NAVIGABLE WATERS PROTECTION RULE

EXCLUSIONS
33 CFR 328.3(b)

Prepared by USACE Norfolk District

9 June 2020

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EXCLUSIONS VS. EXEMPTIONS

- An *exclusion* eliminates certain waters from the definition of “waters of the United States.” Excluded waters are not jurisdictional as a “water of the United States.”
- Statutory *exemptions* are discharges that are exempt from Clean Water Act (CWA) permit requirements. A permit is not needed to perform an activity that is subject to an applicable statutory exemption in a jurisdictional water.
- Section 404(f) of the CWA describes those exemptions of discharges of dredged/fill material associated with certain activities. The Navigable Waters Protection Rule (NWPR) does not address activity exemptions under 404(f), including those for normal farming, ranching, and silviculture activities as part of an established operation.

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EXCLUSIONS OVERVIEW

- 33 CFR 328.3(b) (i.e., paragraph (b) of the NWPR)
  - Codifies twelve exclusions to provide clarity and regulatory certainty.
  - Paragraph (b)(1) excludes from the definition of “waters of the United States” all waters that are not (a)(1), (a)(2), (a)(3), or (a)(4) waters.
  - Specifically identifies categories of waters in (b)(2) through (b)(12) that are excluded.
  - Waters and features that are excluded under paragraph (b) cannot be determined to be jurisdictional under any of the categories under paragraph (a).
    - Note that the exclusion for ditches does not apply to waters identified in paragraph (a)(1) or (a)(2) or is constructed in waters identified in paragraph (a)(4) that satisfies the conditions of paragraph (c)(1).

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EXCLUSIONS OVERVIEW

- Many exclusions reflect longstanding agency practice.
- Two exclusions that have been included in regulatory text for decades are now defined for the first time in the NWPR for CWA purposes.
- Paragraph (b) refers to “waters” and “features” that are non-jurisdictional and excluded from the definition of “waters of the United States.” This presentation collectively refers to all waters and features as “waters.”

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328.3 (b) Overview

- (b)(1) Waters or water features that are not identified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4)
- (b)(2) Groundwater
- (b)(3) Ephemeral features
- (b)(4) Diffuse stormwater run-off and directional sheet flow
- (b)(5) Ditches
- (b)(6) Prior converted cropland

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328.3 (b) Overview

- (b)(7) Artificially irrigated areas
- (b)(8) Artificial lakes and ponds
- (b)(9) Water filled depressions
- (b)(10) Stormwater control features
- (b)(11) Groundwater recharge, water reuse, and wastewater recycling structures
- (b)(12) Waste treatment systems

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EXCLUSIONS OVERVIEW

- The (b)(1) exclusion includes all waters that are not enumerated in paragraph (a)(1) through (a)(4).
- However, paragraph (b) also identifies a list of specific waters that are non-jurisdictional in (b)(2) through (b)(12).
- For documentation purposes, a water should be evaluated as excluded from CWA jurisdiction by first using one of the (b)(2) through (b)(12) exclusions that best describes the water.
- A water that does not meet the conditions of one of the (b)(2) through (b)(12) exclusions and is not an (a)(1), (a)(2), (a)(3), or (a)(4) water will be an excluded water under paragraph (b)(1).

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HOW TO IMPLEMENT AND CONSIDER EXCLUSIONS

- For documentation purposes, a water should be evaluated under a (b)(2) through (b)(12) exclusion prior to identifying a water as non-jurisdictional under the (b)(1) exclusion.
- First, determine if a water is excluded using one of the (b)(2) through (b)(12) exclusions.
  - If the water meets multiple (b)(2) through (b)(12) exclusions, document the exclusion that best describes the water.
  - Next, if a water does not meet a (b)(2) through (b)(12) exclusion, and that water is also not an (a)(1) through (a)(4) water, the water is non-jurisdictional as a (b)(1) exclusion.

