



2020 NH BIA Air & Water Regulatory Conference



Today's Presentation – Federal Waters of the US (‘WOTUS’) update

- 1. Background of “Waters of the United States” (WOTUS) covered by federal rule, pursuant to the Clean Water Act (CWA).**
- 2. Federal waters rule vs. NH State jurisdiction**
- 3. Impact of new rule on NH regulations of Wetlands & surface waters**



1. Background of “Waters of the United States” (WOTUS) covered by federal rule, pursuant to the Clean Water Act (CWA).



Waters of the United States and the Clean Water Act

- **Waters of the United States (WOTUS) is a threshold term in the Clean Water Act and establishes the scope and extent of federal jurisdiction under the Clean Water Act.**
- Clean Water Act regulatory programs address *navigable waters, defined in the statute as “waters of the United States, including the territorial seas.”* The term “navigable waters” means waters of the United States, including the territorial seas. 33 USC § 1362(7)
- **The Clean Water Act does not define WOTUS; Congress left further clarification to the agencies.**
- The EPA and the Department of the Army have defined WOTUS by regulation since the 1970s.

Background of WOTUS – Key Points

1) 1972 Clean Water Act (CWA) objective ---

To restore & maintain the chemical, physical, & biological integrity of the nation's waters. CWA Statute defined:

“Discharge of pollutant” – any addition of any pollutant to navigable waters from any point source defined to mean any discernible, confined & discrete conveyance, such as a pipe or ditch.”

Congress goals:

- ❖ a) To Eliminate discharge pollutants into Navigable waters by 1985
- ❖ b) Where-ever attainable, a goal of water quality to provide for protection & propagation of fish, shellfish & wildlife & provide for recreation in & on waters to be achieved by July, 1983.

Background of WOTUS – Key Points

2) 1973 EPA regulations were defined as: Navigable waters, tributaries of navigable waters of the US, Inter-state waters, intra-state waters (lakes, rivers, streams used by I-S travelers, industry, or could affect commerce). *Based on Rivers & Harbors Act.*

3) 1974 definition was revoked by the courts (held not limited to “navigability”).

4) 1975-1977 rules broadened to add – *Coastal wetlands, adjacent periodically inundated freshwater wetlands, tributaries, Traditional navigable waters (TNW), and adjacent wetlands to those covered above.*

5) 1986 Corps realigned rules to match EPA rules (excluded “waste treatment systems from WOTUS”).

6) 1993 & 2005 amended WOTUS to exclude Prior Converted Cropland (PCC) as long as remained in agriculture use & not converted or abandoned.

Background of WOTUS – Supreme Court cases



US v. Riverside Bayview Homes (1985) Respondent owner of 80 acres of low-lying marshy land near the shores of Lake St. Clair in Michigan began to place fill on their property to prepare for construction of a housing development. The Corps, believing the property was an “**adjacent wetland**” under the 1975 rules defining WOTUS filed suit enjoining the respondent from filling without Corps permission.

The Supreme Court upheld the Corps definition (reviewed Corps judgement & Congressional record).

Corps concluded ---Wetlands may serve to filter and purify water draining into adjacent bodies of water, to slow the flow of surface runoff..., and may serve significant natural biological functions..habitat..nesting, spawning...”

Background of WOTUS – Supreme Court cases



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

SWANCC (23 suburban Chicago cities) purchased 533-acre parcel which had been the site of a sand & gravel pit operation until 1960.

In 1986 Corps ‘clarified’ its jurisdiction to state that 404 authority extends to intra-state waters: “which are or would be used as habitat by birds protected by Migratory Bird Treaties; or which are or would be used as habitat by other migratory birds which cross state lines; or which are or would be used as habitat for endangered species....” (“Migratory Bird Rule” = “MBR”)

Court held: The “MBR” is not fairly supported by the CWA. Case cites *Riverside* case to support regulation of wetlands “inseparably bound up with the ‘waters of the US’ and a “significant nexus between wetlands and ‘navigable waters’ informed our reading of the CWA in *Riverside Bayview Homes*”.

Background of WOTUS – Supreme Court cases



Rapanos v. United States (2006) In the late 1980s, Rapanos filled 22 acres of wetland on his 54 acre parcel of land, in preparation for the construction of a mall, without filing for a permit.

