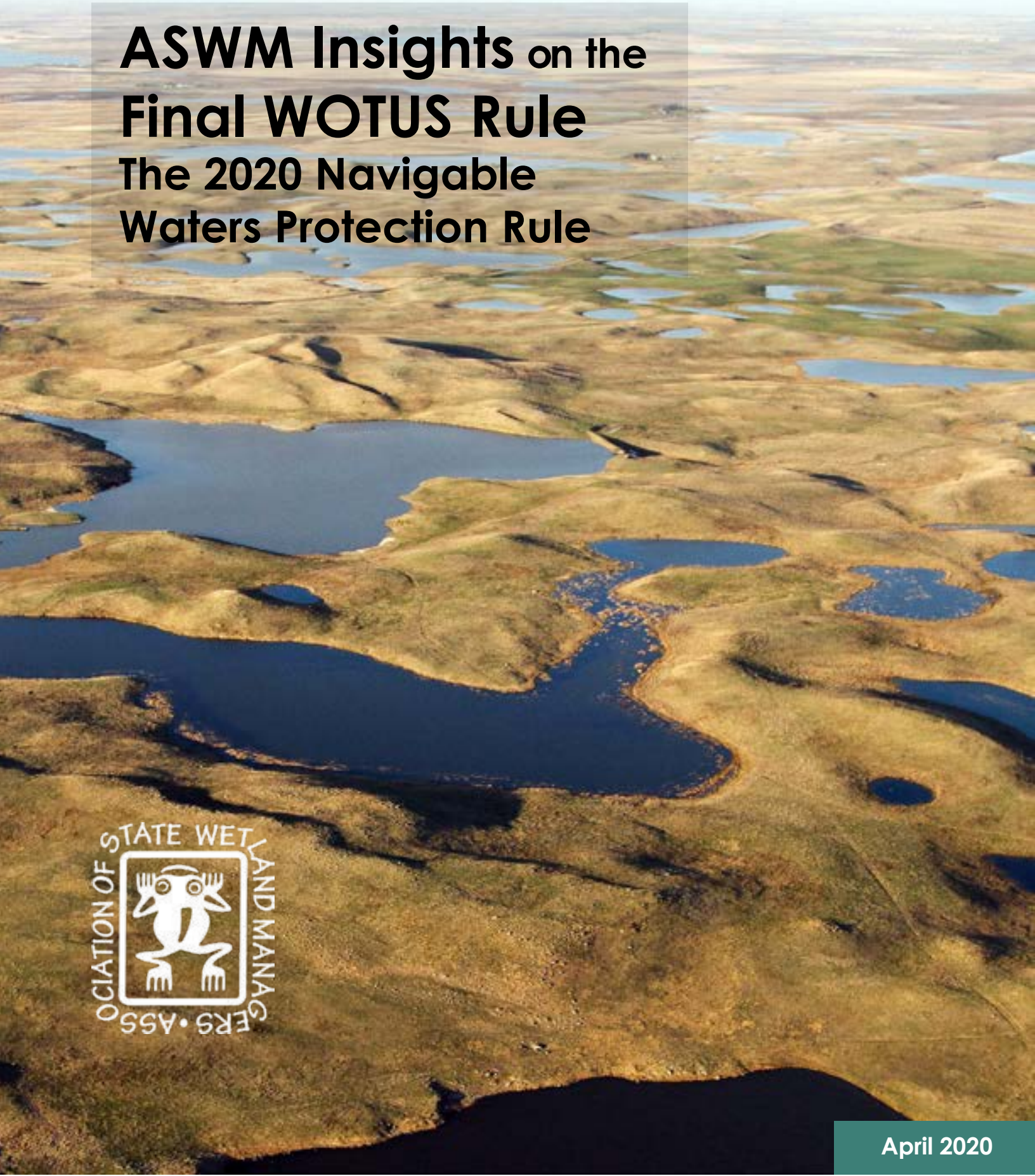
Association of State Wetland Managers

ASWM Insights on the Final WOTUS Rule

The 2020 Navigable Waters Protection Rule



April 2020

Please review and cite the final rule documents rather than this document for language, implementation and analysis purposes.

