

# Jurisdictional Scope of the Clean Water Act

Phyllis Feinmark, Chief, Water and General Law Branch  
Key Environmental Issues in US EPA Region 2

New York City  
June 6, 2018



Office of Regional Counsel  
US EPA Region 2

# Disclaimer

*This presentation does not represent, and should not be construed to represent, the presenter's opinions or any formal or informal EPA determination, policy or regulation. This presentation may not be relied on to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. Technical considerations are provided for discussion purposes only, and diagrams are provided for illustration purposes only.*

# Why Define “Waters of the US” (WOTUS)?

---

**CWA Goal – Section 101(a):** Restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.

**Section 301(a):** Except when in compliance with a permit, discharge of a pollutant from a point source into **navigable waters** is prohibited.

**Navigable Waters – Section 502(7):** waters of the United States, including the territorial seas.

# Why WOTUS Matters

“Navigable” Waters: Waters of the U.S., including Territorial Seas

303  
Water  
Quality  
Standard  
& TMDLs

311  
Oil  
Spill  
Programs

401  
State/tribal  
Water Quality  
Certification

402  
Pollutant  
Discharge  
Permits

404  
Dredge  
and Fill  
Permits

# Many Regulations Incorporate the “Waters of the US” Definition

- 33 CFR Part 328 - Army COE Section 404 Regulations
- 40 CFR Part 110 - Discharge of Oil
- 40 CFR Part 112 - Oil Pollution Prevention
- 40 CFR Part 116 - Designation of Hazardous Substance
- 40 CFR Part 117 - Determination of Reportable Quantities for Hazardous Substances
- 40 CFR Part 122 - EPA Administered Permit Programs: NPDES
- 40 CFR Part 230 - Section 404(b)(1) Guidelines
- 40 CFR Part 232 - 404 Program Definitions; 404 Exempt Activities
- 40 CFR Part 300 - National Oil and Hazardous Substances Pollution
- 40 CFR Part 300 (App E) - Oil Spill Response
- 40 CFR Part 302 - Designation, Reportable Quantities, and Notification
- 40 CFR Part 401 - General Provisions

# “Navigable Waters” Problem: How to Define WUS?

Longstanding previous regulations define “Waters of the U.S.” as:

1. All waters currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters subject to ebb and flow of tide;
2. All interstate waters and wetlands;
3. All other waters that could affect interstate or foreign commerce;
4. All impoundments of waters of the U.S.;
5. Tributaries of the above four categories;
6. The territorial sea; and
7. Wetlands adjacent to waters identified above

Exclusions: waste treatment systems, prior converted cropland

# A Brief History of WOTUS - Part 1

- July 1977 – First definition of “waters of the US” in Corps regulations
- July 1985 – *United States v. Riverside Bayview Homes*
- June 1988 – Last modification of the EPA regulatory definition (until 2015 CWR)
- Jan 2001 – *SWANCC*: Narrows jurisdiction for isolated waters
- June 2006 – *Rapanos*: Addresses “relatively permanent waters” & “significant nexus”



# Supreme Court Decisions Created Uncertainty as to the Scope of Jurisdictional Waters under the Clean Water Act

Key decisions:

- *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
- *Rapanos v. United States*, 547 U.S. 715 (2006).





# ***SWANCC and Isolated Waters***

*Solid Waste Agency of Northern Cook County (SWANCC) v.  
US Army Corps of Engineers (2001)*

- Addressed non-navigable, isolated, intrastate waters
- Presence of migratory birds is not a valid sole basis for CWA jurisdiction  
Congress intended some connection to navigability
- Did not invalidate existing regulations, just qualified how they were applied

# *Rapanos* and Non-Navigable Tribs and their Adjacent Wetlands

*Rapanos v. United States* (2006)