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HOW TO IMPLEMENT AND CONSIDER EXCLUSIONS

- There may be circumstances where, based on the existing record and available information, this order is not followed as it will be more efficient to exclude a water under (b)(1) instead of evaluating the water according to a (b)(2) through (b)(12) exclusion.
  - For example, if the existing record and available information is sufficient to determine a water was a hydrologically isolated and physically remote artificial pond constructed in upland, the subject water may meet the (b)(1) and (b)(8) exclusions. For documentation purposes, identify the water as excluded pursuant to (b)(8) based on being an artificial pond constructed or excavated in upland.
  - However, if the existing record and available information is not sufficient to determine the pond was artificially constructed or excavated in upland or non-jurisdictional waters, then the subject water may be excluded under the (b)(1) exclusion. In this case, identifying the water as a (b)(1) exclusion due to it being hydrologically isolated and physically remote and not meeting any of the paragraph (a)(1) through (a)(4) waters is more efficient than spending additional resources working with the landowner to determine if the pond was in fact artificially constructed in upland or non-jurisdictional waters.

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HOW TO IMPLEMENT AND CONSIDER EXCLUSIONS

- Some exclusions are for features that are not surface water features or are transient features on the landscape. These waters are difficult to observe and document due to their absence on the surface of the landscape or their non-permanent nature. For example: groundwater, ephemeral rills, and sheetflow.

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HOW TO IMPLEMENT AND CONSIDER EXCLUSIONS

- Some exclusions refer to upland. The definition of upland is in the NWPR at paragraph (c)(14).
  - 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) of this section, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.
- Some exclusions refer to waters constructed or excavated in upland or in non-jurisdictional waters. For these exclusions, the waters must have been constructed or excavated wholly in upland or non-jurisdictional waters for the exclusion to apply.
  - When an excluded water is constructed or excavated wholly in upland/non-jurisdictional waters the mere interface with a jurisdictional water does not make the excluded water jurisdictional.

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HOW TO IMPLEMENT AND CONSIDER EXCLUSIONS

- An excluded water that develops wetlands within the confines of the excluded water should be described as a single water that meets the exclusion, except for wetlands that develop in certain ditches.
- In order to conclude a water is non-jurisdictional, the Corps must complete an approved jurisdictional determination.
- Wetlands should be identified within an excluded water using the appropriate wetland delineation method.

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HOW TO IMPLEMENT AND CONSIDER EXCLUSIONS

- Some excluded waters can provide a connection between upstream and downstream jurisdictional waters. Excluded waters remain non-jurisdictional even if they provide a connection between upstream and downstream jurisdictional waters.
- A typical year assessment may be necessary for some waters in order to conclude the water is excluded.

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(b)(1) Waters or water features that are not identified in paragraph (a)(1), (a)(2), (a)(3), or (a)(4)

- Waters not enumerated in paragraphs (a)(1) through (a)(4)
- Prior to determining a water meets the (b)(1) exclusion, first determine if a water is excluded using one of the (b)(2) through (b)(12) exclusions.
- If a water does not meet a (b)(2) through (b)(12) exclusion, and that water is not an (a)(1) through (a)(4) water, the water is excluded from the definition of “waters of the United States” as a (b)(1) exclusion.

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(b)(1) Waters or water features continued…

- (b)(1) Examples, where the requirements of the exclusion have been met:
  - Wetlands connected to a tributary by a non-jurisdictional feature
  - Physically remote isolated wetlands
  - Land areas that do not meet the definition of wetland
  - Intermittent and perennial losing streams that do not contribute flow directly or indirectly to (a)(1) waters in a typical year
  - Natural lakes and ponds that are not (a)(1) waters that lack a direct or indirect surface water connection to downstream (a)(1) waters in a typical year and are not inundated by flooding from an (a)(1), (a)(2) or (a)(3) water in a typical year
  - Impoundments originally constructed in jurisdictional waters but no longer contribute surface water flow in a typical year directly or indirectly to an (a)(1) water.
  - Underground or buried portions of a channel network (including culverts)

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(b)(2) Groundwater, including groundwater drained through subsurface drainage systems

- Groundwater and shallow subsurface water.
- Groundwater drained through subsurface drainage systems, like tile drains used in agriculture that collect groundwater.
- Cannot serve as a connection between upstream and downstream jurisdictional waters.
- The exclusion does not apply at the point at which groundwater is expressed at the surface, such as where groundwater discharges to the channel bed and becomes baseflow in intermittent or perennial streams.
- Subterranean rivers or tunnels, culverts, and structures that bury a portion of a channel network are not groundwater.

