

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

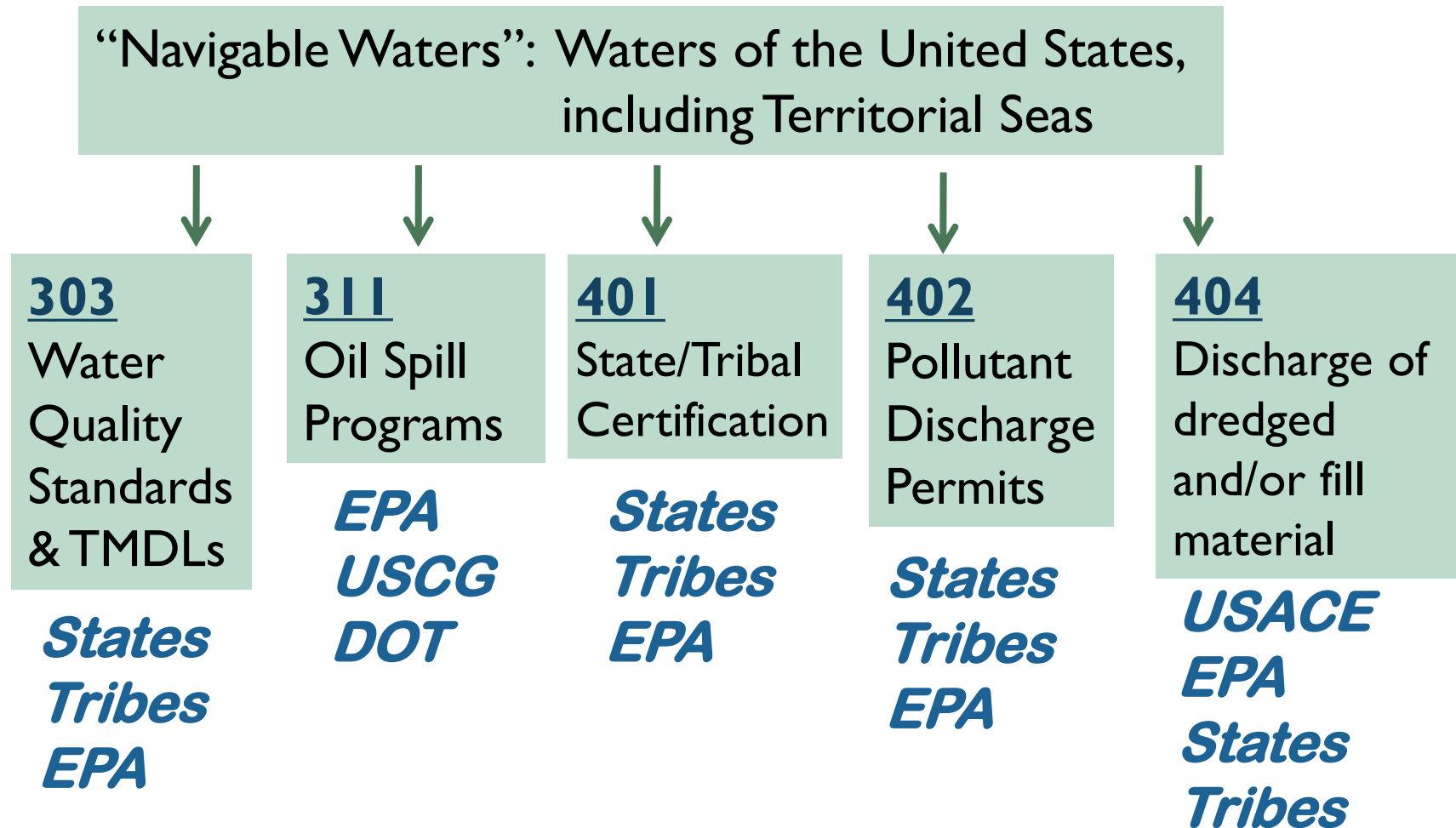
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# Background: “Waters of the United States” and the Clean Water Act

- “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



# Key Features of the Final Rule

- The agencies are interpreting “waters of the United States” to mean the waters defined by the familiar pre-2015 Reagan regulations and 2008 Bush-era guidance, 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



# Exclusions from “Waters of the United States”

- The text of the rule explicitly excludes waters and features that are not covered under the final rule
- Add clarity, consistency, and certainty
- Activities in these waters and features do not require a Clean Water Act permit

# Exclusions: Waste Treatment Systems and Prior Converted Cropland

## 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.

## 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.



# New Exclusions

- The final rule text specifies that features considered “generally non-jurisdictional” in the preamble to the Reagan-era regulations and in the Bush-era 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.

# Categories of Waters Covered Under This Rule

- Traditional Navigable Waters
- The Territorial Seas
- Interstate Waters
- Impoundments of Jurisdictional Waters
- Tributaries
- Adjacent Wetlands
- Intrastate lakes and ponds, streams, and wetlands that do not fall within the above categories





# Two Longstanding Standards

- Relatively permanent standard
- Significant nexus standard



# Definitions

Wetlands

Adjacent

High tide line

Ordinary high water mark

Tidal waters

Significantly affect

Pre-2015 definitions,  
with no changes

New term and definition  
in the final rule



# 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.

# Focus on Clear Implementation

- 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.
- EPA and Army will use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies' Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).



# Questions