Divided court with 5 different opinions held:

- WOTUS only includes relatively permanent, standing or continuously flowing bodies of water – streams, oceans, rivers, lakes
- ‘Adjacent wetlands’ require abutting of TNW.
- Isolated ponds are not WOTUS.
- Significant Nexus Test – To constitute navigable waters under CWA, a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonable be so made.

Background of WOTUS – Reasons for new Rule

- ❖ To clarify US Supreme Court rulings interpreting federal waters jurisdiction - the Corps & EPA (6/29/15), finalized the rule known as the Clean Water Rule or 'WOTUS' rule. Based on significant public comments & scientific literature analysis.

Under the 2015 WOTUS rule –

- ❖ Traditional Navigable waters, interstate waters, territorial seas & impoundments of waters are jurisdictional by rule (as w/ pre-2015 rule)
- ❖ 2 new categories: '**Tributaries**' & '**Adjacent waters**' are jurisdictional;
- ❖ Included a 'Significant Nexus' to navigable waters to determine federal jurisdiction (consistent with the Kennedy opinion under Rapanos).

WOTUS – Case specific analysis & Significant Nexus Test

❖ Case-specific evaluation required—

- Under 2015 WOTUS case specific evaluation required to determine on a case by case basis whether water has a **significant nexus** to traditional navigable waters, interstate waters or wetlands, or territorial seas.

❖ Exclusions –

- ✓ Prior converted cropland (like under pre-2015 rules)
- Groundwater & some ditches
- New exclusions— Stormwater management systems
- ✓ Existing CWA statutory exemptions not impacted – “normal farming”, “silviculture” & “ranching”.

Background: Executive Order 13778

- On February 28, 2017, the President signed the Executive Order on “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
- The E.O. directed the EPA and the Army to review the final 2015 Waters of the United States Rule (2015 Rule) and “publish for notice and comment a proposed rule rescinding or revising the rule...”
- The EPA and the Army implemented a two-step rulemaking to provide certainty to the regulated community and the public while the agencies developed the revised definition of “waters of the United States.”

Background: Federal Rulemaking Process

- **The 2019 Rule (Step 1):** Repeals the 2015 Rule and recodifies prior regulations.
 - Final rule published October 22, 2019
 - Effective date was December 23, 2019
- **The Navigable Waters Protection Rule (Step 2):** Revises the definition of WOTUS, replaces the 2019 Rule.
 - The 60-day public comment period closed on April 15, 2019.
 - The agencies received over 620,000 comments
 - The final rule was signed on January 23, 2020.
 - The **final rule became effective June 22, 2020 (except in the state of Colorado).**

Goals of the Final EPA federal Rule

- Operate within the scope of the federal government's authority to regulate “navigable waters” under the Clean Water Act and the US Constitution.
- Restore and maintain the integrity of the nation's waters while preserving the **traditional sovereignty of states** and tribes over their land and water resources.
- Increase **predictability and consistency** through a clearer definition of “waters of the United States.”

Final Rule: Four Categories of Federal EPA WOTUS Renamed – *Navigable Waters Protection Rule (“NWPR”)*

1

- Territorial Seas & Traditional Navigable Waters

2

- Tributaries

3

- Lakes, Ponds, and Impoundments

4

- Adjacent Wetlands

12 Categories of Non-Jurisdictional Waters

1-3

- Waters not listed as WOTUS
- Groundwater
- Ephemeral features

4-6

- Diffuse stormwater runoff
- Ditches not identified as WOTUS
- Prior Converted Cropland

7-8

- Artificially irrigated areas
- Artificial lakes and ponds

9-10

- Water-filled depressions incidental to mining or construction
- Stormwater control features

11-12

- Groundwater recharge, water re-use & wastewater recycling
- Waste treatment systems

Federal CWA Waters of the U.S.