- *United States v. Rapanos*
- *Carabell v. U.S. Army Corps of Engineers*

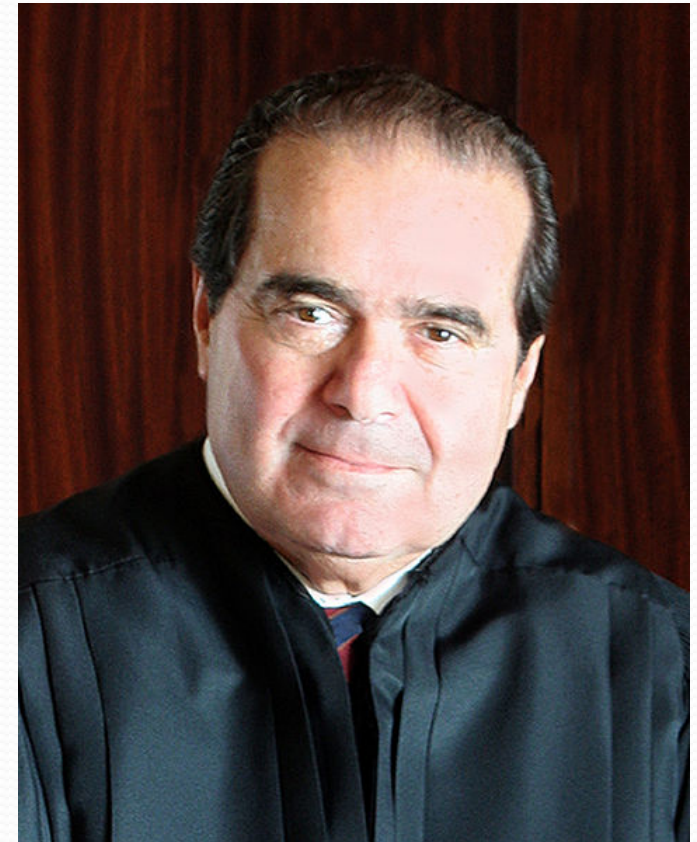
9 Justices, 5 opinions



# *Rapanos* and Non-Navigable Tribes and their Adjacent Wetlands

*Rapanos* Plurality Opinion – Authored by Scalia

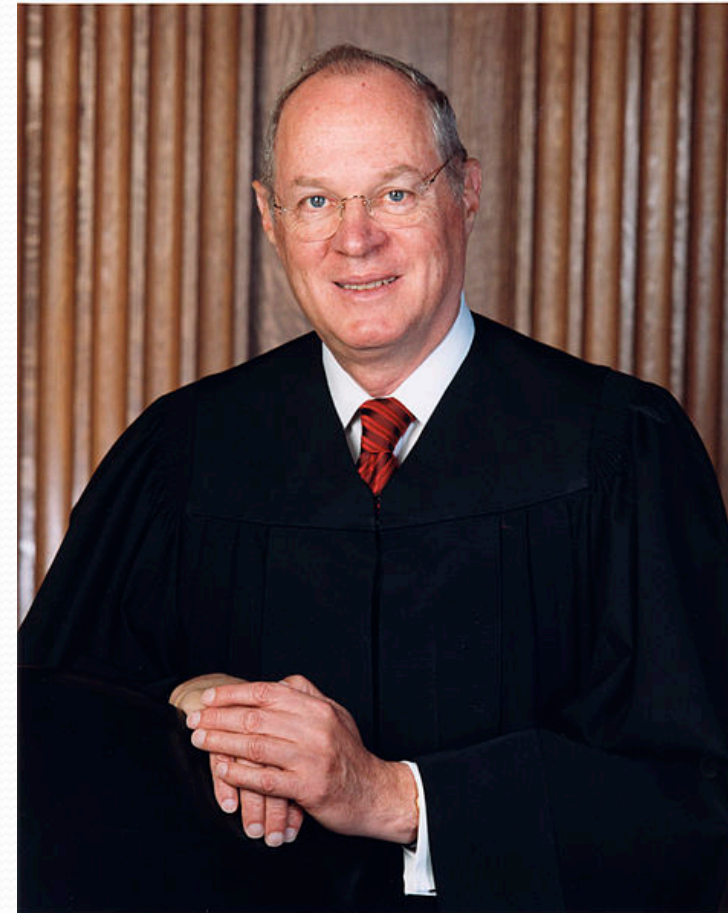
- Only relatively permanent standing or continuously flowing bodies of water connected to traditionally navigable waters and rivers or wetlands with a continuous surface connection to such waters are jurisdictional



# *Rapanos* and Non-Navigable Tribs and their Adjacent Wetlands

## *Rapanos* Kennedy Opinion

- Wetlands and waters are jurisdictional if they have a “significant nexus” to navigable waters
- What is a significant nexus?  
Where the wetland or waterbody, “...either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.”