Note that all page numbering in this document is from the pre-publication document of the rule.

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

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On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published "The Navigable Waters Protection Rule: Definition of the Waters of the United States." The Federal Register publication of the rule is available here. The final rule will become effective 60 days after the publication date. Factsheets on the Navigable Waters Protection Rule are available here.

This document provides insights from the Association of State Wetland Manager's (ASWM) review of the final rule and includes basic information on key takeaways and specific language with citations that highlight important topics and definitional changes, some insights into the potential impacts to states and tribes, and language from the rule addressing implementation. Page numbers cited in this document are based on the April 21, 2020 Federal Register publication.

Changes in Federal Jurisdiction Resulting from the Final Rule May Change the Scope of Application of the Clean Water Act (CWA) to Regulatory Programs

- The scope of jurisdiction has been changed to ensure that the federal government avoids "pressing against the outer limits of its authority when doing so would infringe upon the traditional rights and responsibilities of states to manage their own waters" (D2, p. 22287).
- Waters of the United States in the final rule encompasses relatively permanent flowing and standing water bodies 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" (III, p. 22273). To be jurisdictional, a one-way surface connection with inundation from the water to the wetland is required (i.e. not wetland flow from the wetland contributing flow to the other water).
- The final rule establishes 'categorial bright lines' by defining the following four categories:
  - (a)(1) The territorial seas and traditional navigable waters
  - (a)(2) Tributaries of such waters
  - (a)(3) Certain lakes, pond and impoundments of jurisdictional waters
  - (a)(4) Wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands)
- Waters that are excluded from federal jurisdiction in the final rule are included on the last page of this document.
- The EPA and the Corps (the agencies) state that a "clear regulatory line between jurisdictional and excluded waters has the additional benefit of being less complicated than prior regulatory regimes that required case-specific significant nexus analysis" (D2, p. 22288). The final rule works to establish a "clear and predictable framework that can be implemented in the field" (2, p. 22308).

Key Takeaways

Tributaries must meet several requirements, including being a naturally recurring surface water channel contributing surface water flow to the territorial seas or navigable waters with perennial or intermittent flow in a typical year either directly or through one or more specified waters (see p. 2286).

No ephemeral waters are federally jurisdictional under the new WOTUS rule but may be regulated by states or tribes under their own laws.

Provides and uses definitions of perennial, intermittent and ephemeral waters, as well as the definition of "typical year" from the Connectivity Report.

A 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 30-year period."

Removes any "significant nexus" considerations.

Only ditches that meet definition of 'tributary' (e.g. channelized streams) with flow in a typical year.

Removes interstate waters and impoundments as separate categories.

Federal Jurisdiction Extends to Waters that Fit Under the Rule's New Definition of "Tributaries" (D1, p. 22286).

- Tributaries are defined as "a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or 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) (D1, p. 22286).

- Tributaries must be perennial or intermittent in a typical year (D1, p. 22286). The agencies have concluded that their regulatory authority under the CWA and Supreme Court precedent is most appropriately interpreted to encompass the perennial and intermittent flow classifications provided in the definition of 'tributary' (D2, p. 22287).
- Perennial is defined as "surface water flowing continuously year-round." Intermittent is defined as "surface water flowing continuously during certain times of the year and more than in direct response to precipitation." Melting snowpack may be a sole or primary source of flow (III.a.1., p. 22275).
- A 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 30-year period" (D1, p. 22274).
- A rolling 30-year record is necessary to ensure that changing conditions are captured by the calculation. Typical year calculations are discussed on pages 22274-22275 (III.a.1.).
- 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 (D1, p. 22286).
- A tributary does not lose its jurisdictional status if it contributes surface water flow to 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 (D1, p. 22286).
- In the final rule, stream order is not relevant to stream and river jurisdiction; instead flow classification is the key aspect in determining the jurisdictional status of a tributary (D2, p. 22290).