Key Changes under NWPR (i.e. 2019 NWPR rule from pre-2015 Rule practice)

- Four categories of federal waters & 12 categories of exclusions
- No more case-by-case (significant nexus) determinations of jurisdiction for any waters
- Interstate waters are no longer categorically jurisdictional
- Tributaries must be **perennial or intermittent** – all ephemeral streams are non-jurisdictional
- Lakes, ponds and impoundments must have a direct hydrologic surface connection to traditional navigable waters in a typical year
- Wetlands must be directly abutting a TNW, tributary, lake, pond or impoundment to be jurisdictional as “adjacent”.
- New terms defined: Perennial, intermittent, ephemeral, Typical year; prior converted cropland, Waste treatment system.

WOTUS Definition Rule affects multiple Clean Water Act Programs

- Section 303(c) Water Quality Standards
- Section 303(d) Impaired Waters and TMDL Programs
- Section 311 Oil Spill Prevention and Response Program
- Section 401 State Water Quality Certification Process
- Section 402 NPDES
- Section 404 Dredge and Fill (Wetlands) Program

Changes will occur in the in the following regulations:

- 33 CFR Part 328
- 40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, & 401

2. Federal Waters Rule vs. NH State jurisdiction



RSA 482-A Public Purpose Wetland Function



1992 State Programmatic General Permit (SPGP)

- US Army Corps permit issued to the State of New Hampshire
- Established process for Corps, EPA, and DES processing of permits under the Clean Water Act;
- Applications filed to the NHDES Wetlands program trigger Corps and EPA review under the SPGP; vast majority of state permits serve as federal permits.
- Ensured coordinated pre-application reviews including US Army Corps, EPA, NHDES, NH Fish and Game Department, NH Natural Heritage Bureau, applicant, consultant to provide input on projects before they are submitted.

(a)(1) Territorial Seas and traditional navigable waters (TNW) (Category 1)

The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible for use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.

Key changes from the 2019 Rule:

- Combines the categories of the traditional navigable waters and territorial seas.
- No substantive changes to definition of TNW.



NH state law defines “navigable” under Pilots, Harbor Masters & Public Waters statute (RSA 271). NH wetlands regulatory authority is broader & includes 100-ft upland tidal buffer zone landward of the HOTL. (RSA 482-A:4) “wherever the tide ebbs & flows... any sand dune.. & to those areas within 100 feet of the highest observable tide line which border on tidal waters...”



(a)(2) Federal Waters: Tributaries: (Category 2)

Key Changes from the 2019 Rule:

- **No significant nexus test**
- **All ephemeral streams are non-jurisdictional**, whereas some may be found jurisdictional under the 2019 Rule.
- The final rule does not change existing regulations for establishing the lateral limits of federal jurisdiction for tributaries.