# Redefining WOTUS

After *SWANCC* and *Rapanos*, call for EPA and the Army Corps to do rulemaking to define “waters of the US”

- Cases had created confusion and uncertainty over the exact definition of waters of the United States
- Decisions did not invalidate the longstanding regulatory definition, but did provide important qualifiers on how the definition should be implemented

Guidance was helpful, but can't provide the type of specificity stakeholders requested

- Can't define terms
- Can't create or modify rights or obligations

As a result, the agencies began a rulemaking effort early in 2011

# A Brief History of WOTUS - Part 2

- June 29, 2015** – publication in Federal Register of final Clean Water Rule (CWR) signed by EPA and Army (80 FR 37054, June 29, 2015) (recodifies regulatory definitions listed in slide 5 above)
- Aug 28, 2015** – Original effective date for CWR
- Oct 9, 2015** – Nationwide Stay of CWR by the 6<sup>th</sup> Cir. Court of Appeals
- Feb 28, 2017** – Presidential Executive Order on WOTUS
- July 27, 2017** – Proposed rule rescinding the 2015 definition of WOTUS and recodification of prior regulations (Step 1 Rule) (82 FR 34899, July 27, 2017)
- Feb 6, 2018** – Final Applicability Rule adding applicability date of February 6, 2020 to the 2015 CWR (83 FR 5200, February 6, 2018)
- Presently** – Step 2 outreach ongoing leading to proposed Step 2 rule to revise definition of WOTUS



# Clean Water Rule: Redefining WOTUS

Proposed on April 21, 2014

- More than 1 million public comments during 207-day comment period
- Over 400 meetings with states/tribes, other stakeholders, public.

Signed on May 27, 2015

- Clean Water Rule grounded in law and science, and shaped by public input.

Published in *Federal Register* on June 29, 2015 (80FR 37054)

Effective on August 28, 2015\*

Stayed temporarily nationwide on October 9, 2015

# 2017 Executive Order

**Presidential Executive Order** signed on Feb. 28, 2017

- Entitled “Presidential Executive Order on restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule”
- Calls for EPA and Army Corps to review the final Clean Water Rule and “publish for notice and comment a proposed rule rescinding or revising the rule...”
- Agencies “shall consider interpreting the term ‘navigable waters’ in manner consistent with Justice Scalia’s opinion” in *Rapanos*.”

# 2017 Rulemaking

## **March 6, 2017 - Federal Register notice (82 FR 12532)**

In accordance with EO, announcing EPA and Corps “intention to review and rescind or revise the Clean Water Rule.

## **July 27, 2017 – proposed rule (82 FR 34899)**

“Step 1 Rule” would rescind the 2015 CWR

Re-codifies the regulatory text that existed prior to 2015

Provides certainty pending a second rulemaking which would be a substantive re-evaluation of the definition of WOTUS

# 2018 Rulemaking

**April 11, 2018 – Step 1 Rule supplemental proposal**

Sent to OMB for review - clarifies scope of efforts

**February 6, 2018 – final rule on applicability of 2015 CWR (83 FR 5200)**

Adds a February 6, 2020 “applicability date” to the 2015 CWR

Effective date of CWR was August 28, 2015

OFR provides that some rules may have a compliance or applicability date in addition to effective date – is date affected classes must comply with rule

# Two Step Process

Implement 2017 EO in a two step process

Step 1 - Rule that re-codifies the regulation in place prior to the 2015 CWR being implemented now pursuant to the later applicability date

Step 2 - Plan to propose a new definition to replace the 2015 CWR:

will take into consideration principles outlined by *Scalia in Rapanos* plurality opinion

Until new WOTUS rule is in place, agencies will use “regulatory definition in place prior to the 2015 rule, consistent with Supreme Court decisions, agency guidance, and longstanding practice.

# 2015 CWR Litigation

The Clean Water Rule became effective on August 28, 2015\*

- Challenged in both district and circuit courts – threshold question whether the courts of appeals have exclusive jurisdiction to hear challenges to the rule under section 509 of the CWA
- 18 district court complaints filed, with 97 plaintiffs
- 22 petitions for review in the courts of appeal, with 108 petitioners
- Petitions consolidated in the 6<sup>th</sup> Circuit Court of Appeals

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court.

In response to this decision, EPA and the Department of Army resumed nationwide use of the agencies' prior regulations defining the term "waters of the United States."