No Ephemeral Streams Remain Under Federal Jurisdiction (D1, p. 22296).

- Surface features that flow only in direct response to precipitation, such as ephemeral streams, swales, gullies and tills, are not tributaries and are not jurisdictional.
- The rule states that ephemeral waters are more appropriately regulated by states and tribes under their sovereign authorities (D1, p. 22287).
- The agencies provide that "a mere hydrological connection cannot provide the basis for CWA jurisdiction; the bodies of water must be 'geographical features' (i.e. rivers and streams) that are relatively permanent (i.e. perennial and intermittent) and that contribute surface water flow to a traditional navigable water or the territorial seas in a typical year (D2, p. 22289).
- Ephemeral features may still serve to connect jurisdictional waters, even though the ephemeral feature is itself not jurisdictional.

Final Rule Removes Significant Nexus Test

- Relying on the more specific (tributary) regulations in the final rule, the case-by-case significant nexus review is replaced by categorical treatment of perennial, intermittent and ephemeral streams (p. 22291).

Final Rule Removes Interstate Waters as a Separate Category of Jurisdictional Waters (Including Interstate Wetlands)

- All states protect their water resources under state law and many have the ability and expertise to do so in the absence of federal regulation (C1, p. 22282).

Potential Impacts for States and Tribes

Approximately half the remaining wetlands in the United States will no longer be covered under federal jurisdiction.

States and tribes seeking to protect waters no longer under federal jurisdiction may require time and resources to be able to undertake these responsibilities. This gap may leave waters unprotected for a period of time, despite a state/tribe's desire to protect them.

In some states, legislation does not allow states to regulate more than federal. If changes to these laws were to be made, they would require time.

Will open up new areas for development and reduce the number or waters requiring certain types of permits.

Loss of interstate management of waters by the federal agencies may lead to complex interstate issues.

States and tribes may be required to begin implementation of the Final Rule before clear guidance on some important elements is available.

- Remedies for pollution disputes among states that do not implicate CWA Sections 319(g), 401 or 402 would likely derive from federal common law under Supreme Court original jurisdiction (p. 22286).
- The final rule no longer includes the 1,500-foot rule for neighboring waters.

Only Certain Ditches are Jurisdictional

- Only certain ditches are jurisdictional under the new rule.
- The term tributary includes ditches that either relocate a tributary, are constructed in a tributary, or are constructed in an adjacent wetland, as long as the ditch satisfies the flow conditions of the "tributary" definition (D1, p. 22286); or if constructed in a jurisdictional wetland, the ditch develops wetland characteristics.
- A ditch can also be a traditional navigable water if it meets the conditions of that category (D1, p. 22286).
- All other ditches are excluded from the definition of WOTUS other than those identified in paragraphs (a)(1) and (2) and any ditches which are constructed in an adjacent wetland that lack perennial or intermittent flow (D1, p. 22286).
- Under certain circumstances, ditches that are constructed in adjacent wetlands that lack sufficient flow to be considered tributaries under the new rule may develop wetland characteristics if not maintained. In this limited circumstance, those wetlands may be treated as adjacent wetlands, subject to permitting exemptions in 33 U.S.C. 1344(f) (E, p. 22296).
- Note: The proposed use of the word "alter" is no longer in the new rule as it relates to ditches (E, p. 22296).