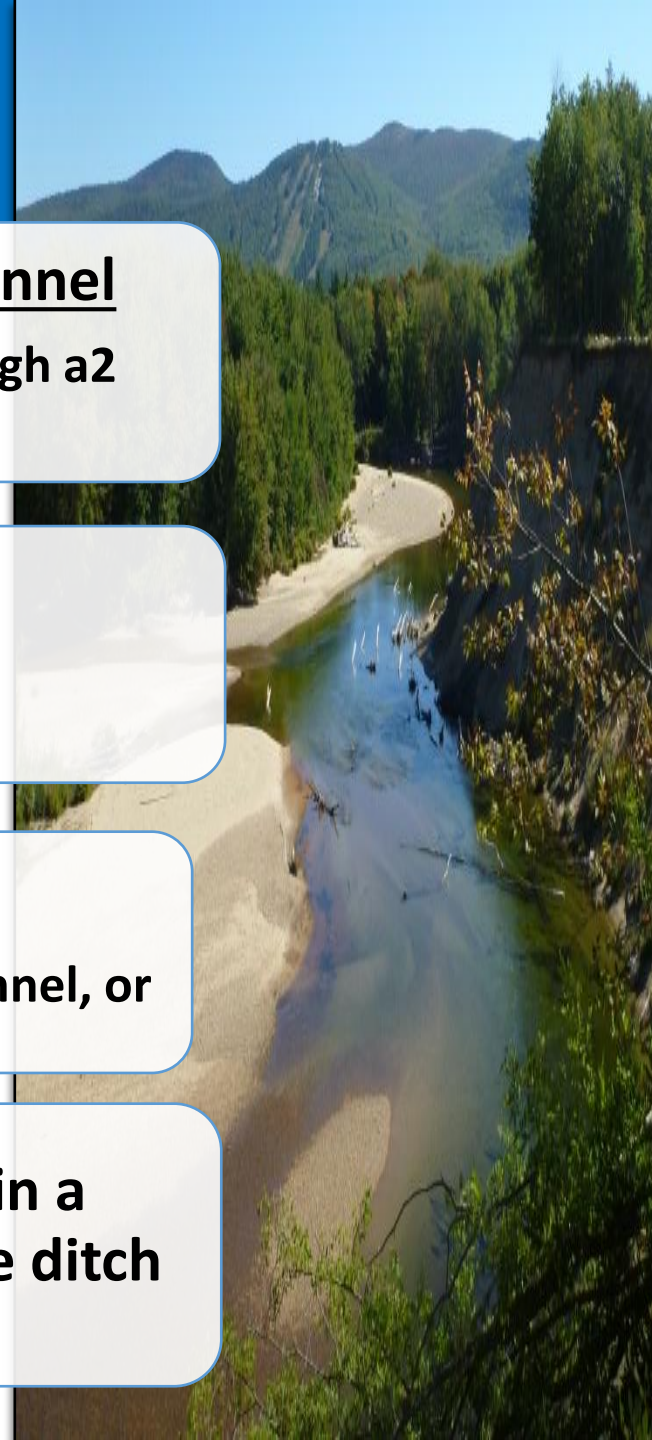


Piscassic River,
Epping, NH

“Tributary” – Defined

- River, stream, or similar naturally occurring surface water channel
- **Contributes surface water flow to a water in a)1 directly or through a2 (tributaries), a3)(lakes, pond, impoundment or a4) (adjacent wetlands)**
- **Must be perennial or intermittent in a typical year*****
- **Alteration or relocation of a tributary does not modify its jurisdictional status if meets flow conditions of rule**
- **Does not lose status if contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized**
- **Non-jurisdictional feature, subterranean river, through a culvert, dam, tunnel, or similar feature**

Includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.



Federal Waters Rule - Tributaries: Definition of “Typical Year”

*****Typical Year (c)(13):**

- ***The term typical year means “when precipitation & other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.” (p. 92 in Federal Register)***

Federal Rules – Tributaries: Perennial or Intermittent Flow

A tributary must be perennial or intermittent in a typical year.

Perennial c)(8):

- The term *perennial* means “surface water flowing continuously year-round”.

Intermittent c)(5):

- The term *intermittent* means “surface water flowing continuously during certain times of year and more than in direct response to precipitation” (e.g., seasonally when groundwater table is elevated or when snowpack melts).

Ephemeral c)(3):

- The term *ephemeral* means “surface water flowing or pooling only in direct response to precipitation (e.g. rain or snow fall).

The rule does not specify certain flow volumes or flow duration metrics, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.

Under NH state law, RSA 485-A:2, XIV “surface waters of the state” means **perennial** and **seasonal streams**, lakes, ponds, and tidal waters within jurisdiction of the state, including all streams, lakes or ponds bordering on the state, marshes, water courses, and other bodies of water natural or artificial.

See Env-Wt 103.53 “perennial stream” & Env-Wt 103.21 “intermittent stream”

Federal “Perennial Stream”

**Surface water
flowing**

**Continuously
year-round**

NHDES “Perennial Stream”

Watercourse that is in the groundwater table for most of the year & has groundwater as its primary source of water for stream flow, with

Runoff from rainfall & snowmelt as supplemental source of water, so that it contains flowing water year round during a *typical year*.