\* On August 27, 2015, the District Court for North Dakota issued a preliminary injunction on the rule in 13 states. In light of the preliminary injunction, the agencies continued to implement the prior regulation in those 13 states.



# 2015 CWR Litigation Cont'd

January 2018 – Supreme Court rules that the district courts have jurisdiction over challenges to the 2015 Rule.

Sixth Circuit dissolved its October 2015 stay

Some district court challenges have been restarted

- SD Texas – decision on nationwide PI pending
- North Dakota – 2015 stay lifted (13 states)
- Georgia – states seeking to restart litigation and renew motion for PI

# Applicability Rule Litigation

February 6, 2018 – Final Applicability Rule adding applicability date of February 6, 2020 to the 2015 CWR

Three lawsuits filed by states and conservation groups:

- SD SC – environmental groups
- Two cases in SDNY – states and NRDC with EDF - motions to transfer still pending

US has moved to transfer all cases to the Texas District Court hearing the 2015 Rule challenges

SDNY plaintiffs have filed motions for summary judgment asserting applicability rule is arbitrary and capricious

Because of S. Ct. decision, other parties can challenge the rule in other districts for six years.

# “Navigable Waters” right now

Longstanding previous regulations define “Waters of the U.S.” as:

1. All waters currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters subject to ebb and flow of tide;
2. All interstate waters and wetlands;
3. All other waters that could affect interstate or foreign commerce;
4. All impoundments of waters of the U.S.;
5. Tributaries of the above four categories;
6. The territorial sea; and
7. Wetlands adjacent to waters identified above

Exclusions: waste treatment systems, prior converted cropland

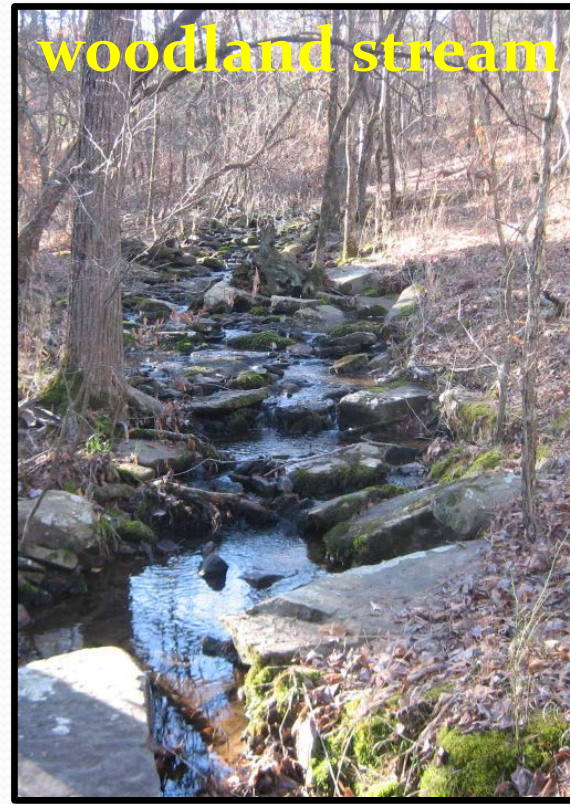


# Are these Waters of the US?

*You make the call...*



Always



Probably



It's complicated  
but no, not a WOTUS

# Traditionally Navigable Waters



**Categorically a water of the U.S.**

All waters which are:

- (1) Currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce,
- (2) Including all waters which are subject to the ebb and flow of the tide.







