

Revised Definition of “Waters of the United States” Final Rule Overview

March 8, 2023

Environmental Federation of Oklahoma

EPA Region 6: Randall Rush, rush.randall@epa.gov,

Presentation Outline

- Background
- Final Rule Framework
 - Jurisdictional Waters
 - Exclusions



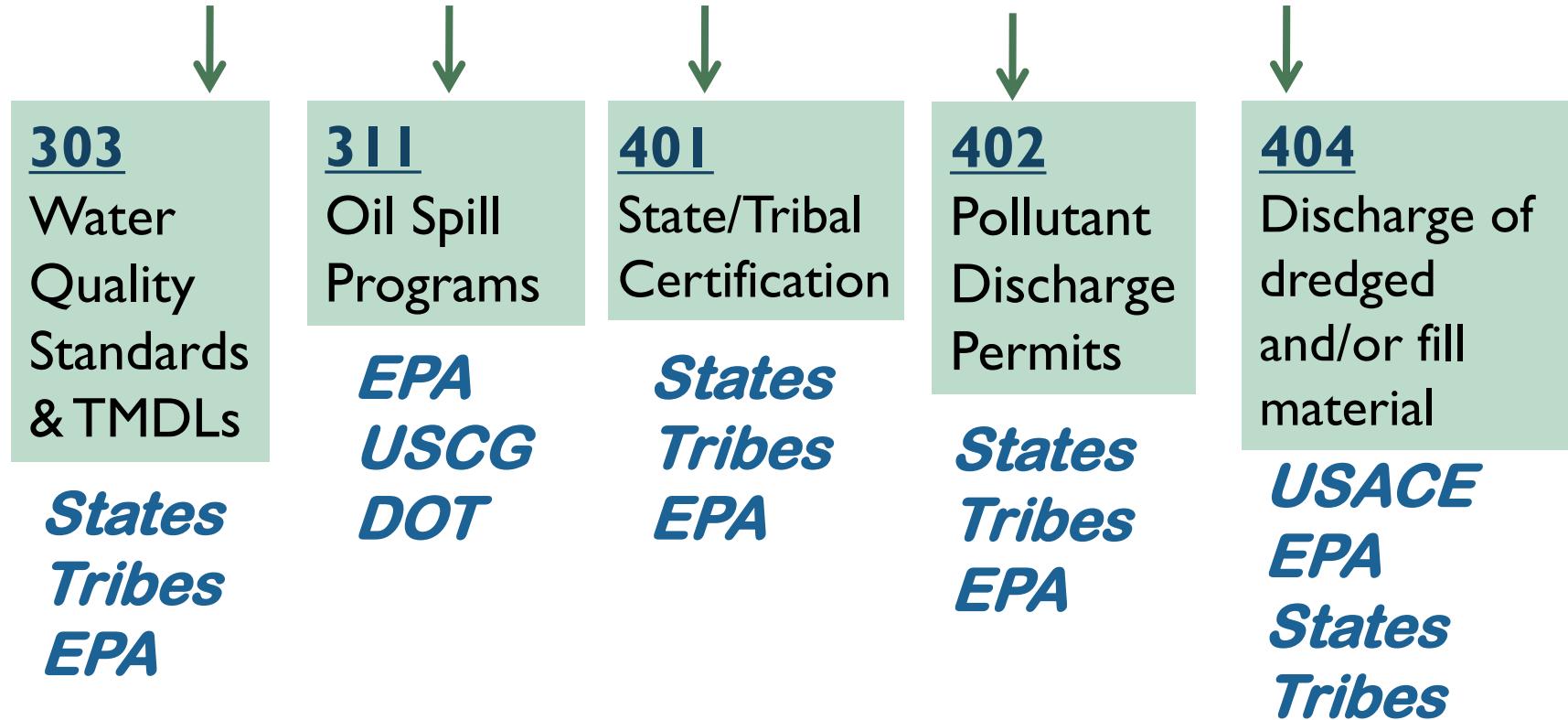
Background: “Waters of the United States” and the Clean Water Act

- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States”; Congress left further clarification to the agencies.
- The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



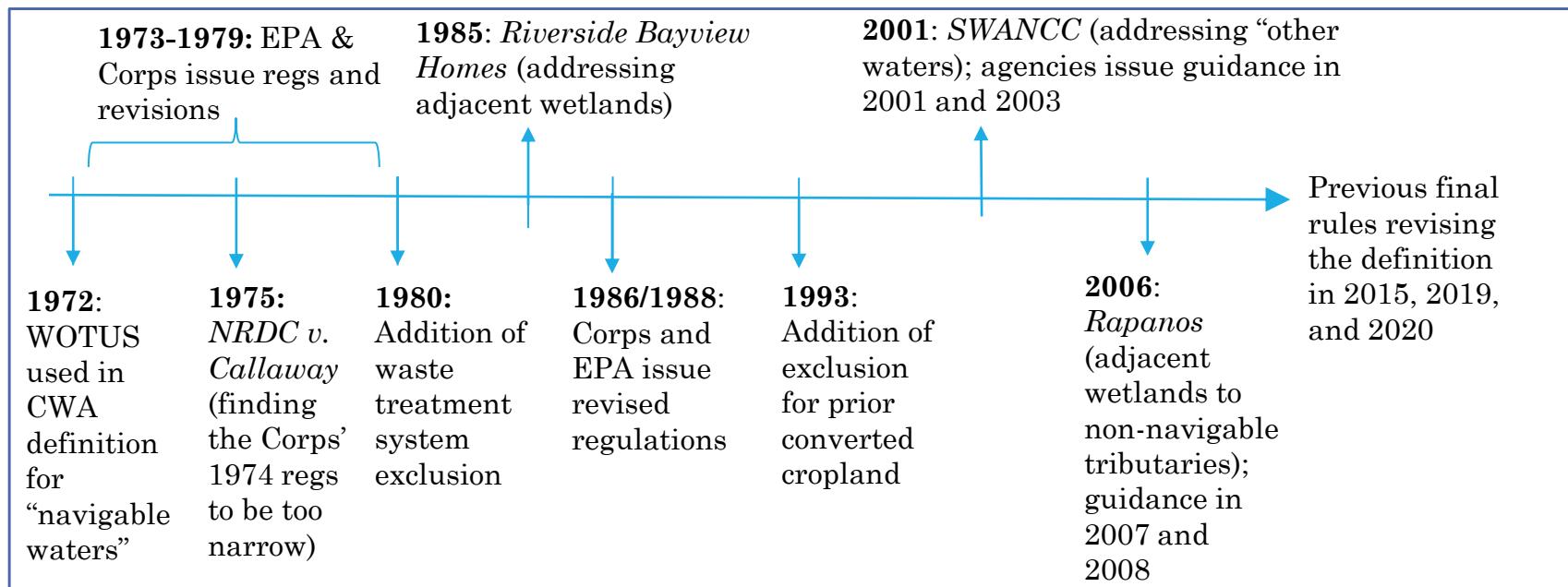
Background: Why “Waters of the United States” Matters

“Navigable Waters”: Waters of the United States,
including Territorial Seas



Background: “Waters of the United States” Over Time

- The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



Background: Rulemaking Process

Summer 2021	Consultations and pre-proposal input
December 2021	Proposed rule published in the <i>Federal Register</i>
February 2022	Public comment period closed
September 2022	Final rule package submitted to OMB for interagency review
December 2022	Final rule signed – “Revised Definition of ‘Waters of the United States’”
Early 2023	Trainings with Federal agencies, Tribes, States, and the public
March 20, 2023	Final rule effective (60 days after January 18, 2023 publication in the <i>Federal Register</i>)