Federal “Intermittent Stream”

**Surface water
flowing**

**Continuously during
certain times of year &
more in direct response
to precipitation (e.g.
seasonally when the
G/W table is elevated or
when snowpack melts**

NHDES “Intermittent Stream”

**Watercourse that is fed by
groundwater but that is not
in the groundwater table
throughout the year,**

**Where runoff from rainfall and
snowmelt is a supplemental source of
water for flow, such that the stream
typically does not have flow during the
dry portions of the year.**

Federal “Ephemeral Stream”

**Surface water
flowing or pooling**

**Only in direct response
to precipitation (e.g.
rain or snow fall)**

NHDES “Ephemeral Stream”

**Watercourse that is located above a
water table year round and is not fed
by groundwater, such that runoff from
rainfall & snowmelt is the primary
source of stream flow &**

**So that the stream has flowing water
only during and for a short duration after
precipitation or spring thaw events, but
which has less flow than an intermittent
stream and no evidence of riffles,
meander bends, point bars, or braiding.**

Federal Waters Rule – Tributaries: Altered or Relocated Tributaries

The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of the definition.

1. Contributes surface water flow to an (a)(1) water
2. Perennial or intermittent flow

(In a typical year)

Federal Waters Rule - Tributaries: Non-Jurisdictional Connections

A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through the following features:

- A channelized non-jurisdictional surface water feature (e.g., ephemeral stream, non-jurisdictional ditch)
- A subterranean river
- A culvert, dam, tunnel, or similar artificial feature
- A debris pile, boulder field, or similar natural feature

Connections that Sever Jurisdiction

The following connections sever jurisdiction upstream:

- Stream channel breaks that do not contribute surface water flows to downstream jurisdictional waters in a typical year.
- These stream breaks may only convey surface water flows during precipitation events that generally do not occur in a typical year (e.g., 10-, 25-, 50-, 100-or 500-year storms or floods).
- Surface stream channels that disappear underground and become part of the groundwater aquifer.
 - They never reconnect with the downstream tributary system (other than possibly via groundwater) and as such are not jurisdictional.

Federal Ditch exemption

Maintain ditches for original purpose & design; not deepen to drain additional areas;
Conversion of use for a ditch not allowed (e.g. culverting it).

Recapture provision triggered w/ conversion of wetland to non-wetland is a change in use

NHDES Ditch exemption

RSA 482-A:3, IV exempts maintenance, repair, replacement, or modification so as to preserve usefulness of man-made non-tidal drainage ditches

Env-Wt 308.02 clarifies exemption to require:

Structure was legally constructed; &
Has been maintained so as to continue its intended use when constructed, &
not abandoned or overgrown.

