

Summary and Key Points from *the Navigable Waters Protection Rule: Definition of “Waters of the United States”*

January 30, 2020

This memorandum provides a brief overview of key parts of *the Navigable Waters Protection Rule: “Definition of Waters of the United States”* (the “Rule” or “New Rule”), released as a Prepublication Version by US EPA and the US Army Corps of Engineers (the “agencies”) on January 23, 2020. Most of the language in this summary is directly from the Rule preamble or the Rule itself or has been slightly adapted for readability.

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

The New Rule is based on the idea that Congress’s power to manage water pollution stems from the Commerce Clause, which states that Congress shall have the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” (Article 1, Section 8, Clause 3 of the U.S. Constitution). Hence, the focus on “navigable waters” in the New Rule.

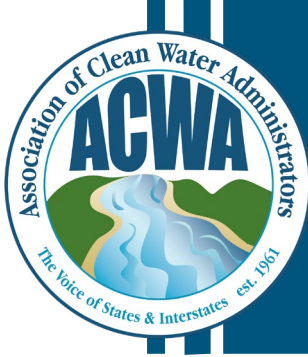
New Definition of “Waters of the United States”

(a) Jurisdictional waters. For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

- (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
- (2) Tributaries;
- (3) Lakes and ponds, and impoundments of jurisdictional waters; and
- (4) Adjacent wetlands.

(b) Non-jurisdictional waters. The following are not “waters of the United States”:

- (1) Waters or water features that are not identified in paragraphs (a)(1) through (4) of this section;
- (2) Groundwater, including groundwater drained through subsurface drainage systems;
- (3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;
- (4) Diffuse stormwater run-off and directional sheet flow over upland;
- (5) Ditches that are not paragraph (a)(1) or (2) waters, and those portions of ditches constructed in paragraph (a)(4) waters that do not satisfy the conditions of paragraph (c)(1);



- (6) Prior converted cropland;
- (7) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;
- (8) 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, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6);
- (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 purpose of obtaining fill, sand, or gravel;
- (10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- (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; and
- (12) Waste treatment systems.

Section (c) contains a list of definitions further clarifying the terms used in (a) and (b). For more information on definitions and terms, see heading ‘Section III: Definition of “Waters of the United States”’ below.

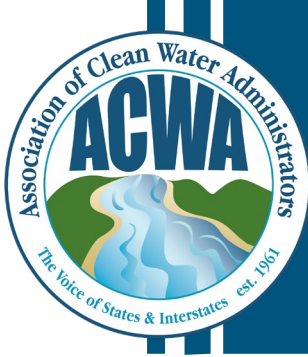
Section II: Background

In the “Supplementary Information” part of the Rule, the agencies provide background, context, and justification for their rulemaking and executive orders. This begins in “Section II: Background”.

Section II(A) provides an executive summary of the Rule. Section II(B) includes information about the historical context of the definition of Waters of the United States. Section II(C) briefly discusses the Trump administration’s Executive Order 13778 directing the agencies to consider redefining “Waters of the United States”. Section II(D) provides information on EPA’s stakeholder outreach. Section II(E) details the legal underpinnings used by the agencies to justify the Rule’s changes and decisions.

Section II(B) is noteworthy as it provides an overview of the Clean Water Act (“CWA”), beginning with the first implementing regulations in 1973 and continuing forward through court cases and regulatory amendments which altered the definition and interpretation of “Waters of the United States.” The section concludes with information about how the 2015 Rule expanded the jurisdiction of the CWA, and information summarizing the lawsuits which followed publication of the 2015 Rule.

Section II(E) is also noteworthy and provides insight into arguments that will likely be deployed in court to defend the Rule. The section examines the statutory framework of the CWA as well as cases during



which the Supreme Court has discussed terms such as adjacent wetlands, navigable waters, tributaries, significant nexus, and more.

Section III: Definition of “Waters of the United States”

Section III of the Rule includes discussions of the relevant definitions narrowing federal jurisdiction under the CWA. Below are notable terms and descriptions taken mostly from Section III, but also from the actual Rule text.

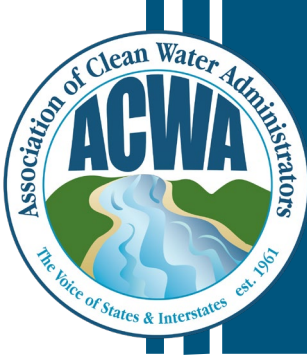
Definitions are listed in order of appearance in Section III.

