



Comparison of EPA and State Jurisdictional Waters Subject to Pesticide NPDES General Permit

U.S. EPA's pesticide NPDES general permit (PGP) regulates pesticide applications that result in discharges to "Waters of the U.S.," (WOTUS) whereas many state versions of the PGP regulate pesticide applications that result in discharges to WOTUS. The differences between these jurisdictional definitions can be great and may create confusion and potential legal jeopardy for aerial applicators who service clients across state lines. Jurisdictional "waters" are not just rivers and lakes, but may be dry ditches, potholes or playa lakes at the time of pesticide application. In June 2015, EPA and the U.S. Army Corps of Engineers (Corps) published a final rule, known as that Clean Water Rule,¹ that redefines WOTUS and expands the jurisdictional reach of the CWA. Over 30 states, agriculture stakeholder groups, and industry filed lawsuits challenging the final rule, and in October 2015 implementation of the rule was stayed nationwide by the Sixth Circuit Court of Appeals. While the 2015 rule is stayed, EPA and the Corps have stated that they will follow the EPA 2008 Guidance² interpreting the Supreme Court decisions. EPA and the Corps initiated a two-step rulemaking process to rescind and replace the 2015 rule in fall 2017 and finalization of the step one rescission is still pending. There have been a number of recent and rapid developments at the federal court and agency level that could impact the status of the nationwide stay of the 2015 rule. In January 2018, the U.S. Supreme Court ruled the legal challenges of the 2015 rule should have been brought in the federal district courts, which will force the Sixth Circuit to dismiss the petitions and dissolve the current nationwide stay. A number of scenarios could play out in the federal courts into March/April 2018, as the parties to the lawsuits seek to reinstate the nationwide stays via district court actions and renew their legal challenges at the district court level. Meanwhile, EPA and the Corps published a [final rule](#) on February 6, 2018, which adds a two-year delay to applicability of the 2015 rule. This delay in applicability would provide interim regulatory certainty as the agencies continue to work through the rescission and replacement rulemaking process regardless of the status of a judicial stay. However, a hand full of states and environmental groups are challenging the delay in applicability, and it is unclear how the courts will rule at this time. NAAA will continue to track and share related developments via eNews communications.

NAAA created the following chart to provide its members with an overview of the differences between these different definitions. Defining which waters are within federal jurisdiction is a *very* complex issue, one that remains unresolved after even two U.S. Supreme Court cases;³ a definitive evaluation is beyond the scope of this overview. This chart is meant to provide NAAA members with a brief understanding of the issues and links to additional resources. For more information, please refer to NAAA's website and the references identified in the chart.

¹ https://www.epa.gov/sites/production/files/2015-06/documents/clean_water_rule_40_cfr_230_3.pdf

² EPA's 2008 Guidance is accessible at: https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

³ *Rapanos v. United States*, 547 U.S. 715 (2006). See also: <http://www.acoel.org/post/2011/12/01/Finding-Consensus-Amid-Chaos-The-Third-Circuit-Weighs-in-on-the-Interpretation-of-Rapanos.aspx>

