



# Overview of the new Navigable Waters Protection Rule

CHRIS A. HAMILTON | October 30, 2020



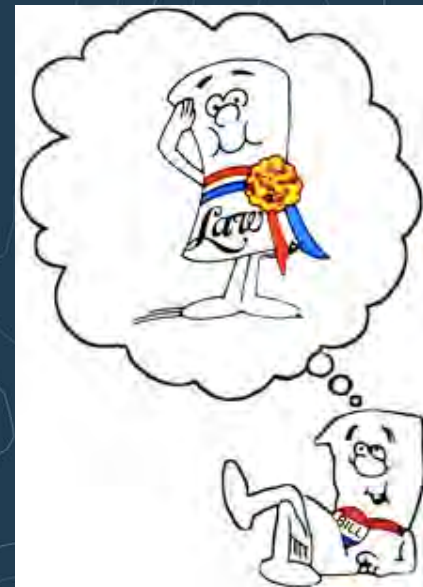
# AGENDA

- Background on the Clean Water Act (§ 404)
- The new Waters Rule
- Questions?

# CLEAN WATER ACT

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- Purpose
  - “...to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. 1341 et seq.)
- Section 404 regulates discharge of dredge and fill material.
- Provides for a permitting program to be administered by the U.S. Army Corps of Engineers (USACE).





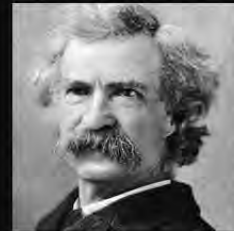
# NAVIGABLE WATERS PROTECTION RULE

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On April 21, the USACE and EPA published the Navigable Waters Protection Rule (NWPR) in the Federal Register. The rule went into effect on June 22, 2020.

After implementation, the NWPR resulted in several significant changes relative to the definition of waters of the U.S. (i.e. those features which are subject to Clean Water Act jurisdiction), including, but not limited to, the following:

- Ephemeral Waters
- Wetlands
- Interstate Waters



Whiskey is for drinking; water is for fighting over.

~ Mark Twain

AZ QUOTES

# NAVIGABLE WATERS PROTECTION RULE

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- The NWPR limits the definition of waters of the U.S. to four distinct categories:
  1. Territorial seas and traditional navigable waters (TNWs)
  2. Tributaries
  3. Lakes, ponds, and impoundments of jurisdictional waters
  4. Adjacent wetlands