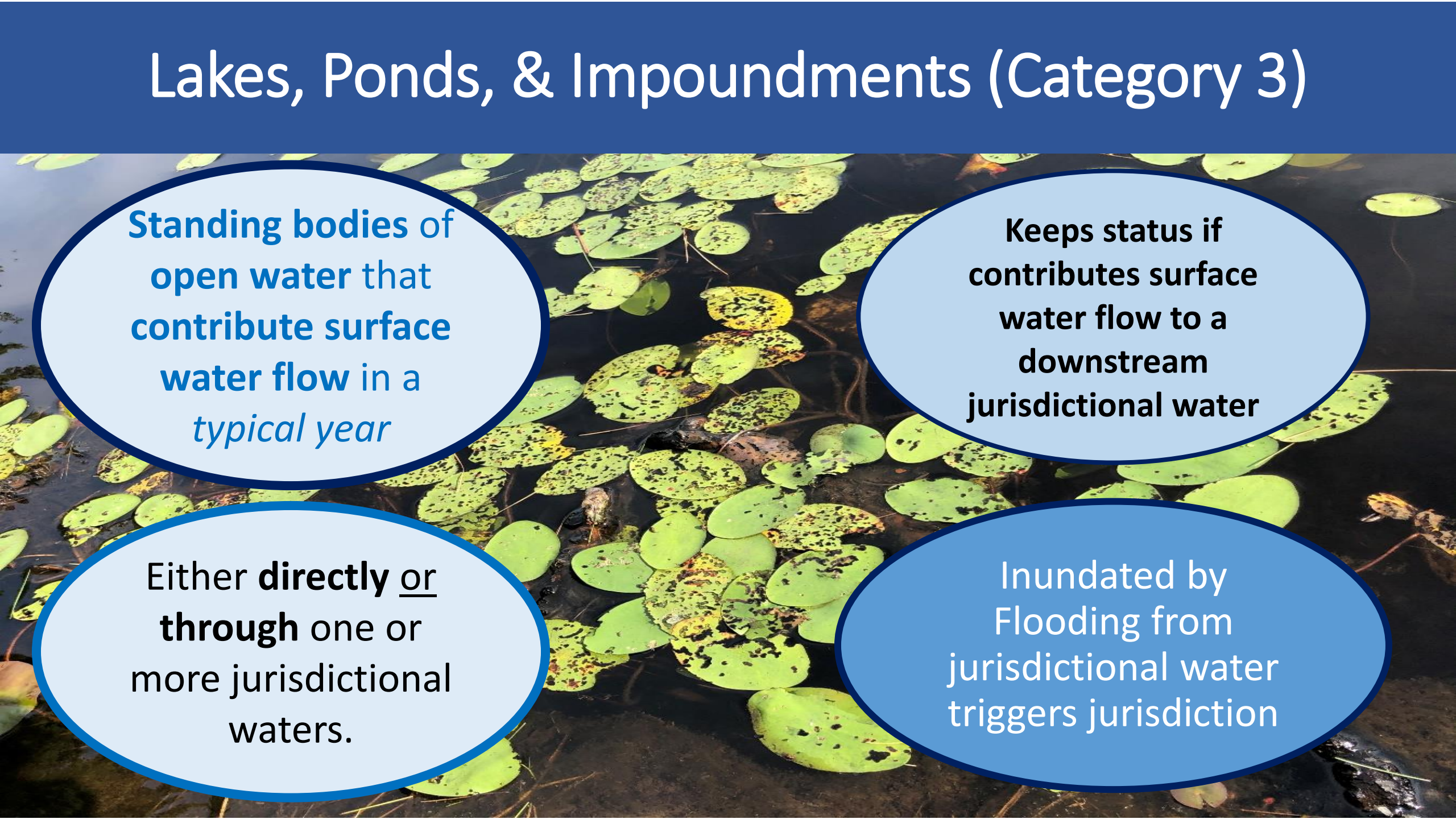
(a)(3) Waters: Lakes and ponds and impoundments of jurisdictional waters (Category 3)

Defined in paragraph c)(6):

- The term means lakes and ponds, impoundments of jurisdictional waters means **standing bodies of open water** that **contribute surface water flow** to a paragraph (a)(1) water in a **typical year** either directly or through one or more paragraph (a)(2) – (4) waters.
- **it contributes surface water flow to a downstream jurisdictional water** in a typical year through a channelized non-jurisdictional surface water feature



Lakes, Ponds, & Impoundments (Category 3)



Standing bodies of open water that contribute surface water flow in a *typical year*

Keeps status if contributes surface water flow to a downstream jurisdictional water

Either **directly** or **through** one or more jurisdictional waters.

Inundated by Flooding from jurisdictional water triggers jurisdiction

What are Wetlands under federal rules?

Definition of Wetlands has not changed:

- Defined in paragraph (c)(16) as areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Rule adds a definition for Upland:

- Defined in paragraph (c)(14) as any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in the definition of “wetlands”, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

NH Law defines

“Wetlands” by RSA 482-A:2, X
“means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

Env-Wt 103.02 “Federal delineation method” references the US Army Corps of Engineers Wetlands Delineation Manual.

Adjacent Wetlands (Cat 4): Definition of Adjacent

Federal Rules Adjacent wetlands
means wetlands that:

