



2020 Definition of Waters of the United States

Navigable Waters Protection Rule

On Jan. 23, 2020, the Trump Administration issued the final Navigable Waters Protection Rule (NWPR), which redefines the federal definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA). Through the NWPR, the agencies sought to balance the CWA’s legislative history, prior Supreme Court rulings, institutional expertise, scientific practices, and states’ CWA authority to manage their own water resources. Additionally, the agencies sought to base federal jurisdiction on observable conditions and empower landowners to determine for themselves whether their activities would require federal permits. The NWPR largely accomplishes these goals by requiring regulable features to maintain surface connections in a “typical year” to traditional navigable waters and territorial seas, and tributaries of those features.

By linking jurisdiction to observable surface conditions, the NWPR addresses many of the concerns NAHB had with prior rules. For example, the 1986 rule defined the extent of “adjacent wetlands” to encompass ambiguous “neighboring” features. Additional regulatory guidance issued in 2008 added a confusing, ad-hoc, and time-intensive “significant nexus” test that could extend federal jurisdiction to scattered ephemeral and isolated features if they were found to affect the chemical, physical, or biological integrity of other jurisdictional waters. And, the 2015 rule significantly expanded federal jurisdiction to “similarly situated” features including isolated wetlands, ephemeral streams, and even roadside drainage ditches. In comparison, the NWPR clearly defines adjacent wetlands and eliminates the neighboring and similarly situated concepts, renders the significant nexus test irrelevant, and categorically exempts “ephemeral” features that form only in response to rainfall and ditches that fail to meet a new definition of tributary.

Compared to the prior rule, the NWPR provides many improvements including:

- **Eliminates “significant nexus” test:** The onerous significant nexus test is no longer relevant due to the NWPR’s focus on features that maintain a surface connection to traditional navigable waters.
- **Encompasses fewer adjacent wetlands:** Because the NWPR only asserts federal authority over wetlands that have a surface connection to other jurisdictional waters in a typical year, it does not encompass the “neighboring” and “similarly situated” waters covered by the 2015 rule.
- **Excludes ephemeral waters:** The NWPR does not extend federal jurisdiction to waters that form only in response to rainfall. The 2015 rule included many ephemeral features.
- **Narrows federal jurisdiction over tributaries:** Because the NWPR requires tributaries to maintain intermittent or perennial flow, it does not depend on physical observations of “bed and banks and an

ordinary high-water mark” that could form during ephemeral flow and last long after that flow ceased. Such physical features established jurisdiction under the 2015 rule.

- **Excludes more ditches:** The NWPR excludes all ditches unless they satisfy the conditions of a traditional navigable water or tributary. In comparison, the 2015 rule regulated all ditches unless they met narrow exemptions.

In general, compared to prior rules, the NWPR subjects less area to federal oversight, eliminates ambiguous tests and provides landowners with greater certainty, and focuses on conditions that are more easily observable, making it easier to implement in the field.

Background

The CWA grants the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) statutory jurisdiction over the “waters of the United States, including the territorial seas” but does not define that phrase. The definition is of critical importance to builders and developers because conducting certain activities within these designated areas, such as land clearing, grading, and earth moving, can trigger CWA permitting and mitigation requirements. Unfortunately, the WOTUS definition has never been clear. EPA and USACE defined WOTUS through regulation in 1986, but that resulted in several legal challenges including *Rapanos v. United States* in 2006. In an effort to further clarify the extent of federal authority and respond to the court, the agencies issued guidance in 2008 and 2011. The Obama Administration, unhappy with the guidance and concerned with the splintered *Rapanos* decision, issued a new WOTUS definition on June 29, 2015. The 2015 rule fundamentally expanded federal jurisdiction yet was never implemented nationwide due to various legal challenges and court decisions. As of late 2019, both the 1986 and 2015 rules were effective in different states.

Clarification of WOTUS has been a top environmental priority of the Trump Administration. On February 28, 2017, President Trump issued Executive Order 13778, which directed EPA and USACE to review the 2015 rule and rescind or revise it consistent with law and legal precedent. The Trump Administration proposed a new WOTUS rule on December 11, 2018 and rescinded the 2015 rule on September 19, 2019. Upon repeal of the 2015 rule, the 1986 rule and its 2008 and 2011 guidance became effective nationwide. On January 23, 2020, the agencies issued the final NWPR, which will be consistently implemented across the country unless it also becomes subject to legal challenges. The NWPR will take effect 60 days after the date it is published in the *Federal Register*.