The Final Rule Provides Numerous Clarifications on Severed Connectivity

- The final rule provides that channelized, non-jurisdictional surface water features do not sever jurisdiction of upstream perennial and intermittent waters so long as they convey surface water from such upstream waters to downstream jurisdictional waters in a typical year (D2, p. 22289).
- The use of "channelized" in this context generally indicated features with a defined path, such as a ditch or the bed of an ephemeral stream. The flow must be channelized in the sense of being discrete and defined to a channel, as opposed to diffuse, non-channelized flow (D2, p. 22289).
- Tributaries that contribute surface water to a downstream federal jurisdictional water in a typical year through certain natural features (such as debris piles or boulder fields) or artificial features (such as culverts and dams) are tributaries, even though these features may result in an interruption in the surface water channel (D2, p. 22290).
- Non-jurisdictional ditches capable of conveying channelized surface water flow between upstream relatively permanent jurisdictional waters in a typical year do not sever jurisdiction for those waters, but the ditch itself, would remain non-jurisdictional (D, p. 22290).

The New Rule Clarifies the Role of "Reaches"

- In the new rule, a reach is defined as "a section of stream or river along which similar hydrological conditions exist, such as discharge, depth, area and slope" (D2, p. 22236).
- Reaches are used in the new rule instead of entire river/stream networks.

Potential Impacts, Cont.

States and tribes will need to take over jurisdictional determinations from the Corps for newly non-federal waters (especially isolated wetlands).

Impact of the rule changes will be greater in Western states where mostly have ephemeral waters and more limited wetland programs.

Possibly less impacts on states that are water-rich (more waters meet adjacency requirement) and/or have strong wetland programs.

However, even strong state programs will require time to adapt their programs to take on jurisdiction and protection of waters.

Many states will require a revision of state laws/statute/regulations to adopt new federal language/requirements (which will require time and resources).

In some states, conflicts between state and federal requirements will need to be addressed around buffer rules.

- If a perennial tributary becomes intermittent and then ephemeral and then perennial again, it may be viewed as four separate reaches (e.g. perennial reach, intermittent reach, ephemeral reach, perennial reach) (D2, p. 22290).
- The agencies will use best professional judgement and various tools to identify where the change in flow classification occurs (i.e. different reaches) (D2, p. 22290).
- The agencies will gather information from upstream and downstream of the transition zone as far as needed to get an accurate assessment of the conditions to make a determination about the most appropriate point at which to distinguish flow classifications (D3, p. 22294).

Lakes, Ponds and Impoundments of Jurisdictional Waters Must Meet Same Flow Requirements as Tributaries by Contributing Surface Flow to Traditionally Navigable Water or Flooding from Other Jurisdictional Waters (Excluding Wetlands)

- Lakes and ponds are defined as "standing bodies of open water that contribute to traditional navigable waters or are inundated by flooding from paragraph (a)(1-3) water in a typical year (2, p. 22238).
- Some of these waters are jurisdictional under paragraph (a)(3) of the final rule, while others are non-jurisdictional, particularly many artificial lakes and ponds pursuant to paragraph (b).

To be jurisdictional, lakes, ponds and impoundments of jurisdictional waters must contribute surface water flow to traditionally navigable waters or territorial seas in a typical year. If they do not meet this flow requirement, they are not jurisdictional (2, p. 192).

Final Rule Changes Longstanding Practices Around Jurisdiction of Impoundments.

- If an impoundment contributes surface water flow through a channelized non-jurisdictional surface water feature through a culvert, dike, spillway, or similar artificial feature or through a debris pile, boulder field or similar natural feature when surface water flow is conveyed in a typical year and that such flow leads to mixing between an upstream relatively permanent water and a downstream jurisdictional water then the impoundment does not lose federal jurisdiction status (2, p. 22300).
- Impoundments are Waters of the U.S. if they are inundated by flooding from an (a)(1-3) water in a typical year (specific language applies, see (2, p. 22300).

