



Clean Water Act Update: U.S. Army Corps of Engineers and EPA Publish New WOTUS Definition

By [Nicole Blevins](#)

On April 21, 2020, the Corps and EPA published a new definition of the Waters of the United States (WOTUS), [The Navigable Waters Protection Rule: Definition of “Waters of the United States.”](#) The new rule is effective on June 22, 2020.

The new WOTUS definition is important because it defines the scope of waters subject to federal regulation under the Clean Water Act. This update aims to provide regulatory certainty after many years of confusion and uncertainty. To that end, the new definition identifies four categories of regulated waters and enumerates several excluded waters.

Waters **Included** in the New Definition

- Territorial seas and traditional navigable waters (i.e., large rivers and lakes);
- Tributaries;
- Lakes, Ponds, and impoundments of jurisdictional waters; and
- Adjacent wetlands.

Tributaries

Notably, the rule adds a definition of “tributary” which includes naturally occurring surface water channels that are perennial or intermittent which contribute surface water flow to a traditional navigable water in a typical year.

Ditches

Significant to agricultural and ranching areas, the new WOTUS definition generally excludes ditches. However, the new definition of tributary includes certain ditches that meet the criteria for tributaries and (1) relocate a tributary; (2) are constructed in a tributary; or (3) are constructed in an adjacent wetlands.

Adjacent Wetlands

The term “adjacent wetlands” includes wetlands that:

- (1) physically touch other jurisdictional waters;
- (2) are separated from WOTUS by only a natural berm, bank, or dune;
- (3) are inundated by flooding from a WOTUS;
- (4) are physically separated from a jurisdictional water by an artificial dike, barrier, or similar artificial structure so long as the structure allows for a direct hydrologic surface connection between the wetlands and the jurisdictional water in a typical year; and
- (5) are divided by a road or similar artificial structure as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

Waters **Excluded** from the New Definition

- Waterbodies not included in the four included categories (above);
- Groundwater;
- Ephemeral features that flow only in direct response to precipitation;
- Diffuse stormwater runoff;
- Ditches that are not traditional navigable waters, tributaries, or that are not constructed in wetlands subject to certain limitations;
- Prior converted cropland;
- Artificially irrigated areas;
- Artificial lakes and ponds;
- Water-filled depressions constructed in upland or in non-jurisdictional waters incidental to mining or construction activity;
- Stormwater control features constructed in or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;
- Groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and
- Waste treatment systems.

The new definitions of perennial, intermittent, and ephemeral waters and the exclusion of ephemeral waters are significant clarifications that should help limit the reach of federal regulation. The term “ephemeral” is defined to mean surface water flowing or pooling only in direct response to precipitation such as rain or snow fall.

Please contact [Nicole Blevins](#) if you have any questions about WOTUS and Clean Water Act permits, discharges, or enforcement.