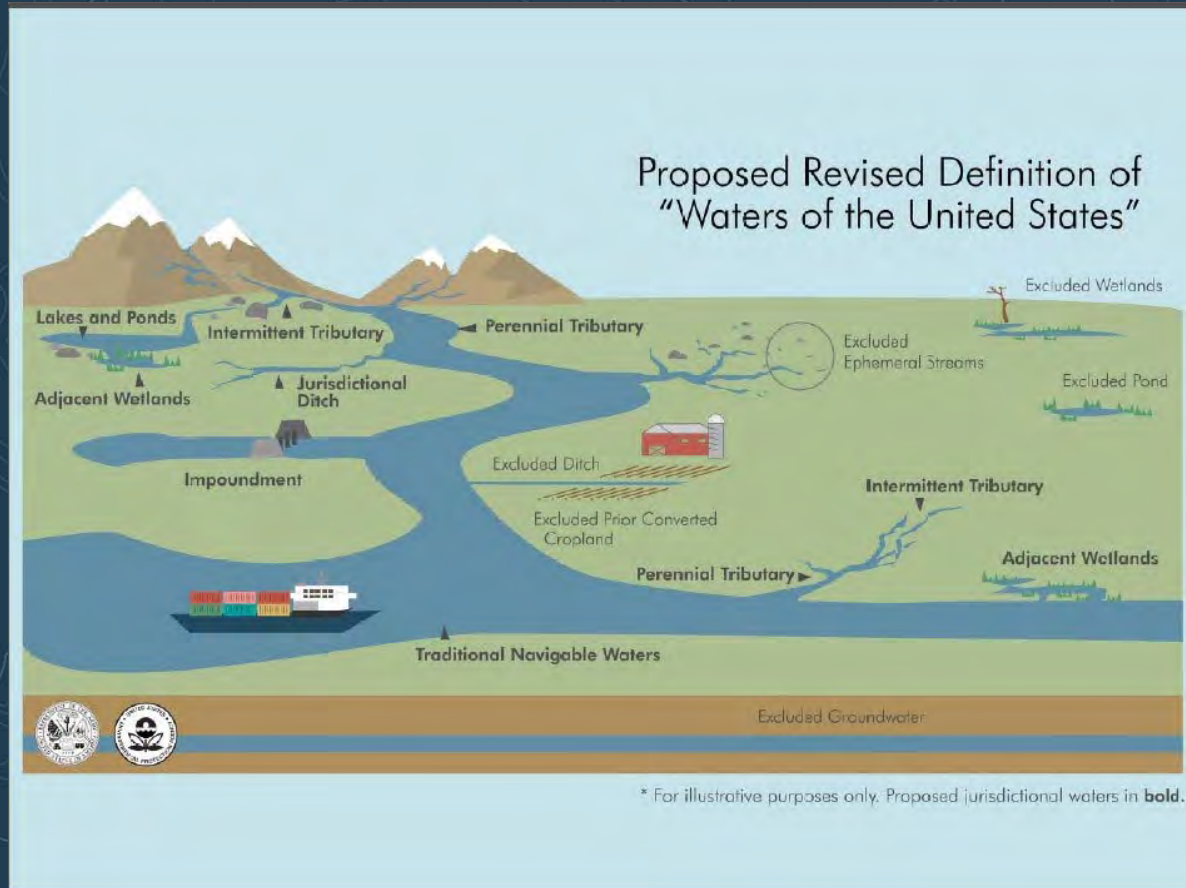
# NAVIGABLE WATERS PROTECTION RULE

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- Additionally, the NWPR codifies a non-jurisdictional status for many aquatic resource types that have generally been considered non-waters of the U.S. as a matter of policy or interpretation.
- The following waters/features are not jurisdictional under the rule:
  - Groundwater, including groundwater drained through subsurface drainage systems, such as drains in agricultural lands.
  - Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools.



# NAVIGABLE WATERS PROTECTION RULE



# NAVIGABLE WATERS PROTECTION RULE

Water Feature Type	Jurisdictional Status Under Navigable Waters Protection Rule
Territorial seas and traditional navigable waters	Jurisdictional/WOTUS
Tributaries, including perennial and intermittent rivers and streams	Jurisdictional/WOTUS
Lakes, ponds, and impoundments of jurisdictional waters	Jurisdictional/WOTUS
Adjacent wetlands	Jurisdictional/WOTUS
Groundwater	Not Jurisdictional
Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;	Not Jurisdictional
Diffuse stormwater run-off and directional sheet flow over upland	Not Jurisdictional
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;	Not Jurisdictional
Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters	Not Jurisdictional
Stormwater control features excavated or constructed in upland or in non-jurisdictional waters	Not Jurisdictional



# DEFINITIONS

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## WATERS OF THE U.S.

- Navigable waters and interstate waters
- Lakes, streams, rivers, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds
- Tributaries of waters
- Territorial seas
- Adjacent wetlands

# DEFINITIONS

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## WETLANDS

- Areas that are inundated or saturated at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions.
- Includes swamps, marshes, bogs, and similar areas.
- According to USACE methodology, wetlands have to meet three criteria: (1) hydrophytic vegetation, (2) hydric soils, and (3) hydrology.















# NAVIGABLE WATERS PROTECTION RULE

## Navigable Waters Protection Rule WOTUS: Adjacent Wetlands



Wetlands that abut a traditional navigable water like these near Ram Island in Massachusetts



Wetlands with manmade structures that allow surface connection like these in the Mississippi River Delta region of Louisiana



Wetlands that are adjacent to a traditional navigable water like these in Wyoming next to the Snake River



[epa.gov/nwpr](http://epa.gov/nwpr)



# NAVIGABLE WATERS PROTECTION RULE

## Navigable Waters Protection Rule WOTUS: Tributaries to Navigable Waters



A perennial tributary like a section of the Boise River in Idaho that contributes surface flow to the Snake River



A snowpack-fed intermittent tributary like Hayes Creek in Colorado that contributes surface flow to the Crystal River



A perennial tributary like the San Marcos River that contributes surface flow to the Guadalupe River



[epa.gov/nwpr](https://epa.gov/nwpr)

# DEFINITIONS

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## PERENNIAL STREAM

- Flowing water year-round during a typical year.
- Water table is above the stream bed elevation for most of the year.
- Groundwater is the primary source for flow.







# DEFINITIONS

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## **INTERMITTENT STREAM**

- Flowing water during certain times of the year, when groundwater provides water for stream flow.
- Runoff from precipitation is supplemental.
- Some groundwater contribution.







# NAVIGABLE WATERS PROTECTION RULE

## Navigable Waters Protection Rule Not WOTUS



Dry washes and ephemeral streams



Many farm ditches



Many roadside ditches



Isolated wetlands



Farm and stock watering ponds  
constructed in upland



Stormwater runoff



[epa.gov/nwpr](http://epa.gov/nwpr)

# DEFINITIONS

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## EPHEMERAL STREAM

- Flowing water only during and for a short duration after precipitation events.
- Above the water table elevation year-round.







# NAVIGABLE WATERS PROTECTION RULE

Section 404 WOTUS  
Protection EPA  
Supreme Court Trump  
Intermittent Navigable  
Clean Water Act  
Interstate Ponds  
Rule Tributaries Wetland  
USACE Lakes Waters  
Ephemeral Perennial  
Biden



# NAVIGABLE WATERS PROTECTION RULE



**U.S. ARMY CORPS OF ENGINEERS  
REGULATORY PROGRAM  
APPROVED JURISDICTIONAL DETERMINATION FORM (INTERIM)  
NAVIGABLE WATERS PROTECTION RULE**

**I. ADMINISTRATIVE INFORMATION**

Completion Date of Approved Jurisdictional Determination (AJD): Select.  
 ORM Number: (e.g. HQS-2020-00001-MSW).  
 Associated JDs: N/A or ORM numbers and identifiers (e.g. HQS-2020-00001-MSW-MITSITE).  
 Review Area Location<sup>1</sup>: State/Territory: Enter. City: Enter. County/Parish/Borough: Enter.  
 Center Coordinates of Review Area: Latitude Decimal Degrees. Longitude Decimal Degrees.