Final Rule

The NWPR presents a unifying theory for extending federal jurisdiction to only those waters and wetlands that “maintain a sufficient surface water connection to traditional navigable waters of the territorial seas.” It intends to clearly distinguish federal waters, based on commonly-agreed standards for CWA jurisdiction that are supported by statutory text and Supreme Court decisions, from state waters that may be broader than those covered by the federal WOTUS definition.

Broadly, the final rule is organized into three sections: key terms and concepts, waters and features that are ‘waters of the United States’ (i.e., jurisdictional features), and waters and features that are not ‘waters of the United States’ (i.e., exemptions).

Key Terms and Concepts

- **Typical year:** In general, the NWPR extends federal jurisdiction to tributaries, ponds, lakes, and impoundments that maintain a sufficient surface water connection to traditional navigable waters or territorial seas during a typical year. A “typical year” is based on the average precipitation during a rolling thirty-year period. The term is useful for builders and developers because it requires regulators to consider site conditions that may not be immediately present. For example, if a surface water connection forms between a lake and tributary to a traditional navigable water during rare floods, regulators cannot base jurisdictional status on its presence. Conversely, a particular dry period may not sever jurisdiction.
- **Ephemeral, intermittent, and perennial:** Under the NWPR, features are considered to have sufficient connections to traditional navigable waters during a typical year when intermittent or perennial flow exists between them. The focus on sufficient surface water connections automatically excludes ephemeral features. However, the NWPR does not establish a flow volume or other metric to distinguish between intermittent and ephemeral features. Rather, intermittent tributaries are always jurisdictional when there is evidence of periodic but consistent surface water flow to other jurisdictional features. By comparison, ephemeral features that lack any surface water connections to other jurisdictional features are always exempted.
- **Tributary:** Under the NWPR, the term “tributary” is redefined to mean intermittent or perennial rivers, streams, or similar naturally-occurring surface water channels that contribute surface water to traditional navigable waters or territorial seas in a typical year. Tributaries remain jurisdictional even when debris piles, boulder fields, or culverts exist between them and other jurisdictional waters. However, if structures such as dams or levees entirely and permanently separate a tributary from another jurisdictional feature, the tributary is no longer jurisdictional. By focusing federal jurisdiction on features that maintain surface water connections, and not hydrologic features, the NWPR eliminates the focus of the 2015 definition on “bed and banks and ordinary high-water mark.” Such features were often difficult to identify and could form and remain after fleeting rain events in arid regions of the country.
- **Upland:** Though all WOTUS rules have defined the term “wetland,” the NWPR defines “upland” for the first time. To be jurisdictional, wetlands must have all three wetland factors (i.e., wetland hydrology, hydrophytic vegetation, and hydric soils). Under the NWPR, however, an “upland” is defined as any area that lacks all three wetland factors under normal conditions. By including a regulatory definition for upland, the NWPR could help to reduce instances of jurisdictional determinations made on the assumed presence of all three required wetlands factors.
- **Adjacent wetlands:** Under the NWPR, the only wetlands that are jurisdictional are those that abut or are inundated by traditional navigable waters or territorial seas (including tributaries, lakes, ponds, or impoundments of those waters) in a typical year. Therefore, jurisdiction is not broken by the presence of a natural berm, bank, or dune, or artificial dike or barrier (e.g., road, bridge, culvert, flood control pumps) as long as those features provide for a sufficient surface water connection in a typical year. Similar to the tributary requirements, manmade barriers such as dams or levees would sever jurisdiction when they physically and permanently separate features. The NWPR provides greater clarity compared to prior rules—most importantly by removing expansive terms included in the 2015 rule, such as “neighboring” that extended jurisdiction to all waters located within a 100-year

floodplain, or “similarly situated” that subjected certain types of waters to federal oversight even if they were separated from other jurisdictional features by a considerable distance (i.e., 4,000 feet).