Wetlands – Critical Abutting, Adjacent and Non-Jurisdictional Differences

- The final rule retains the former definition of wetlands, which is: "those areas that are inundated or saturated by surface or ground water at a frequency or 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." (G, p. 22307).
- Adjacent wetlands are defined as wetlands that (G, p. 22307):
  1) 'abut' a paragraph (a)(1) through (3) water;
  2) are inundated by flooding from paragraph (a)(1) through (3) water in a typical year;

Water Categories

(a)(1) The territorial seas and traditional navigable waters

(a)(2) Tributaries of such waters

(a)(3) Certain lakes, pond and impoundments of jurisdictional waters

(a)(4) Wetlands adjacent to A(as) (1)-(a)(3) waters

Additional Considerations

The definition of 'perennial' is written in a way that suggests that if a stream does not flow it would be, at most, identified as 'intermittent.'

Guidance is needed in many areas. Two examples:

1) The definition of 'tributary' in the final rule includes no provisions for lack of flow during drought and does not provide clarification on what the determination would be when (at the time of agency review) conditions do not reflect a 'typical year' (either too wet or too dry).
2) It is unclear whether the definition of 'typical year' includes the 30th-70th percentile range as part of the calculation.

If states and tribes are planning to fill gaps in jurisdiction, considerations should include that groundwater connections are not recognized in the final rule.

3) are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune or similar feature;

4) are physically separated from a paragraph (a)(1) through (3) water only by a dike, barrier or similar artificial structure, so long as that structure allows for a direct hydrological surface connection to a paragraph (a)(1) through (3) water. This connection is required to be one way from the (a)(1) – (a)(3) water to a wetland. It is not jurisdictional if the flow is only from the wetland to the (a)(1)-(a)(3) water.

- The term 'abut' is defined in the final rule as "to touch at least one point or side" (2, p. 22309).
- For wetlands that 'abut' a paragraph (a)(1) through (3) water, a surface water exchange is not required (2, p. 22309).
- The final rule adopts categorical tests for adjacency (2, p. 22307):
  1) Federal jurisdiction is maintained over wetlands separated from other jurisdictional waters only by berms, banks, or dunes as those natural separations are evidence of a dynamic and regular direct hydrologic surface connection between the resources.
  2) Connectivity considerations.
  3) Wetland complexes that are crossed by roads and similar structures if those structures allow for surface water connection from an (a)(1) – (a)(3) water between the segregated wetland portions (such as through a culvert through a roadway) in a typical year.
- Physically remote, isolated wetlands (wetlands that do not abut, are separated by more than a natural berm, are not inundated by flooding in a typical year, and do not have a direct hydrologic surface connection to a jurisdictional non-wetland water in a typical year are not jurisdictional (p. 22280).
- Wetlands that do not meet the definition of adjacent wetlands are identified as not "inseparably bound up with the Waters of the United States" and are not federally jurisdictional. The rule states that these non-adjacent wetlands "are more appropriately regulated by states and tribes pursuant to their own authorities" (p. 22308).
- The final rule is consistent with the agencies' long-standing practice that a jurisdictional water may be altered and made non-jurisdictional by obtaining a CWA Section 404 Permit to place fill material in a wetland, thereby converting that water to fast land (p. 22305).

Uplands Provided a Formal Definition in the Final Rule

- The final rule also finalizes the definition of 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 by the Corps 1987 Wetlands Delineation Manual (G, p. 22308).
- Under the final rule, features that were once wetlands but have been naturally transformed or lawfully converted to upland (e.g. in compliance with a CWA Section 404 permit) are considered upland and are not federally jurisdictional (2, p. 22308).

Making Jurisdictional Determinations

Jurisdictional determination process includes identifying:

- Relevant features on the landscape;
- Whether the feature contributes surface water flow to federally jurisdictional waters (a)(2-4) in a typical year to determine flow path;
- Flow classification; and
- Whether climatic conditions represent conditions in a 'typical year'.

The agencies plan to continue to use the Corps' ordinary high water mark (OHWM) manuals, as well as Regulatory Guidance Letter 05-05 when making OHWM determinations to identify the lateral extent of jurisdiction.