**II. FINDINGS**

**A. Summary:** Check all that apply. At least one box from the following list MUST be selected. Complete the corresponding sections/tables and summarize data sources.

- The review area is comprised entirely of dry land (i.e., there are no waters or water features, including wetlands, of any kind in the entire review area). Rationale: N/A or describe rationale.
- There are "navigable waters of the United States" within Rivers and Harbors Act jurisdiction within the review area (complete table in Section II.B).
- There are "waters of the United States" within Clean Water Act jurisdiction within the review area (complete appropriate tables in Section II.C).
- There are waters or water features excluded from Clean Water Act jurisdiction within the review area (complete table in Section II.D).

**B. Rivers and Harbors Act of 1899 Section 10 (§ 10)<sup>2</sup>**

§ 10 Name	§ 10 Size	§ 10 Criteria	Rationale for § 10 Determination
N/A	N/A	N/A	N/A

**C. Clean Water Act Section 404**

**Territorial Seas and Traditional Navigable Waters ((a)(1) waters):<sup>3</sup>**

(a)(1) Name	(a)(1) Size	(a)(1) Criteria	Rationale for (a)(1) Determination
N/A	N/A	N/A	N/A

**Tributaries ((a)(2) waters):**

(a)(2) Name	(a)(2) Size	(a)(2) Criteria	Rationale for (a)(2) Determination
N/A	N/A	N/A	N/A

**Lakes and ponds, and impoundments of jurisdictional waters ((a)(3) waters):**

(a)(3) Name	(a)(3) Size	(a)(3) Criteria	Rationale for (a)(3) Determination
N/A	N/A	N/A	N/A

**Adjacent wetlands ((a)(4) waters):**

(a)(4) Name	(a)(4) Size	(a)(4) Criteria	Rationale for (a)(4) Determination
N/A	N/A	N/A	N/A

<sup>1</sup> Maps/figures are attached to the AJD provided to the reviewer.

<sup>2</sup> If the navigable water is not subject to the rule and one of the lists is included on the District list of Rivers and Harbors Act Section 10 navigable water list, do NOT use this document to make the determination. The District must continue to follow the procedure outlined in 33 CFR part 329.14 to make a Rivers and Harbors Act Section 10 navigability determination.

<sup>3</sup> A stand alone TNW determination is completed independently of a request for an AJD. A stand alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits of lake borders are established. A stand alone TNW determination should be completed following applicable guidance and should NOT be documented on the AJD Form.

# NAVIGABLE WATERS PROTECTION RULE

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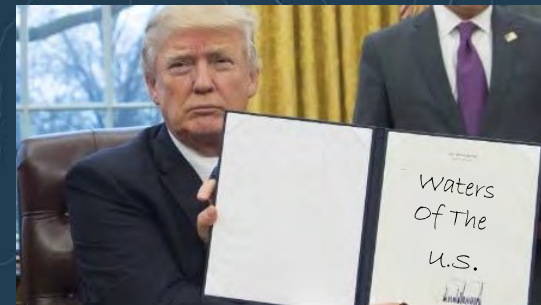
## EPA Complaints and Petitions for Review (2020):

- 04/27/2020, CWA/WOTUS, Chesapeake Bay Foundation
  - Complaint/Challenge to the Navigable Waters Protection Rule
- 04/29/2020, CWA/WOTUS, Conservation Law Foundation
  - Complaint to the Navigable Waters Protection Rule
- 06/22/2020, CWA/WOTUS, Puget Soundkeeper Alliance
  - Complaint/Challenge to (1) Navigable Waters Protection Rule and (2) final rule repealing the 2015 regulatory definition of "waters of the United States" and recodifying the prior regulations.
- 06/22/2020, CWA/WOTUS, Fond Du Lac Band of Lake Superior Chippewa, Menominee Tribe of WI, Pascua Yaqui Tribe
  - Complaint/Challenge to (1) Navigable Waters Protection Rule and (2) final rule repealing the 2015 regulatory definition of "waters of the United States" and recodifying the prior regulations.



# NAVIGABLE WATERS PROTECTION RULE

- While the rule looks very encouraging, with significant benefits in regulatory clarity for land development, infrastructure, and energy projects, it's still unknown if future litigation will result in an injunction stopping the rule.
- For comparison, the Clean Water Rule proposed by the Obama Administration became effective in August 2015 and was subsequently stayed nationwide in October 2015, with the Trump administration formally repealing the 'Obama' rule in September 2019.



The background of the entire image is a dark blue topographic map with white contour lines. A light gray rectangular box is centered on the map, containing the text.

# PELTON

## LAND SOLUTIONS

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