

EPA – Proposed Waters of the US Rule



AG TASK FORCE
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Topics



- **Proposed Rule Summary**
- **Interpretive Rule – NRCS Practices**
- **NCDA&CS plans**

Why Rulemaking?



- **Court cases have caused confusion**
- **Reliance on guidance documents**
- **More predictability and consistency**
- **Public process**

Proposed Rule Summary



Jurisdictional Waters:

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
- Impoundments
- Tributaries
- Adjacent Waters (wetlands)

- Other Waters

Definitions



- Tributary:

means a water physically characterized by the presence of a bed and banks and ordinary high water mark as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as the bed and banks and an ordinary high water mark can be identified upstream of the break. **A tributary, including wetlands, can be natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.**

Definitions



Tributary

- Means a water physically characterized by the presence of a bed and banks and ordinary high water mark
- A tributary, including wetlands, can be natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.

Definitions



Jurisdictional Ditches

- Altered natural streams
- Ditches excavated in wetlands
- Ditches with perennial flow
- Ditches that connect two waters



Definitions



Excluded Ditches

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow (all 3 criteria).
- Ditches that do not contribute flow, either directly or through another water, to a navigable water, interstate water, territorial seas, or impoundment

Definitions



Adjacent Waters

- Wetlands, ponds, lakes, and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.
- Shallow groundwater connection can qualify

Definitions



Other Waters

- Evaluated on a case-by-case basis
- Could cover a small percentage of “isolated wetlands”

Agriculture Issues



Traditional Agriculture Exemptions Maintained

- **Normal farming, silvicultural, and ranching practices**
- **Prior converted cropland**
- **Agricultural stormwater**
- **Return flows from irrigated agriculture**

Public Comment



- **Published in FR on April 21**
- **90 day comment period**
- **Comments due July 21 – will likely ask for extension**

- **NCDA&CS is reviewing**
- **Working with other groups**

Interpretive Rule



- MOU between EPA, USACE, and USDA
- 56 activities are now considered to be “normal farming” and are exempt from CWA 404 permitting
 - Must be an established farming operation
 - Practices must meet NRCS Standards
 - NRCS does not have to design or approve practices
 - Notification/permission not required – practices automatically exempt if NRCS Standards are met
- List to be revisited annually
- Existing agricultural exemptions still apply

Interpretive Rule



- Does the Interpretive Rule actually restrict “normal farming practices?”
 - Most of the 56 practices were likely already exempt as “normal”
 - Compliance tied to NRCS Standards
 - Conflicts between Forestry BMPs, Extension Guidance, SWCC Practices
 - These other practices also protect water quality, but are ineligible for the exemption

Interpretive Rule



- **Implementation Questions**
 - What if a practice is removed from the list (or revised) after it has been installed?
 - Some standards reference other standards that are not exempt – Fishpond Management (399) references Pond (378)

Interpretive Rule



- **Interpretive Rule = Guidance Document**
- **Can be revised without notice or comment period**
 - Practices can be added or removed as Standards are updated
- **Compliance determined by EPA and USACE**
- **Comments on this version due June 5 – will likely ask for an extension**

Thank You!



Questions?

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