

WOTUS in a Nutshell

WOTUS Rule did three things: (1) Listed waters covered under the Clean Water Act, (2) Listed specific exclusions, (3) Defined terminology (red font).

Note that this document was prepared to explain the rule as relevant in North Dakota. While large portions of the rule have been directly copied from the official version of the law, other portions have been summarized, abbreviated, and rearranged for ease of presentation and understandability.

General Notes

WOTUS – Waters of the United States (33 C.F.R. § 328.3)

CWA – Clean Water Act (33 U.S.C. § 1251, et seq.)

Primary Waters – Collectively waters (1)-(3) below (i.e., TNWs, interstate waters, territorial seas)

Listed Waters

(1) 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;

- Sometimes called (a)(1) waters because the definition is found at § 328.3(a)(1).
- Sometimes called Traditional Navigable Waters (TNWs).
- This is also a similar definition to the definition of “navigable waters” for state sovereign lands purposes. Therefore, while sovereign lands and WOTUS are separate issues, waters that are navigable for sovereign lands purposes will also be WOTUS. However, the reverse is not true; just because water is a WOTUS does not make it navigable for sovereign lands purposes.

(2) All interstate waters, including interstate **wetlands;**

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as WOTUS;

(5) All **tributaries of Primary Waters;**

(6) All waters **adjacent** to any of the above (i.e., Primary Waters, impoundments, **tributaries**), including **wetlands**, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All Prairie Potholes where they are determined, on a case-specific basis, to have a **significant nexus** to a Primary Water.

- Prairie Potholes are similarly situated and shall be combined, for purposes of a **significant nexus** analysis, in the watershed that drains to the nearest Primary Water.
- Prairie Potholes shall not be combined with **adjacent** waters when performing a **significant nexus** analysis. If Prairie Potholes are also an **adjacent** water, they are an **adjacent** water and no case-specific **significant nexus** analysis is required.
- Note: Other regional water features – Carolina bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie **wetlands** – are subject to the same “similarly situated” test.

(8) All waters located within the 100-year floodplain of a Primary Water and all waters located within 4,000 feet of the **high tide line** or **ordinary high water mark** of a Primary Water, impoundment, or **tributary** where they are determined on a case-specific basis to have a **significant nexus** to a Primary Water.

- For waters determined to have a **significant nexus**, the entire water is a WOTUS if a portion is located within the floodplain/**OHWM** boundary.
- These waters shall not be combined with **adjacent** waters when performing a **significant nexus** analysis. If these waters are also an **adjacent** water, they are an **adjacent** water and no case-specific **significant nexus** analysis is required.

Exclusions

The following are not WOTUS even where they are impoundments, **tributaries**, **adjacent**, Prairie Potholes, or within floodplain/**OHWM** boundaries:

- (1) Waste treatment systems, including treatment ponds or lagoons designed to meet CWA requirements.
- (2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, the final authority regarding CWA jurisdiction remains with EPA.
- (3) Ditches:
 - (i) with ephemeral flow that are not a relocated **tributary** or excavated in a **tributary**.
 - (ii) with intermittent flow that are not a relocated **tributary**, excavated in a **tributary**, or drain **wetlands**.
 - (iii) that do not flow, either directly or through another water, into a Primary Water.
- (4) The following features:
 - (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - (ii) 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;
 - (iii) Artificial reflecting pools or swimming pools created in dry land;
 - (iv) Small ornamental waters created in dry land;
 - (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
 - (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of **tributary**, non-**wetland** swales, and lawfully constructed grassed waterways; and
 - (vii) Puddles.
- (5) Groundwater, including groundwater drained through subsurface drainage systems.
- (6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

Definitions

Adjacent means bordering, contiguous, or **neighboring** a Primary Water, impoundment, or **tributary**, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.