Final Rule Framework

- The agencies are interpreting “waters of the United States” to mean the waters defined by the familiar pre-2015 regulations, with amendments to reflect the agencies’ determination of the statutory limits on the scope of WOTUS informed by Supreme Court precedent, the best available science, and the agencies’ experience and technical expertise.
- The final rule is organized in three parts:
 - (a) Jurisdictional Waters
 - (b) Exclusions
 - (c) Definitions



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)



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 reflecting 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

Final Rule Framework

Definitions

- (c)(1) Wetlands
- (c)(2) Adjacent
- (c)(3) High tide line
- (c)(4) Ordinary high water mark
- (c)(5) Tidal waters
- (c)(6) Significantly affect

} (c)(1) – (c)(5):
Pre-2015 definitions,
with no changes

} (c)(6):
New term and definition
in the final rule



Key Concepts

- The “relatively permanent standard” means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters.
- The “significant nexus standard” means waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters.



Significantly Affect – applies to tributaries, adjacent wetlands, and (a)(5) waters

- The final rule text specifies that “significantly affect” requires a “material influence” on the chemical, physical, or biological integrity of an (a)(1) water.
- The final rule text includes **factors** to consider:
 - (A) The distance from a water identified in paragraph (a)(1) of this section;
 - (B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;
 - (C) The size, density, or number of waters that have been determined to be similarly situated;
 - (D) Landscape position and geomorphology; and
 - (E) Climatological variables such as temperature, rainfall, and snowpack.

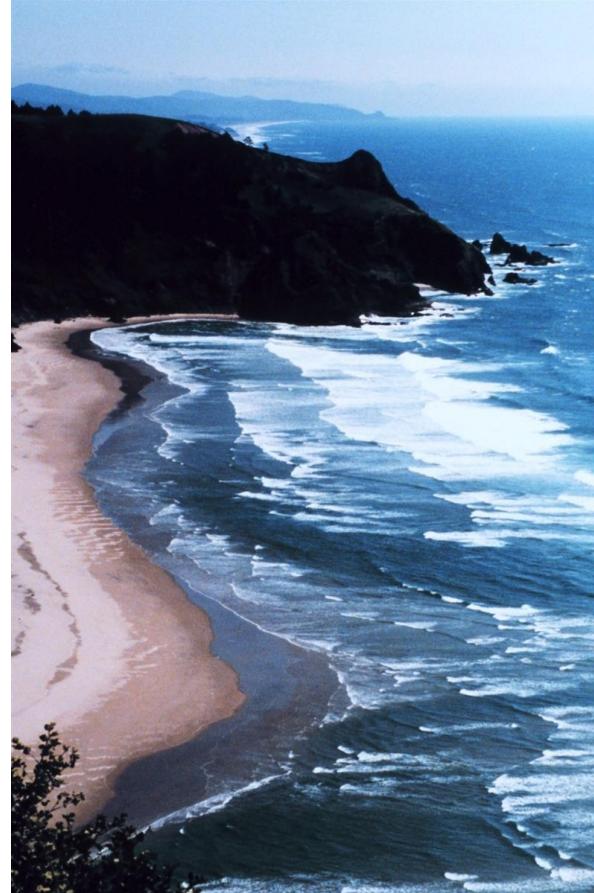
(a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
 - Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.



(a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
 - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



(a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
 - “Waters of the United States” include interstate waters, including wetlands.
 - The preamble clarifies implementation of interstate waters:
 - Lakes, ponds, and wetlands crossing state boundaries are jurisdictional as interstate waters in their entirety.
 - For streams and rivers, interstate waters include the portion of the water of the same stream order as the point that crosses or serves as a state line.
 - The agencies plan to address waters that cross between state and tribal boundaries in a future action.



(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.



(a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
- Jurisdictional tributaries must meet either:
 - The relatively permanent standard – *i.e.*, the tributaries have flowing or standing water year-round or continuously during certain times of year. **OR**
 - The significant nexus standard – *i.e.*, the tributaries alone or in combination “significantly affect” an (a)(1) water. Adjacent wetlands and tributaries are aggregated together within the catchment of the tributary of interest.