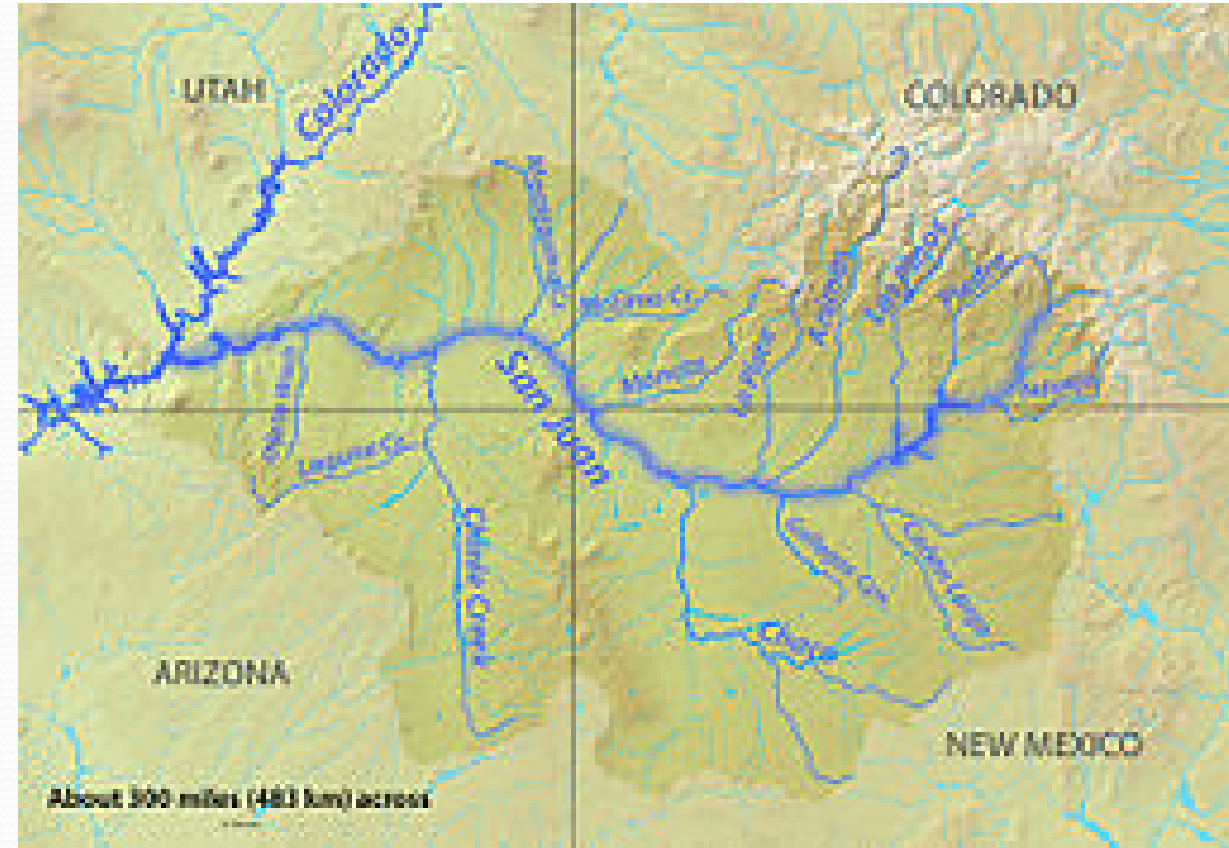


# Interstate Waters

## **Categorically a water of the U.S.**

Interstate waters are jurisdictional.

Supports ability of states to protect against pollution from outside their borders.



