



Navigable Waters Protection Rule

Quick guide to understanding the new definition of WOTUS

Introduction

The U.S. Environmental Protection Agency (EPA) and Department of the Army, Corps of Engineers (USACE) have, in response to public comment on the 2019 Waters of the U.S. (WOTUS) draft rule, finalized what is being called the Navigable Waters Protection Rule (NWPR). This is the new definition of WOTUS, which defines what is, and is not, jurisdictional under Section 404 of the Clean Water Act.¹

The final rule became effective June 22, 2020.

<https://www.epa.gov/nwpr/final-rule-navigable-waters-protection-rule>

Four Categories of Jurisdictional Waters of the U.S.

1. **Territorial Seas and Traditional Navigable Waters (TNWs)** (e.g., Trinity River, Colorado River, Lavaca Bay, and the Gulf of Mexico): All are jurisdictional by rule.

2. **Tributaries**

All are jurisdictional by rule. Tributaries are defined as all **perennial and intermittent rivers/creeks** that provide surface flow to TNWs in a typical year not just after a rainfall event. Ditches are to be considered tributaries only where they satisfy the flow conditions of the perennial and intermittent tributary definition and either were constructed in or relocate a tributary or were constructed in an adjacent wetland and contribute perennial or intermittent flow to a traditional navigable water in a typical year.

3. **Lakes, Ponds, and Impoundments**

These features are jurisdictional by rule when they:

- Provide direct surface water flow to a TNW or territorial sea or indirect surface water flow through other jurisdictional WOTUS
- Are flooded by another WOTUS in a typical year
 - Includes oxbow lakes to a TNW

4. **Adjacent Wetlands are jurisdictional if they meet the following criteria**

- When it physically touches another jurisdictional WOTUS.
- When it is separated from a jurisdictional WOTUS by only a natural berm, bank, or dune.
- When it is inundated by flooding from a jurisdictional WOTUS in a typical year.
- When it is physically separated from a jurisdictional WOTUS by an “adjacent” artificial dike, barrier, or similar structure, but a direct hydrologic surface connection persists between the wetland and the jurisdictional WOTUS in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.

¹ This is an initial review; subject to change as understanding grows.



- When 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

5. Definition of/Identifying Perennial and Intermittent Flow

- The river/creek must be flowing continuously year-round or flowing continuously during **certain times of the year** and more than in direct response to a single precipitation event in a typical year.
 - **Certain times of the year** refers to the hydrological flows or surface water connections that occur during a typical year. The hydrological flows or surface water connections may not necessarily occur in every calendar year, due to seasonal variation within years as well as variation among typical years.
- One tool that could inform determinations of a channel's flow classification is the USGS Stream Stats web application, including the Probability of Streamflow Permanence 3 (PROSPER) tool. Stream Stats allows users to obtain estimates of streamflow statistics for user-selected ungagged sites, and is available at: <https://streamstats.usgs.gov/ss/>.

6. Definition of Typical Year

- The normal periodic range of precipitation and other climactic variables for a given waterbody. The EPA and Department of the Army are considering normal hydrologic flows or surface water connections that occur under normal condition, rather than making jurisdictional determinations based on conditions that are abnormally wet or dry, such as during extreme flooding or drought.
- Determining if conditions associated with a given waterbody meet the definition of “typical year” requires a comparison of precipitation, periods of drought, and other climatic factors from a period of interest (e.g., from the past season or past year) with the normal range of those factors that would be expected, based on the past 30 years of data.
- By considering 30 years of data on precipitation, drought, and other climatic factors for a given location, the National Oceanic and Atmospheric Administration (NOAA) can determine the “normal” conditions for the area.
 - Using data from a shorter period of historical data could potentially exaggerate the normalcy of excessive precipitation or drought.
 - For purposes of trend accuracy, the most recent 30 years of data is continuously updated on a rolling basis by NOAA.