- [T]he agencies interpret the term “**the waters**” in the phrase “the waters of the United States” to encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters....According to the *Rapanos* plurality, however, the ordinary meaning of the term “**waters**” does not include areas that are dry most of the year, and which may occasionally contain “transitory puddles or ephemeral flows of water.” [Pages 85-86 (Prepublication version)].
- **Typical Year** is defined as when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period... [T]he purpose of the term is to ensure that flow characteristics are not assessed under conditions that are too wet or are too dry.

[T]he agencies have modified the definition of “typical year” [from the Proposed Rule] to expressly include *other climatic variables* in addition to precipitation and additional description of the normal periodic range, signaling that such range need not be based on a calendar year.

In ACWA’s April 2019 comment letter on the Proposed Rule, ACWA asked the agencies the clarify the geographic area used for “typical year” determinations. The New Rule explains that specifying a particular watershed size or Hydrologic Unit Code (HUC) could preclude the use of the best available data sources, but that watershed boundaries should be a consideration when selecting climate records. Other considerations should include data availability, topography, and distance of climatic data collection in relation to the aquatic resource location. More information on this issue is located on Pages 90-94 (Prepublication version).

- **Perennial, Intermittent, and Ephemeral:** Though “perennial,” “intermittent,” and “ephemeral” are commonly used scientific terms, the agencies are including definitions of these terms in the Rule to ensure that the regulation is clear.



The agencies specifically distinguish ephemeral flow resulting from a snow fall event from sustained intermittent flow resulting from melting snowpack that is continuous, such as for weeks or months at a time.

- **Perennial:** Surface water flowing continuously year-round.
- **Intermittent:** 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)

- “**Certain times of the year**” is intended to include extended periods of predictable, continuous surface flow occurring in the same geographic feature year after year.

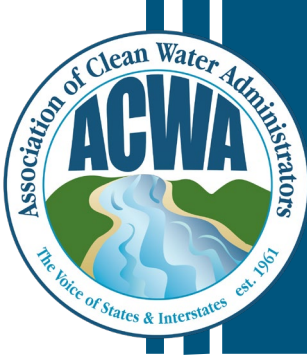
In ACWA’s April 2019 comment letter on the Proposed Rule, ACWA asked the agencies the clarify this term.

- **Snowpack:** Layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions).
- **Ephemeral:** Surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall
 - The use of the term “direct” in this Rule is intended to distinguish between flow solely caused by individual precipitation events (including multiple, individual back-to-back storms), and continuous flow resulting, for example, from weeks- or months-long accumulation of precipitation in the form of snowpack that melts slowly over time or an elevated groundwater table that provides baseflow to the channel bed.

In ACWA’s April 2019 comment letter on the Proposed Rule, ACWA asked the agencies to the clarify the grey area between intermittent and ephemeral. The agencies sought to do so by explaining the inclusion of “direct”. More information on this issue is located on Pages 94-98 (Prepublication Version).

- **Breaks in connection hydrological connection/Severed jurisdiction**

- A tributary, lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow in a typical year to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.



However, these non-jurisdictional surface water features do not themselves become jurisdictional.

If an artificial feature, or natural features such as debris piles and boulder fields, does not allow for the contribution of surface water flow to a downstream jurisdictional water in a typical year, it severs jurisdiction upstream of the artificial feature.

- **Subterranean Rivers:** when a tributary naturally, temporarily flows underground as a channelized river or stream, maintaining the same or very nearly the same flow volume underground and at the downstream point where it returns to the surface.

The agencies do not consider subterranean rivers to be groundwater, even though they flow under the surface of the ground for what is generally a short period of time through subterranean natural channels. Further, subterranean rivers, as compared to groundwater and other subsurface waters, may not break jurisdiction of upstream tributaries, including any jurisdictional lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow through these tributaries, depending on the factual circumstances.

- **Traditional Navigable Waters:** All waters that 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.

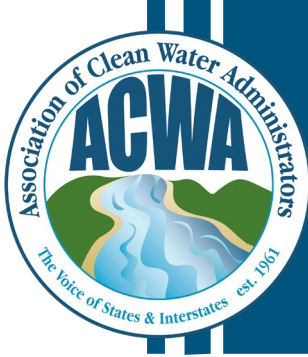
However, whether a water is susceptible to use in interstate commerce requires more than simply being able to float a boat to establish jurisdiction over navigable-in-fact waters under paragraph (a)(1) [of the Rule]; it requires evidence of physical capacity for commercial navigation and that it was, is, or actually could be used for that purpose.

- **Territorial Seas:** 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.” The territorial seas establish the seaward limit of “waters of the United States.”

This definition comes from CWA Section 502(8), 33 U.S.C. 1362(8).

- **Interstate waters and interstate wetlands as categories** are removed. Interstate waters and interstate wetlands can still be jurisdictional under the proposed rule if they fall under other definitions.