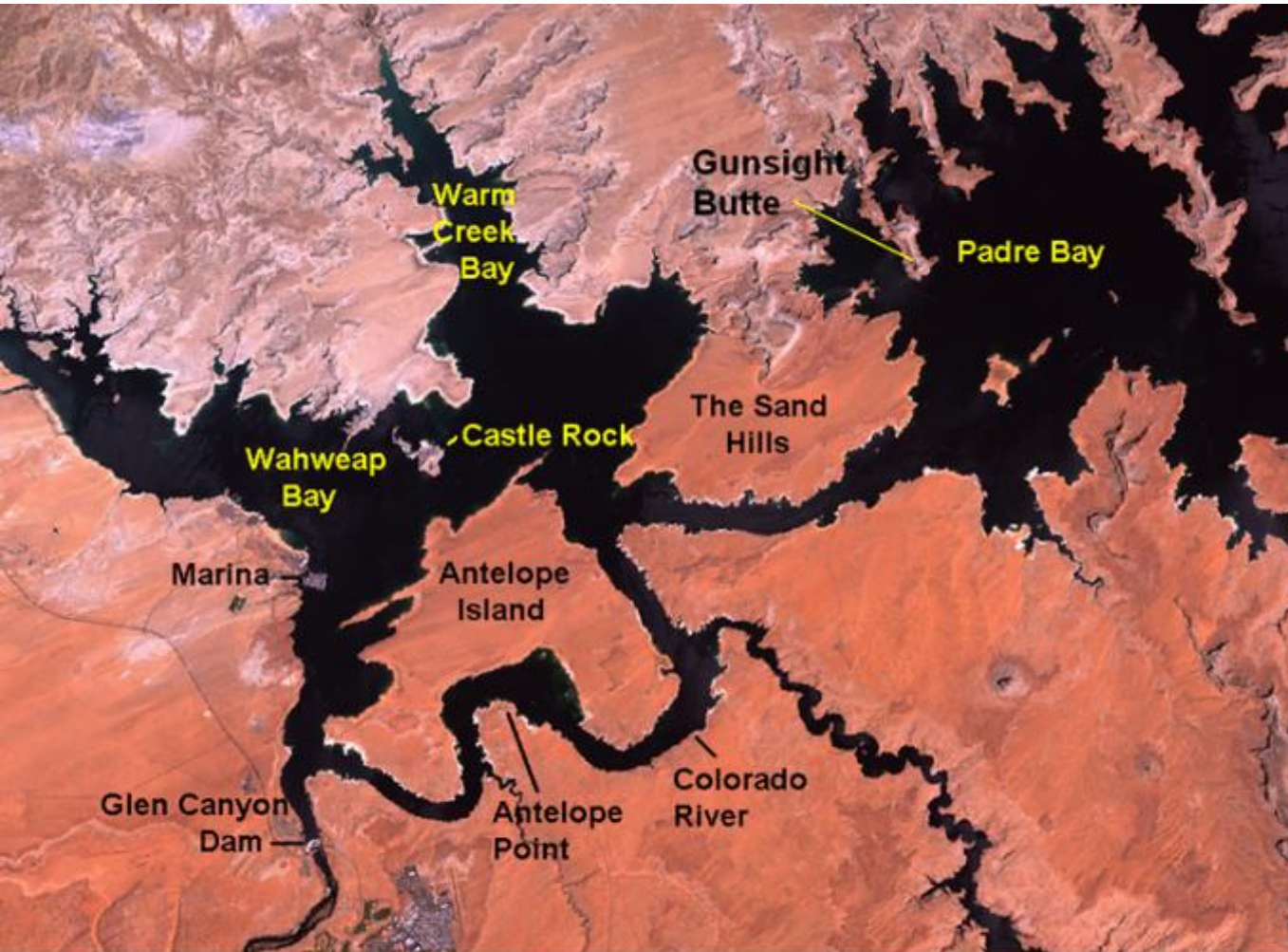


# Impoundments

Impoundments of otherwise jurisdictional waters are also jurisdictional.









# Tributaries

1988 Rule: “Tributaries” are waters of the United States

- ditches can be tributaries



# Territorial Seas

**Categorically a water of the U.S.**

The Clean Water Act lists territorial seas as jurisdictional





# Adjacent Wetlands/Waters

## The 1988 Rule

Wetlands adjacent to traditionally navigable waters, interstate waters, territorial seas, tributaries or jurisdictional impoundments are waters of the U.S.

Wetlands are adjacent if they are “bordering, contiguous, or neighboring.”



# Limits of Jurisdiction

## Tidal Waters

- (1) High Tide Line (HTL), or
- (2) If Adjacent Non-tidal waters are present:  
Apply limits for the Non-tidal waters.

## Non-Tidal Waters

- (1) Ordinary High Water Mark (OHWM), or
- (2) When Adjacent Wetlands are present: The limit of the adjacent wetlands.
- (3) When the water consists only of Wetlands: The limit of the wetland.



# Excluded Waters - Part 1

## Unchanged Exclusions and Exempt Activities

### **From the 1988 Rule:**

- Prior Converted Cropland
- Waste Treatment Systems

### **Statutory Exemptions:**

- Agricultural stormwater discharges.
- Return flows from irrigated agriculture.
- Normal farming, silviculture, and ranching practices.
- Upland soil and water conservation practices.
- Construction and maintenance of farm or stock ponds or irrigation ditches.
- Maintenance of drainage ditches.
- Construction or maintenance of farm, forest, and temporary mining roads.





# Excluded Waters - Part 2

## Features Generally Excluded by Past Agency Practice

- Artificially irrigated areas that would revert to dry land should application of water cease;
- Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
- Artificial reflecting pools, swimming pools, small ornamental waters created in dry land;
- Water-filled depressions created in dry land incidental to mining or construction activity;
- Erosional features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways;
- Puddles









# Contact Information

Phyllis Feinmark  
Chief, Water and General Law Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007  
[feinmark.phyllis@epa.gov](mailto:feinmark.phyllis@epa.gov)