EPA guidance on the term “typical year” can found at the following location.

https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_typical_year.pdf

7. Categories of Non-Jurisdictional Waters of the U.S.

- Ephemeral Rivers/Creeks/Swales/Gullies/Rills/Pools
- Any wetlands that are adjacent to or physically touching only an ephemeral river/creek/swale/gully/rill/pool
- Groundwater, including groundwater drained through subsurface drainage systems, such as drains in agricultural lands
- Diffuse storm water run-off and directional sheet flow over upland
- Many farm and roadside ditches

- Prior converted cropland retains its longstanding exclusion, but is defined for the first time in the final rule. The EPA and Department of the Army are clarifying that this exclusion will cease to apply when cropland is abandoned (i.e., not used for, or in support of, agricultural purposes in the immediately preceding five years) and has reverted to wetlands.
- Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease
- Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters
- 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 purpose of obtaining fill, sand, or gravel
- Stormwater control features excavated or constructed in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off
- Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention and infiltration basins and ponds, that are constructed in upland or in non-jurisdictional waters

8. Determining Contribution of Downstream Flow

- A perennial or intermittent river, stream, or other naturally occurring surface water channel must contribute surface water flow to a TNW or territorial sea in a typical year in order to meet the definition of “tributary” and qualify as a jurisdictional WOTUS under the final rule. Similarly, a lake, pond, or impoundment of a jurisdictional WOTUS may be jurisdictional if it contributes surface water flow to a TNW or territorial sea in a typical year.

9. Determining Inundation by Flooding

- A lake, pond, or impoundment of a jurisdictional water may meet the definition of a WOTUS if it is inundated by flooding from another jurisdictional WOTUS in a typical year. A wetland that is inundated by flooding from another jurisdictional WOTUS in a typical year is an “adjacent wetland” under the final rule, which makes it a jurisdictional WOTUS.
- The following are used to determine whether or not a waterbody has been inundated by flooding: on-site observation and field-based indicators of recent inundation (e.g., the presence of water marks, sediment and drift deposits, water-stained leaves, or algal mats), and/or remote tools and datasets (e.g., USGS stream gage records, recurrence intervals of peak flows, wetland surface water level records, flood records, aerial photography, satellite imagery, and inundation modeling techniques and tools such as those available from the USGS Flood Inundation Mapping (FIM) program).

Guidance

The NWPR has already been challenged in court. Given the legal uncertainty surrounding implementation of the NWPR, the USACE has made the following suggestions within Texas.

Consider Conducting Delineations Using NWPR and pre-NWPR Definitions

The USACE suggested conducting delineations with a consideration towards the possibility the new NWPR may change. While delineations should be conducted following the NWPR definitions, the USACE suggested adding information to the delineation that discusses water features pre-NWPR. This approach may result in fewer delineation revisions necessary if the NWPR is enjoined in Texas.



Districts should consider this approach on a case by case basis. Please reach out to ENV to discuss as necessary.

Consider Requesting an Approved Jurisdictional Determination

The USACE advised there could be situations where requesting an approved jurisdictional determination (AJD) could be beneficial. If an AJD is received under the NWPR, and the rule is enjoined in Texas, the AJD remains valid until the expiration date regardless of rule revisions in the interim. This could be of benefit in situations where some waters (e.g. ephemeral streams/wetlands adjacent to ephemeral streams) may be considered non-jurisdictional under the current NWPR, but may become jurisdictional again if the NWPR is enjoined in Texas.

Districts should consider this approach on a case by case basis. Knowing the amount and type of jurisdictional WOTUS can be helpful when identifying permitting and mitigation needs, especially if Permittee Responsible Mitigation (PRM) may be required. Please reach out to ENV to discuss as necessary.

Training Resources

Training resources have been provided by the EPA. Links to an available presentation and associated slides can be found below.

https://www.youtube.com/watch?v=dt_OoxYU0-M&feature=youtu.be

<https://www.epa.gov/nwpr/navigable-waters-protection-rule-webcast>

Additional training resources and applicable agency guidance will be added as available.

Helpful Definitions

Below are the definitions of Ephemeral and Intermittent Streams found within the NWPRs.

Ephemeral. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall). An example of an ephemeral stream is Helotes Creek in the San Antonio District.

Intermittent. The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts). An example of an intermittent stream is the Blanco River in the Austin District.



Appendix A: Revision History

The following table shows the revision history for this interim guidance document.

Revision History	
Effective Date Month, Year	Reason for and Description of Change
February 2020	Version 1 was released.
July 2020	Guidance Section, EPA training links, and Definition Section.