- For purposes of adjacency, an open water such as a pond or lake includes any **wetlands** within or abutting its **ordinary high water mark**.
- Adjacency is not limited to waters located laterally to a Primary Water, impoundment, or **tributary**.
- Adjacent waters also include all waters that connect segments of a Primary Water, impoundment, or **tributary** or are located at the head of a Primary Water, impoundment, or **tributary** and are bordering, contiguous, or **neighboring** such water.
- Waters being used for established normal farming, ranching, and silviculture activities are not adjacent.

High tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. (There is more to this definition, but not relevant in North Dakota.)

Neighboring means:

- (i) All waters located within 100 feet of the **ordinary high water mark** of a Primary Water, impoundment, or **tributary**. The entire water is neighboring if a portion is located within 100 feet of the **ordinary high water mark**;
- (ii) All waters located within the 100-year floodplain of a Primary Water, impoundment, or **tributary** and not more than 1,500 feet from the **ordinary high water mark** of such water. The entire water is neighboring if a portion is located within 1,500 feet of the **ordinary high water mark** and within the 100-year floodplain;
- (iii) All waters located within 1,500 feet of the **high tide line** of a Primary water, and all waters within 1,500 feet of the **ordinary high water mark** of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the **high tide line** or within 1,500 feet of the **ordinary high water mark** of the Great Lakes.

Ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Significant nexus means that a water, including **wetlands**, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a Primary Water.

- The term “in the region” means the watershed that drains to the nearest Primary water.
- For an effect to be significant, it must be more than speculative or insubstantial.
- Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters.
- For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream Primary waters shall be assessed by evaluating the following aquatic functions:

- Sediment trapping,
 - Nutrient recycling,
 - Pollutant trapping, transformation, filtering, and transport,
 - Retention and attenuation of flood waters,
 - Runoff storage,
 - Contribution of flow,
 - Export of organic matter,
 - Export of food resources, and
 - Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a Primary Water.
- A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest Primary water.

Tributary means a water that contributes flow, either directly or through another water (including an impoundment), to a Primary Water that is characterized by the presence of the physical indicators of a bed and banks and an **ordinary high water mark**.

- These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an **ordinary high water mark**, and thus to qualify as a tributary.
- A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not specifically listed as exclusions.
- 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 constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as **wetlands** along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an **ordinary high water mark** can be identified upstream of the break.
- A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a WOTUS that does not meet the definition of tributary or through a non-jurisdictional water to a Primary Water.

Wetlands means those areas that are inundated or saturated by surface or groundwater 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.

WOTUS Litigation Summary

State of North Dakota, *et al.* v. EPA, *et al.*

Case No. 3:15-cv-00059-RRE-ARS

District of North Dakota

North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; New Mexico Environment Department; and New Mexico State Engineer

State of Georgia, *et al.* v. Regina A. McCarthy, *et al.*

Case No. 2:15-cv-00079-LGW-RSB

Southern District Of Georgia

Georgia, Alabama, Indiana, Florida, Kansas, Kentucky, West Virginia, Wisconsin, South Carolina, Utah, North Carolina (DENR)

State of Ohio, *et al.* v. Corps of Engineers, *et al.*

Case No. 2:15-cv-2467-EAS-NMK

Southern District of Ohio

Ohio, Michigan, Tennessee

State of Texas, *et al.* v. EPA, *et al.*

Case No. 3:15-cv-162

Southern District of Texas

Texas, Louisiana, Mississippi

State of Oklahoma, *et al.* v. EPA, *et al.*

Case No. 4:15-cv-381-CVE-FHM

Northern District of Oklahoma

Oklahoma

31 states total

5 additional cases by various industry groups and private parties

Federal government has moved to consolidate all these cases

North Dakota has submitted a motion for a Preliminary Injunction to keep the rule from going into effect on August 28.

North Dakota and the other states have also done a protective filing in the 8th Circuit Court of Appeals.

- A protective filing means that the states believe the case should be heard at the district court level, but the EPA believes the case should be heard at the appellate court level. The protective filing means that if the court sides with the EPA about where the case should be heard that we won't have missed the deadlines to file with the appellate court level.
- We have been consolidated in a lottery with the other parties to the 6th Circuit (KY, MI, OH, TN make up the 6th Circuit).