	WOTUS Definition and applicable EPA 2008 Guidance	“Waters of the State”	EPA/Corps 2015 Clean Water Rule (Note: implementation halted by ongoing litigation)
Jurisdictional Waters	<p>“Waters of the United States” is defined in the Clean Water Act (CWA), in federal rules at 40 CFR 122.2, and modified by two U.S. Supreme Court rulings. The language of the definition and/or EPA’s 2008 Guidance interpreting U.S. Supreme Court rulings identify the following waters as WOTUS:</p> <ul style="list-style-type: none"> • Traditionally Navigable Waters (TNW): All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; • All interstate waters, including interstate “wetlands;” • Territorial seas; • Tributaries to the TNW: (1) Relatively permanent, non-navigable tributaries of TNWs are jurisdictional; (2) on basis of “significant nexus” analysis⁴, non-navigable tributaries that are <u>not</u> relatively permanent may be deemed jurisdictional.⁵ • All impoundments of water otherwise defined as waters of the United States under this definition; • “Adjacent” wetlands/Waters: (1) All wetlands adjacent to TNWs; all wetlands directly abutting relatively permanent tributaries; (2) on basis of a “significant nexus” analysis, wetlands adjacent to non-navigable tributaries that are not relatively permanent; wetlands adjacent to but that do not directly abut a relatively permanent may be deemed jurisdictional wetlands. • Isolated or “Other Waters”: all others waters other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use the use, degradation or destruction of 	<p>Definition of state waters varies greatly from state to state*, but generally includes:</p> <ul style="list-style-type: none"> • All lakes, bays, impounding reservoirs, springs, wells, rivers, streams (including intermittent streams), creeks, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, estuaries, marshes, inlets, canals, sounds, adjacent oceans or seas within the territorial limits of the state; • All other bodies of <u>surface or underground waters, natural or artificial</u>, inland or coastal, fresh or salt, public or private which are wholly or partially within or bordering the state or within its jurisdiction (except those private waters which do not combine or affect a junction with natural surface or underground waters); • Any “waters of the United States” as defined under the CWA which are not included in the preceding description. • Tributaries of such waters, including adjacent wetlands, any manmade bodies of water that were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state, including adjacent wetlands. <p>* NOTE: Given the variability across states, applicators should familiarize themselves with the definition of “waters of the state” in the states where they operate.</p>	<p>Key Changes to the Definition of WOTUS in the 2015 Clean Water Rule that is currently stayed pending outcome of legal challenge created the following novel definitions for terms included in WOTUS and set distance limits and parameters for certain categories for the first time. These changes raise many implementation questions and many would require a case-by-case analysis:</p> <ul style="list-style-type: none"> • Defines “tributary” for the first time as waters with a bed, banks and ordinary high water mark (OHWM) that contributes flow to a jurisdictional water. • Defines “adjacent” for purposes of determining which wetlands/waters are “adjacent” to other categories of jurisdictional waters and included in WOTUS as being within 100 feet of the OHWM, 1,500 feet of the high tide line, or within the 100 year floodplain (if also within 1,500 feet of the OHWM), of a jurisdictional water. Waters/wetland meeting the parameters for adjacency no longer require a significant nexus analysis. • Eliminated the term “Other Waters” and instead lists the following specific waters as “similarly situated” for case-by-case analysis to determine if significant nexus (alone or in combination with other “similarly situated” waters): prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, Texas coastal prairie wetlands, and waters that are within 100-year flood plain and 4,000 feet of a jurisdictional water.

⁴ Justice Kennedy’s concurring opinion in the *Rapanos* decision held that waters/wetlands with a “significant nexus” to a TNW fell within the definition of WOTUS. This creates a case-by-case evaluation that lacks bright lines, certainty, and consistency in implementation, and affords great deference to EPA/Corps. EPA’s 2008 guidance document following the *Rapanos* decision sets forth various hydrologic and ecological factors considered in evaluating whether a water meets a “significant nexus” threshold, including volume and duration of flow, and potential to carry pollutants and flood waters to a TNW.

⁵ Note: Tributaries may include features (e.g., seasonally wet ditches or conveyances) that are dry at the time of pesticide application.
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	<p>which could affect interstate or foreign commerce.</p>		
<p>Non-Jurisdictional Waters (i.e., waters specifically exempted from definition)</p>	<p>Exclusions from WOTUS definition are:</p> <ul style="list-style-type: none"> • Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition. This exclusion applies only to manmade bodies of water which neither were originally created in WOTUS (such as disposal area in wetlands) nor resulted from the impoundment of WOTUS; • Prior converted croplands; and • Agricultural stormwater discharges or return flows from irrigated agriculture. • EPA’s 2008 guidance added that “The agencies generally will not assert jurisdiction over the following features:” Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. 	<p>Exclusions from most states’ “waters of the state” definitions are:</p> <ul style="list-style-type: none"> • Waste treatment ponds or lagoons designed and actively used to meet requirements of the CWA (other than cooling ponds as defined in 40 CFR Part 423(m) that also meet the criteria of this definition), unless they were originally created in surface waters of the state or resulted in impoundment of surface waters of the state. 	<p>The final Clean Water Rule retains the previous exclusions and adds to the list of excluded waters. New parameters on specific ditches excluded from WOTUS (discussed below) have created many uncertainties and confusion as to which ditches qualify for exclusion and which could be regulated as WOTUS. This and other additional exclusions included in final rule are as follows:</p> <ul style="list-style-type: none"> • Ditches with: 1) ephemeral flow that are not a relocated tributary or excavated in a tributary; or 2) with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands; or 3) that do not flow, either directly or through another water, into a TNW, interstate water or the territorial seas. • Artificial lakes or ponds created in dry land such as ponds for stock watering, irrigation, settling basins, rice growing, or log cleaning. • Artificial reflecting pools or swimming pools created in dry land. • Small ornamental bodies of water created in dry land. • Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for the purpose of obtaining fill, sand, or gravel that fill with water. • Erosional features, including gullies and rills and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; • Puddles; • Groundwater; • Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. • Wastewater recycling structures constructed in dry land.