The agencies are developing tools to use in several areas of implementation, including in classification efforts and for use in determining 'typical year', in addition to information sources and field data.

Despite simplifications, implementation of the final rule will continue to require technical expertise to support determinations of adjacency, flow etc. for determining federal jurisdiction, incl. the use of models, maps, datasets and expertise for field observations.

Determining Whether a Feature is a Tributary

While the final rule does not provide any formal methodology for determining flow regime in the field, it does include information on the steps that will need to be taken to make determinations. The final rule indicates that the Corps will have a major role in making these determinations. Highlights of these steps are listed below:

- Identify relevant features on the landscape using fieldwork (D3, p. 22292).
  - May use direct observation and other reliable methods (stream gauge data, elevation data, historic or current water flows, flood predictions, statistical evidence, aerial imagery and USGS maps) (D3, p. 22292).
- Identify whether the feature contributes surface water flow to federally jurisdictional waters (a)(2-4) in a typical year to determine flow path (D3, p. 22292). Looking to determine whether a specific point on a tributary may have a surface water connection to a downstream (a)(1) water in a typical year.
  - May use USGS maps, state and local maps and knowledge, aerial photography or other remote sensing equipment; may use range of available models, for example, Flow (Raindrop) Path GIS tool or StreamStats tool (D3, p. 22292).
- Identify flow classification: looking at whether the water is perennial, intermittent or ephemeral.
  - Use of multiple data points and sources of information should be used to determine flow classification (D3, p. 22294).
  - May use visual observation; field-based indicators, local flow data from government agencies, trapezoidal flumes and pressure transducers; existing rapid, field-based, streamflow duration assessment methods (SDAMs, often regional); remote desktop tools (in conjunction with site specific information) (p. 22293).
  - May be harder to make determinations in rural and remote areas and in heavily modified systems (p. 22293).
- Identify if climatic conditions are typical to determine whether the water feature meets the definition of tributary, i.e. represents a 'typical year'.
  - The rule defines 'typical year' 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" (D3, p. 22295). Must consider seasonality and timing of tributary flows in determinations (D3, p. 22295).
  - May use remote and field-based hydrologic and non-hydrologic indicators of the flow classification that would occur during seasonally wet conditions.
    - Remote might include aerial and satellite images spanning multiple years and taken under normal climatic conditions (D3, p. 22295).
    - In the field might include signs of certain ordinary highwater mark indicators (point bars, drift deposits, destruction of terrestrial vegetation; landowner input; presence of oxidized rhizospheres living along root channels) (D3, p. 22295).
- To identify the lateral extent of jurisdiction, the agencies plan to continue to use the Corps' ordinary high-water mark (OHWM) manuals, as well as Regulatory Guidance Letter 05-05 when making OHWM determinations (D3, p. 22295).

Useful Links

To learn more about this document, please contact Brenda Zollitsch at brenda@aswm.org or 207-892-3399.

EPA Navigable Waters Protection Rule Website:
https://www.epa.gov/nwpr

Final Rule Published in Federal Register:
https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states

Federal Pollution Control Act (Clean Water Act):
https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf

Excluded Waters

The final rule also outlines what waters are not "waters of the United States." Waterbodies that are not included in the four categories of "waters of the United States" are not a jurisdictional water under the Clean Water Act. Excluded waters include:

1) Groundwater, including groundwater drained through subsurface drainage systems, such as drains in agricultural lands.

2) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools.

Excluded Waters (Continued)

3) Diffuse stormwater run-off and directional sheet flow over upland.
4) Many farm and roadside ditches.
5) Prior converted cropland (however, this exclusion will cease to apply when cropland is abandoned and has reverted to wetlands).
6) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease.
7) 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 and is not a jurisdictional impoundment.
8) 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.
9) Stormwater control features excavated or constructed in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off.
10) 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.
11) Waste treatment systems (defined for the first time as “all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge)”.