

NAVIGABLE WATERS PROTECTION RULE & IMPLICATIONS OF WETLAND AND WATERWAY FEDERAL JURISDICTION

June 22, 2020. Today the U.S. Environmental Protection Agency (USEPA) and the U.S. Army Corps of Engineers (USACE) began implementing the Navigable Waters Protection Rule. The new rule is intended to clarify “waters of the U.S.” that are subject to federal regulation under the Clean Water Act including waterways and wetlands.

The Navigable Waters Protection Rule (NWPR) identifies four categories that specifically define what are waters of the U.S. and what are not. The four categories that define waters of the U.S. under the rule are:

- 1) **Territorial seas and traditional navigable waters**
 - Traditional navigable waters (TNWs) have been previously identified and classified as Section 10 waters and consist of major river and lake systems used for interstate or foreign commerce such as the Mississippi River and Great Lakes.
- 2) **Tributaries**
 - Tributaries now include *only* perennial and intermittent rivers and streams that ultimately connect to a TNW and must support surface flow more often than just after single precipitation events. Ephemeral (short-term flow) streams or swales will not meet the definition of a tributary as a basis for a water of the U.S. determination.
- 3) **Lakes, ponds, and impoundments of jurisdictional waters**
 - Similar to Tributaries (above), lakes, ponds and impounded waters are jurisdictional waters of the U.S. if they have a surface water connection to a TNW. In addition, lakes, ponds, and impoundments that experience flooding from a water of the U.S. during a typical year are jurisdictional.
- 4) **Adjacent wetlands**
 - Adjacent wetlands are considered waters of the U.S. if they abut any of the three types of waters defined above. Physical separation of a wetland from a water of the U.S. by an artificial structure does not eliminate federal jurisdiction if there is a direct hydrologic surface water connection (e.g. culvert under a road). Separation of the wetland from a water of the U.S. by a natural berm, stream bank or dune also does not eliminate federal jurisdiction of the wetland. Additionally, natural wetlands that are flooded by waters of the U.S. during a typical year are considered waters of the U.S.

The NWPR is in its very infancy, and it is difficult to explicitly outline the expected implications of federal jurisdiction of wetlands and waterways in Wisconsin, however there are several modifications in the NWPR that may lead to some noticeable changes such as the following:



- Wetlands must abut a water of the U.S. (with some specific exceptions) to be federally jurisdictional. In many cases, the abutting water of the U.S. will need to meet the definition of a tributary (an intermittent or perennial waterway). Before the NWPR, wetlands needed to have a surface water connection that constituted a “significant nexus” which may include tributaries as defined above but also non-waters of the U.S. such as ephemeral drainageways.
- Jurisdictional determinations, particularly of wetlands and waterways, may be more predictable with the defined categories, and may reduce the time necessary for determining jurisdiction of such features for planning and regulatory purposes.
- The NWPR formalizes many cases where waters are excluded from federal jurisdiction. Many of these exclusions previously existed under various preambles and guidance documents but the rule now formalizes and, in some cases, expands upon the exclusions or better defines such exclusions.

Provisions for exclusion of certain waters and wetlands from federal jurisdiction are addressed for resources such as, but not limited to:

- Ditches, Prior Converted (PC) cropland,
- Ephemeral water features,
- Artificially created wetlands, and
- Constructed stormwater management water features.

In some cases, the federal exclusions may be more aligned with the state of Wisconsin’s exemptions for “artificial wetlands” under WI Act 183. There may also be situations where the State’s exemptions for “nonfederal wetlands” per WI Act 183 will apply where they may not have previously applied.

This overview of the NWPR does not address all of the changes, applications or implications of the rule and is intended to make those that may be interested aware of the implementation of the new rule.

The wetland regulatory process and its applicability to your project should always be evaluated specifically to the site, the project components, and the ecological resources involved. Heartland Ecological Group can assist you in evaluating and navigating the process efficiently and appropriately for achieving your goal of a successful project.

Please feel free to contact us with any questions.

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