- **Lakes, ponds, and impoundments of jurisdictional waters:** For the first time, the NWPR includes and defines the phrase “lakes, ponds, and impoundments of jurisdictional waters”. Such features must either contribute flow to jurisdictional waters in a typical year or be inundated by flooding from jurisdictional waters in a typical year. The new phrase adapts the concept of “impoundments,” which occupied its own category in prior rules.
- **Prior converted cropland:** The NWPR maintains the exemption for “prior converted cropland” and adapts its definition to help address the longstanding area of confusion among EPA, USACE, and U.S. Department of Agriculture (USDA) regulations as to which lands are eligible for various conservation funding awards. The NWPR makes clear that EPA and the Corps will recognize designations made by USDA.

Jurisdictional Features

- **Category 1:** Territorial seas and traditional navigable waters;
- **Category 2:** Tributaries of category 1 waters;
- **Category 3:** Lakes, ponds, and impoundments of category 1 and 2 waters; and
- **Category 4:** Wetlands adjacent to category 1 - 3 waters.

Exemptions

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| 1. Features not identified in categories 1 - 4; | 7. Artificially-irrigated areas; |
| 2. Groundwater; | 8. Artificial lakes and ponds; |
| 3. Ephemeral features; | 9. Water-filled depressions; |
| 4. Diffuse stormwater runoff; | 10. Stormwater control features; |
| 5. Certain ditches; | 11. Groundwater recharge, water reuse, and wastewater recycling; and |
| 6. Prior converted cropland; | 12. Waste treatment systems. |

Areas for Future Clarification

While the NWPR signifies a vast improvement over prior WOTUS rules, it will still require clarifications and guidance as it is implemented in the field. The EPA and USACE have already made several factsheets available to explain “typical year” and other implementation considerations. They have also provided photos of real WOTUS waters to communicate the type of features that are jurisdictional and exempted under the new rule. Elements that may require further guidance include:

- **Identifying natural berms, banks, or dunes:** Under the NWPR, natural berms, banks, and dunes do not sever jurisdiction between adjacent wetlands and traditional navigable waters and territorial seas. However, the NWPR does not explain how to identify these features.
- **Distinguishing ephemeral from intermittent tributaries:** The NWPR defines ephemeral features as waters that form only in response to rainfall and exempts those features. However, in some cases, land owners, consultants, and USACE staff could face challenges with identifying whether tributaries have formed in response to rainfall. For example, melting snow fall (i.e., precipitation) can be difficult to distinguish from melting snow pack. The former would form ephemeral tributaries while the latter would form intermittent or perennial ones.
- **Applying the “upland” definition:** The NWPR distinguishes uplands from wetlands. However, since several Regional Supplements to USACE’s Wetland Delineation Manual allow USACE staff to assume the presence of wetland factors even if they are not readily observable, it is unclear how uplands determinations will be made.

The NWPR is scheduled to become effective 60 days after its publication in the *Federal Register*. However, it could be subject to litigation at any time after publication, and court decisions could affect its implementation. Regardless, NAHB will continue to work closely with members and the agencies to implement the NWPR. For information on rule status, please visit nahb.org/wotus or contact Evan Branosky at (800) 368-5242 x8662 or ebranosky@nahb.org.

