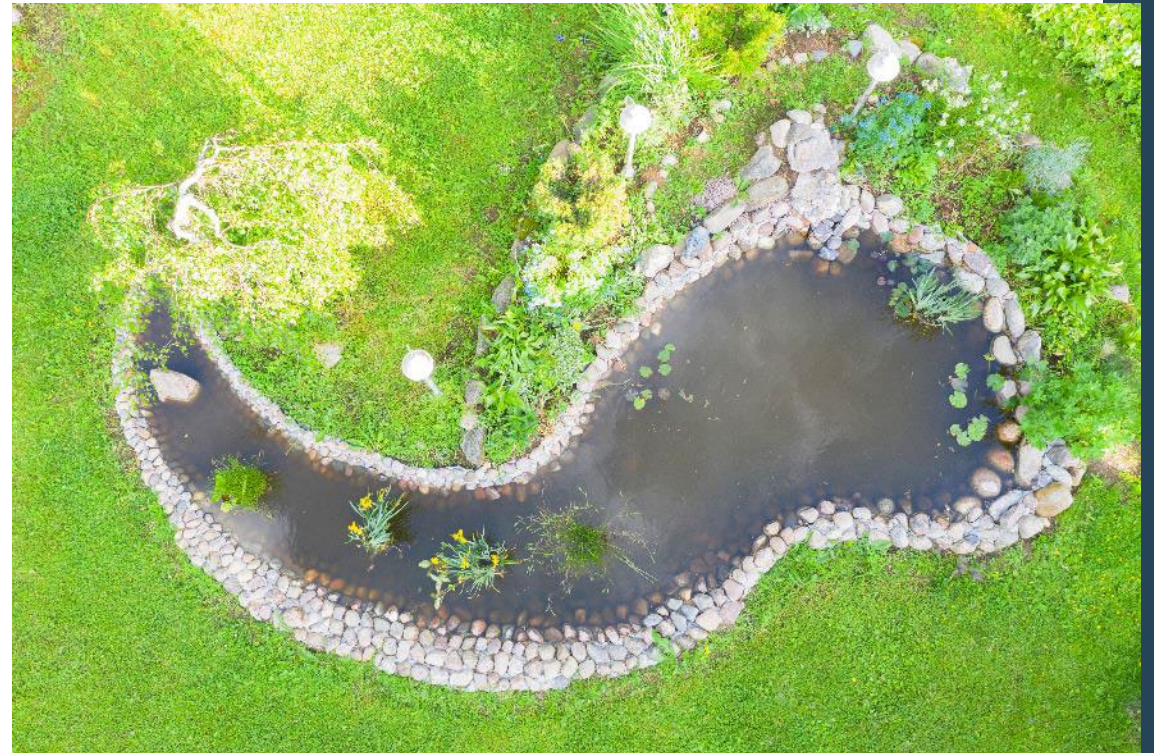


# **(b)(6) Exclusion: Certain Artificial Reflecting or Swimming Pools or Other Small Ornamental Bodies of Water**

“Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons.”

## **Implementation**

- For the exclusion to apply, these bodies of water must have been created by excavation or diking, wholly in dry land.



# (b)(7) Exclusion: Certain Waterfilled Depressions

“Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.”

## Implementation

- The exclusion requires that the waterfilled depression was created wholly in **dry land**.
- The exclusion includes an abandonment provision.
  - If a previously excluded feature no longer meets the terms of the exclusion and/or is **abandoned**, it is no longer excluded.

# (b)(8) Exclusion: Certain Swales and Erosional Features

“Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.”

## Implementation

- Swales are generally shallow features in the landscape that may convey water across dry land areas during and following storm events and typically have grass or other low-lying vegetation throughout the swale.
- While a swale is a discrete topographic feature, it does not have a defined channel, nor an ordinary high water mark (OHWM). This distinguishes a swale from an ephemeral stream because ephemeral streams typically have a channel and at least one indicator of an OHWM.





# (b)(8) Exclusion: Certain Swales and Erosional Features

## Implementation

- Erosional features can typically be distinguished from swales because erosional features are generally deeper than swales and have an absence of vegetation.
- Erosional features can be distinguished from tributaries by the absence of a channel and an OHWM
  - **Rills:** small incisions formed by overland water flow eroding the soil surface during rainstorms.
  - **Gullies:** tend to be much smaller than streams, and are often deeper than they are wide, with very steep banks, commonly found in areas without much vegetation or with soils that are prone to erosion.



# Exclusions: Additional Considerations

## Dry Land

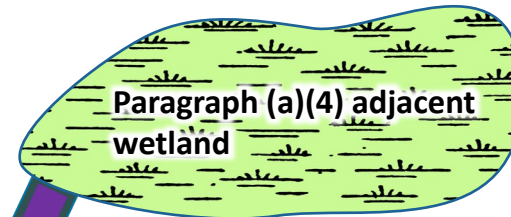
- Some of the exclusions in the 2023 Rule refer to the term “dry land.”
- The preamble explains that the term “**dry land**” refers to areas of the geographic landscape that do not include waters such as streams, rivers, wetlands, lakes, ponds, tidal waters, ditches, and the like.



# Exclusions: Additional Considerations

- Even when a feature is excluded and therefore is not “waters of the United States,” the excluded feature may be relevant to the analysis of whether *another* water is jurisdictional.
- For example, excluded surface features (e.g., certain ditches, swales, gullies, or erosional features) may still contribute to a hydrologic connection relevant for asserting jurisdiction (e.g., between an adjacent wetland and a jurisdictional water, or between a tributary and the downstream tributary network).

**Excluded paragraph(b)(8) swale**  
Provides continuous surface connection between an adjacent wetland and a relatively permanent water



**Paragraph (a)(3) Tributary that Meets the Relatively Permanent Standard**

# Exclusions: Additional Considerations

“Wetlands that develop entirely within the confines of an excluded feature are not jurisdictional.” (88 FR 3105)

“However, a wetland may be located both within and outside the boundaries of a non-jurisdictional feature or entirely outside the boundaries of non-jurisdictional feature. In these circumstances, the wetland will be evaluated under this rule’s provisions for ‘adjacent wetlands’ and paragraph (a)(5) ‘intrastate lakes and ponds, streams, or wetlands’ and not considered as part of the non-jurisdictional feature.” (88 FR 3105)

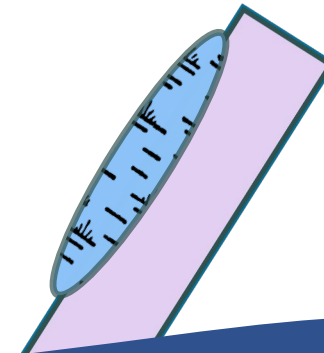
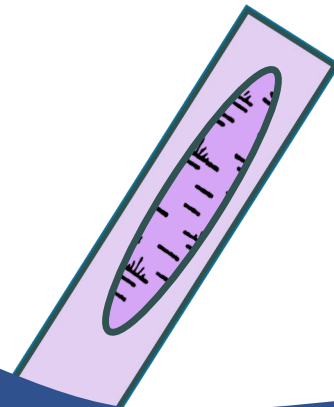
Excluded feature



Wetlands that develop wholly within the confines of an excluded feature



Wetlands that develop within and outside the confines of an excluded feature



Paragraph (a)(1), (a)(2), or (a)(3) water

# Additional Information

- See <https://www.epa.gov/wotus> for additional information.
- Please contact [wotus-outreach@epa.gov](mailto:wotus-outreach@epa.gov) with questions.

# Questions and Answers

*Please type your questions into the chat box.*