Category of WOTUS Waters	Rule	Relevant Definitions (North Dakota relevant items only!)
Primary Waters (PW)	Traditional Navigable Waters	
	Interstate Waters	<i>Wetlands</i> means those areas that are inundated or saturated by surface or groundwater 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.
	Territorial Seas	
	Impoundments	
	Tributaries of PW	<p><i>Tributary</i> means a water that contributes flow, either directly or through another water (including an impoundment), to a PW that is characterized by the presence of the physical indicators of a bed and banks and an <i>ordinary high water mark (OHWM)</i>.</p> <ul style="list-style-type: none"> • These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an <i>OHWM</i>, and thus to qualify as a tributary. • A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not specifically listed as exclusions. • 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 constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as <i>wetlands</i> along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an <i>OHWM</i> can be identified upstream of the break. • A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a WOTUS that does not meet the definition of tributary or through a non-jurisdictional water to a PW. <p><i>OHWM</i> means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.</p> <p><i>Wetlands</i> – see above.</p>
	Adjacent to PW, Impoundments, and Tributaries	<p><i>Adjacent</i> means bordering, contiguous, or <i>neighboring</i> a PW, impoundment, or <i>tributary</i>, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.</p> <ul style="list-style-type: none"> • For purposes of adjacency, an open water such as a pond or lake includes any <i>wetlands</i> within or abutting its <i>OHWM</i>. • Adjacency is not limited to waters located laterally to a PW, impoundment, or <i>tributary</i>. • Adjacent waters also include all waters that connect segments of a PW, impoundment, or <i>tributary</i> or are located at the head of a PW, impoundment, or <i>tributary</i> and are bordering, contiguous, or <i>neighboring</i> such water. • Waters being used for established normal farming, ranching, and silviculture activities are not adjacent. <p><i>Neighboring</i> means:</p> <p>(i) All waters located within 100 feet of the <i>OHWM</i> of a PW, impoundment, or <i>tributary</i>. The entire water is neighboring if a portion is located within 100 feet of the <i>OHWM</i>;</p> <p>(ii) All waters located within the 100-year floodplain of a PW, impoundment, or <i>tributary</i> and not more than 1,500 feet from the <i>OHWM</i> of such water. The entire water is neighboring if a portion is located within 1,500 feet of the <i>OHWM</i> and within the 100-year floodplain.</p> <p><i>OHWM</i> – see above.</p> <p><i>Tributary</i> – see above.</p> <p><i>Wetlands</i> – see above.</p>
Non-Adjacent Case-Specific Waters (Prairie Potholes)	<p>Waters determined to have a significant nexus to a PW.</p> <p>Waters are considered similarly situated and combined within the nearest PW watershed for significant nexus analysis.</p>	<p><i>Significant nexus</i> means that a water, including <i>wetlands</i>, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a PW.</p> <ul style="list-style-type: none"> • The term “in the region” means the watershed that drains to the nearest PW. • For an effect to be significant, it must be more than speculative or insubstantial. • Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. • For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream PWs shall be assessed by evaluating the following aquatic functions: <ul style="list-style-type: none"> ▪ Sediment trapping, ▪ Nutrient recycling, ▪ Pollutant trapping, transformation, filtering, and transport, ▪ Retention and attenuation of flood waters, ▪ Runoff storage, ▪ Contribution of flow, ▪ Export of organic matter, ▪ Export of food resources, and ▪ Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a PW. • A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest PW. <p><i>Adjacent</i> – see above.</p>
Non-Adjacent Within Floodplain/OHWM	<p>Waters within 100-year floodplain of PW if significant nexus to PW.</p> <p>Waters within 4,000 feet of OHWM of PW, Impoundment, or Tributary if significant nexus to PW.</p>	<p><i>Adjacent</i> – see above.</p> <p><i>OHWM</i> – see above.</p> <p><i>Significant nexus</i> – see above.</p> <p><i>Tributary</i> – see above.</p>