Comparison of Prior and New WOTUS Rules

Key: ✓ = jurisdictional feature ⊗ = not jurisdictional feature

JURISDICTIONAL FEATURES				
Feature	1986 Rule	2015 Rule	2020 Rule	2020 Rule Notes
Adjacent waters	⊗	✓	⊗	• Returns “adjacency” focus to wetlands, rather than more expansive “waters” of 2015 rule
Adjacent wetlands	✓	⊗	✓	<ul style="list-style-type: none"> • Encompasses wetlands that 1) abut a category 1-3 water or are 2) inundated by flooding from a category 1-3 water in a typical year; 3) separated from a category 1-3 water only by a natural berm, bank, dune or similar feature; 4) physically separated only by an artificial dike, barrier, or similar structure so long as there is a surface hydrologic connection between the wetland and a category 1-3 water in a typical year • Eliminates problematic term “neighboring” that extended jurisdiction to isolated wetlands • Defines “upland” for the first time to include features with less than three wetland factors (i.e., hydrology, plants, soils)
Interstate waters and wetlands	✓	✓	⊗	• Eliminates “interstate waters and wetlands” category and thus federal oversight of features simply because they cross state lines
Impoundments	✓	✓	✓	• Incorporates impoundments into new “lakes, ponds, and impoundments” category
Lakes and ponds	⊗	⊗	✓	<ul style="list-style-type: none"> • Extends federal jurisdiction to lakes, ponds, and impoundments that are inundated by a downstream WOTUS at least once in a typical year • Does not sever jurisdiction if inundation is ephemeral, which may require clarification due to ephemeral exemption
Traditional navigable waters	✓	✓	✓	<ul style="list-style-type: none"> • Combines traditional navigable waters and territorial seas into a new category but does not affect extent of federal jurisdiction • Full category text retains phrase “... may be susceptible to <i>use in</i> interstate or foreign commerce...,” which is broader than NAHB’s recommended focus on “... <i>transport</i> interstate or foreign commerce”
Territorial seas	✓	✓	✓	
Tributaries	✓	✓	✓	<ul style="list-style-type: none"> • Defines “tributary” to mean surface water flowing perennially or intermittently during a typical year, thereby eliminating ephemeral features • Eliminates “bed, bank, and ordinary high-water mark” from the tributary definition, which should simply application in the field • Focus on “typical year” excludes conditions during extreme wet or dry years • Encompasses ditches, which must 1) relocate a tributary; 2) be constructed in a tributary; or 3) be constructed in a wetland and satisfy the flow conditions of the tributary definition • Places burden of proof on agencies to determine a ditch’s historic status
Waters located within 100-year floodplain and all waters within 4,000 ft with a significant nexus	⊗	✓	⊗	• Due to the NWPR’s focus on surface connections, the “significant nexus” test is no longer relevant
Waters with significant nexus including those similarly situated	⊗	✓	⊗	• Due to the NWPR’s focus on surface connections, the “significant nexus” test is no longer relevant

Comparison of Prior and New WOTUS Rules (cont'd)

Key: ✓ = exempted ⊗ = not exempted

EXEMPTIONS				
Feature	1986 Rule	2015 Rule	2020 Rule	2020 Rule Notes
Artificially irrigated areas	✓	✓	✓	• Upholds exemption with slight clarifications
Artificial lakes or ponds	✓	✓	✓	• Upholds exemption • Clarifies that exemption covers features in uplands or non-jurisdictional waters
Artificial reflecting pools or swimming pools	✓	✓	⊗	
Certain ditches	✓	✓	✓	• Explains that ditches are excluded unless they are traditional navigable waters, tributaries, or are constructed in adjacent wetlands and meet the tributary definition • Clarifies that ditches are exempted unless that meet narrow criteria, compared to 2015 Rule that included ditches unless they met narrow exemptions
Diffuse stormwater runoff	⊗	⊗	✓	• Exempts stormwater runoff, which is a type of ephemeral feature
Erosional features	✓	✓	⊗	
Ephemeral features	⊗	⊗	✓	• Exempts ephemeral features for the first time, which reinforces the tributary definition and reduces extent of federal jurisdiction compared to prior rules
Features not identified as "jurisdictional features"	⊗	⊗	✓	• Exempts features for the first time that are not identified as jurisdictional • Reduces uncertainty and improves implementation in the field
Groundwater	✓	✓	✓	• Upholds long-standing exemption for groundwater
Groundwater recharge, water reuse, and wastewater recycling	⊗	⊗	✓	• Upholds exemption • Clarifies that exemption covers features in uplands or non-jurisdictional waters
Prior converted cropland	✓	✓	✓	• Upholds exemption for prior converted cropland • Clarifies confusion between WOTUS and USDA regulations, stating that EPA and the Corps will recognize PCC designations made by USDA
Puddles	⊗	✓	⊗	
Small ornamental waters	✓	✓	⊗	
Stormwater control features	⊗	✓	✓	• Upholds exemption • Clarifies that exemption covers features in uplands or non-jurisdictional waters
Swales or erosional features	✓	⊗	⊗	
Waste treatment systems	✓	✓	✓	• Upholds exemption • Clarifies that waste treatment include all components of system, and extends to both active and passive systems
Wastewater recycling structures	⊗	✓	⊗	
Water-filled depressions	✓	✓	✓	• Upholds exemption • Clarifies that exemption covers features in uplands or non-jurisdictional waters