(a)(4) Adjacent Wetlands

- The final rule includes the agencies' longstanding definitions of "wetlands" and "adjacent."
- Jurisdictional adjacent wetlands include:
 - Wetlands that are adjacent to an (a)(1) water;
 - Adjacent wetlands that meet the relatively permanent standard – *i.e.*, the wetlands have a continuous surface connection with a relatively permanent (a)(2) impoundment or a relatively permanent tributary;
 - Adjacent wetlands that meet the significant nexus standard – *i.e.*, the wetlands alone or in combination "significantly affect" an (a)(1) water. Adjacent wetlands and tributaries are aggregated together within the catchment of the tributary of interest.



(a)(5) Waters: waters not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds, streams, and wetlands not identified in the other jurisdictional categories, that meet either:
 - The relatively permanent standard – *i.e.*, the waters are a relatively permanent, standing or continuously flowing body of water with a continuous surface connection to an (a)(1) water or relatively permanent tributary. **OR**
 - The significant nexus standard – *i.e.*, the waters alone or in combination “significantly affect” an (a)(1) water. Waters under (a)(5) will generally be assessed individually.



Exclusions

- The final rule includes the pre-2015 regulatory exclusions, with modifications:
 - Waste treatment exclusion, prior converted cropland exclusion
- The final rule includes regulatory exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
 - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

(b)(1) Exclusion: Waste Treatment Systems

- The final rule text excludes waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- The final rule preamble provides clarification on 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.

(b)(2) Exclusion: Prior Converted Cropland

- 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.
- 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)(3) – (b)(8) Exclusions

- The final rule text specifies that features considered “generally non-jurisdictional” in the preamble to the pre-2015 regulations and in the pre-2015 guidance are excluded.
 - Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
 - Artificially irrigated areas that would revert to dry land if the irrigation ceased;
 - 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;
 - 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;
 - 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; and
 - Swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.

The Final Rule does not affect exemptions from the permitting requirements

- From CWA 404 (dredge and fill)
 - Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
 - Maintenance of dikes, levees, groins, riprap, and transportation structures;
 - Construction of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, and
 - Construction or maintenance of farm roads, in accordance with best management practices
- From CWA 402 (discharge of pollutants other than dredge and fill from a point source)
 - Return flows from irrigated agriculture
 - Agricultural Stormwater

Economic Analysis Summary

- The agencies have prepared an Economic Analysis (EA) to inform the public of potential effects associated with this rulemaking.
- In comparison to the regulatory regime that the agencies are implementing now (in light of the vacatur of the 2020 rule) and have been implementing for most of the past 15 years, the agencies' primary estimate is that the final rule will have *de minimis* impact.
 - The agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime.
 - These increases are related to implementation of the relatively permanent standard and the significant nexus standard.

Technical Support Document

- The Technical Support Document provides additional detail on the existing scientific literature and technical information in support of the final rule.
- The document utilizes the 2015 Science Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.
- The agencies have also reviewed and summarized relevant literature published since the 2015 Science Report's release, which is overwhelmingly supportive of the conclusions of the Report and has expanded scientific understanding and quantification of functions that ephemeral streams and non-floodplain waters perform that affect the integrity of larger downstream waters, particularly in the aggregate.

Focus on Clear Implementation

Guide for Landowners Fact Sheet

<https://www.epa.gov/system/files/documents/2022-12/Guide%20for%20Landowners%20Fact%20Sheet.pdf>

Agricultural Community Fact Sheet https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf

EPA and Army have prepared a **new Coordination Memo** to ensure consistency of jurisdictional determinations under the final rule.

EPA and Army have also partnered with USDA to prepare a new **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion under the final rule. https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Agricultural%20Memorandum.pdf

EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf

Questions?

- See <https://www.epa.gov/wotus> for additional information.
- Please contact wotus-outreach@epa.gov with any questions.