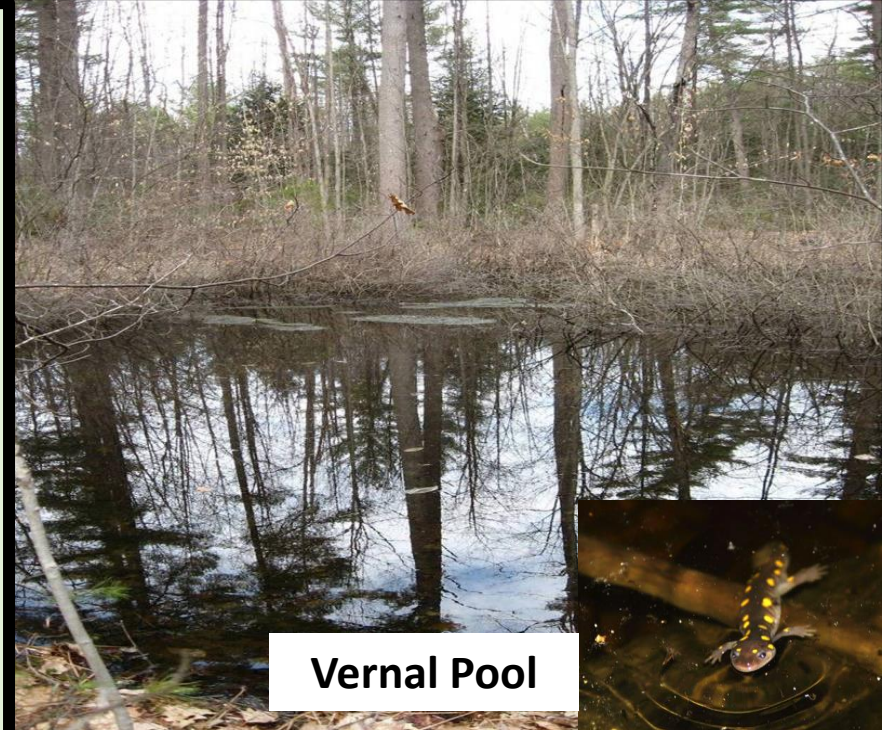
- **Abut**, meaning to touch at least at one point or side of, an (a)(1)-(3) water;
- Change from previous definition of adjacent (bordering, contiguous or neighboring)

OR

- Are **inundated by flooding** from an (a)(1)-(3) water in a **typical year**;

NH law does not require wetlands to abut others waters to be jurisdictional.

For example,
Bogs and Vernal Pools are jurisdictional.



Vernal Pool



Bog

Adjacent Wetlands: Physical Separation

Adjacent wetlands can also be wetlands that are physically separated from an (a)(1)-(3) water only by a:

- **Natural berm, bank, dune, or similar natural feature;**

OR

- **Artificial dike, barrier, or similar artificial structure**
- Artificial structure must allow for a **direct hydrologic surface connection** between the wetlands and the (a)(1)-(3) water **in a typical year**,
- Direct hydrologic surface connection such as through a culvert, flood or tide gate, pump, or similar artificial feature.
- An adjacent wetland is **jurisdictional in its entirety** when a road or similar artificial structure divides the wetland, as long as the structure allows for a **direct hydrologic surface connection through or over that structure in a typical year.**



Federal CWA Exclusions Overview

Many exclusions listed in paragraph (b) reflect longstanding agency practice

- Prior converted cropland and Waste treatment systems are defined in NWPR for the first time for CWA purposes

Waters and features listed in paragraph (b) cannot be determined to be jurisdictional under any of the categories in paragraph (a)

- Note that the exclusion for ditches does not apply to (a)(1) or (a)(2) waters or when a ditch is constructed in (a)(4) waters that satisfy the conditions of paragraph (c)(1) – adjacent wetlands.
- A typical year assessment may be necessary for some waters in order to conclude the water is excluded.

Point source discharges of pollutants into excluded waters may still be subject to NPDES permitting if the excluded water conveys the pollutant to a downstream jurisdictional water.

Key Elements of Federal Exclusions: Features Constructed in Upland

Upland is defined in paragraph (c)(14) of NWPR

- The term upland means any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) and does not lie below the OHWM or the HTL of a jurisdictional water.
- Features constructed or excavated in upland or in non-jurisdictional waters must be constructed/excavated wholly in upland or non-jurisdictional waters to meet applicable exclusions.

Federal Exclusions needing to be in upland or in non-jurisdictional waters:

- (b)(8) Artificial lakes and ponds **Artificial lakes and ponds are State jurisdictional**
- (b)(9) Water-filled depressions incidental to mining or construction activity **May be exempt**
- (b)(10) Storm-water control features **May be exempt (See RSA 482-A)**
- (b)(11) Groundwater recharge, water reuse, and wastewater recycling structures
- (b)(12) Waste treatment systems **May be exempt (See RSA 482-A)**



Federal
“Prior Converted
Cropland” (PCC)

Federal Exclusion

Used for agricultural
purposes unless abandoned
(not used for previous 5
years).