In ACWA’s April 2019 comment letter on the Proposed Rule, ACWA requested that the agencies keep this category.



- **Tributaries:** A river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or traditional navigable waters (paragraph (a)(1) waters) in a typical year either directly or through one or more tributaries (paragraph (a)(2) waters), lakes, ponds, and impoundments of jurisdictional waters (paragraph (a)(3) waters), or adjacent wetlands (paragraph (a)(4) waters).

A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition.

A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

A ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland can be a tributary as long as the ditch satisfies the flow conditions of the “tributary” definition.

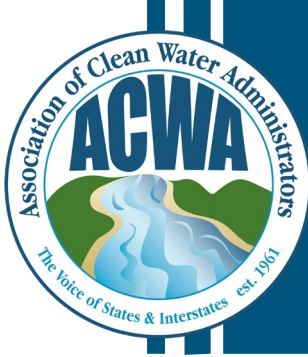
Surface features that flow only in direct response to precipitation, such as ephemeral streams, swales, gullies and rills, are not tributaries.

- **Ditches**, defined as a constructed or excavated channel used to convey water, are removed in the Rule *as a category*. However, ditches that are paragraph (a)(1) waters do not need to be identified in another jurisdictional category. Also, ditches that are constructed in or that relocate a tributary are included in the Rule as tributaries, as long as the ditch satisfies the flow conditions of the “tributary” definition. The same is true for ditches that are constructed in adjacent wetlands.

In ACWA’s April 2019 comment letter on the Proposed Rule, ACWA asked the agencies to clarify the concept of ditches “constructed in a tributary”. The New Rule attempts to solve this problem stating that the alteration of a tributary does not modify its jurisdictional status as a tributary as long as it continues to meet the flow conditions of the definition. The New Rule opts for this rather than to classify the alteration of a tributary as a ditch. An extensive discussion of tributaries and ditches is located in Pages 135-182 (Prepublication Version).

- **Lakes and Ponds, and Impoundments of Jurisdictional Waters** are combined in the Rule. A **lake, pond, or impoundment of a jurisdictional water** meets the definition of “waters of the United States” if it:

(1) satisfies any of the conditions in paragraph (a)(1) [of the Rule];



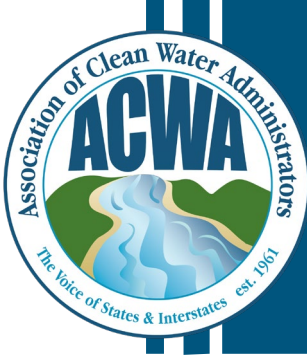
- (2) contributes surface water flow to the territorial seas or a traditional navigable water in a typical year either directly or through one or more jurisdictional waters; or
- (3) is inundated by flooding from a paragraph (a)(1) through (3) water in a typical year.

- **Wetlands:** Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent Wetlands:** Wetlands that:
 - (1) abut a paragraph (a)(1) through (3) water;
 - (2) are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year;
 - (3) are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature; or
 - (4) are physically separated from a paragraph (a)(1) through (3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.

An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure (i.e., not naturally occurring) divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

In a wetland complex, if a wetland can be delineated from another wetland by upland or other separation (other than a road or similar artificial structure dividing a wetland that allows for a direct hydrologic surface connection through or over that structure in a typical year) then each wetland will be considered separately for purposes of determining adjacency.

- **Upland:** Any land area above the ordinary high-water mark or high tide line that does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances, as described in the Corps' [1987 Wetlands Delineation Manual](#).
- **Groundwater** is still left out of the definition of “waters of the United States”. Further, groundwater, as opposed to subterranean rivers or tunnels, cannot serve as a connection between upstream and downstream jurisdictional waters.
- **Diffuse Stormwater Run-off and Directional Sheet Flow over Upland** are not jurisdictional under the terms of paragraph (a) in the Rule or its definitions in paragraph (c). They are both specifically excluded in the final rule for additional clarity.



- **Prior Converted Cropland:** 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 prior converted cropland made by the Secretary of Agriculture.

An area is no longer considered prior converted cropland for purposes of the CWA when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of the Rule. 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 purposes of the CWA, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

The Rule's Effect on CWA Section 402

According to Section III(H), the agencies believe that a CWA Section 402 permittee currently discharging to a jurisdictional water that becomes non-jurisdictional under this Rule would likely remain subject to the requirements of the CWA. Based on Justice Scalia's decision in *Rapanos*, the agencies view ephemeral features, such as arroyos or ditches, as potential conveyances of discharges of pollutants from point sources subject to NPDES permitting requirements.