NHDES Agriculture rules

NHDES jurisdictional & PBN process for
preexisting & ongoing bona fide
agriculture operation.

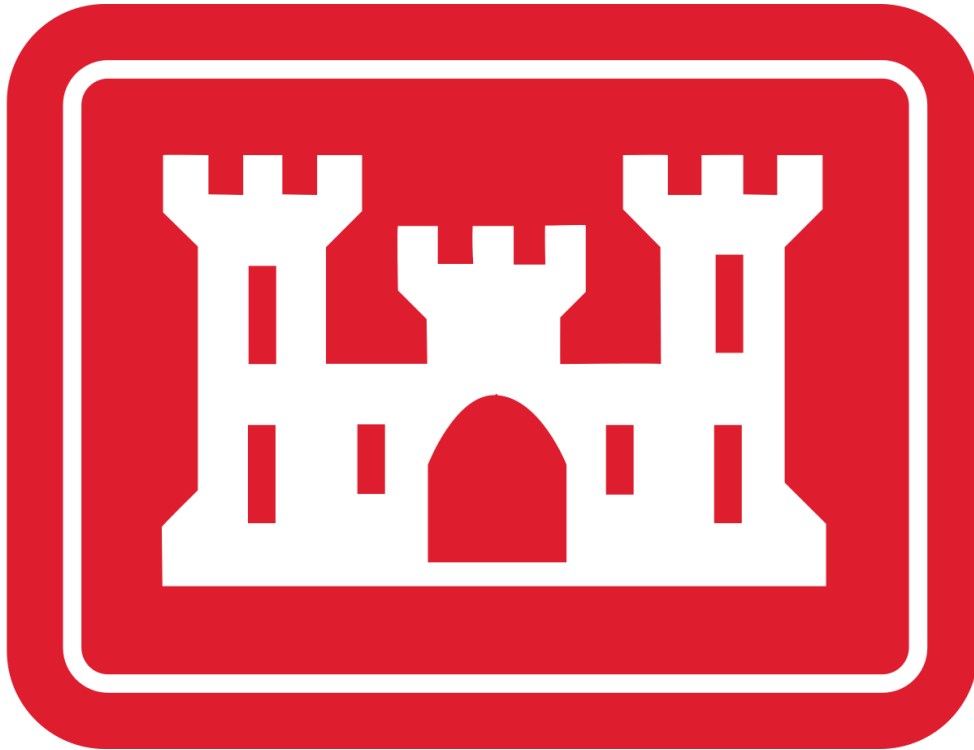
PBN for improvement portion not more than 3 acres of
wetland area & no more than 15% very poorly drained
soils.

NH Dept of Agriculture BMPs, US Army Corps Technical
& NRCS guidance applies.

3. Impact of new rule on NH regulations of Wetlands & surface waters



State – Federal NH Wetland permitting



NH has enjoyed a strong state- federal partnership for Wetlands Permitting with the US Army Corps of Engineers.

New England District Army Corps of Engineers, Regulatory Division Chief, Tammy R. Turley met with state officials on the impact of the new federal waters rule.

- ❖ NH state officials were informed that the Corps would assume jurisdiction through the State General permit.
- ❖ All State-federal permitting would continue efficiently and coordinated.

Vulnerable Resources in New Hampshire

Ephemeral Streams

- **NOT PROTECTED**
- Installation of a stream crossing in an Ephemeral Stream does not require a permit. ([Env-Wt 309.02 \(d\)](#))

Vernal Pools

- **PROTECTED**
- Vernal Pools are defined and regulated under the New Hampshire Wetland Rules. ([Env-Wt 101.108](#))

Bogs

- **PROTECTED**
- Bogs are defined and regulated under the New Hampshire Wetland Rules. ([Env-Wt 101.11](#))

Kettle Ponds

- **PROTECTED**
- Definition of “Surface Water Body” under the N.H. Wetlands Rules includes Kettle Ponds ([Env-Wt 101.99](#))



Mary Ann Tilton, PWS
Assistant Administrator
Wetlands Bureau
Land Resources Management
MaryAnn.Tilton@des.nh.gov