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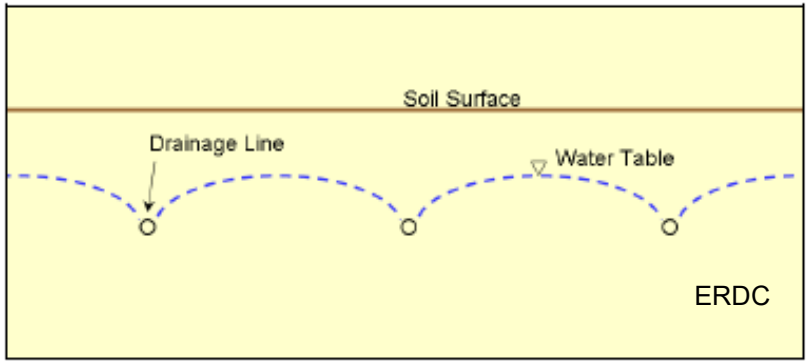
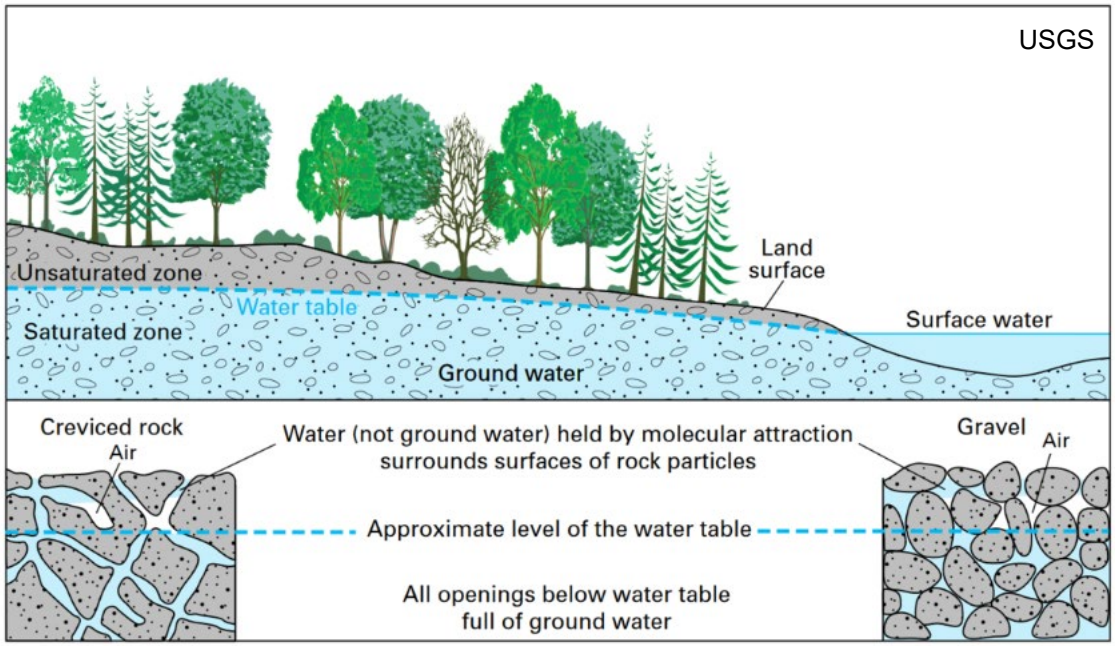
(b)(2) Groundwater continued…

- (b)(2) Examples
  - Groundwater
  - Agricultural tile drains that drain groundwater
  - Aquifers
  - Shallow subsurface flow





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(b)(3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools

- Ephemeral is defined at paragraph (c)(3).
  - The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).
- Includes ephemeral waters created as a result of artificial features such as dikes or dams or man-made manipulation such as water transfers or pumping that cause downstream waters to become ephemeral.
- Channelized ephemeral waters do not sever jurisdiction of an upstream water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.

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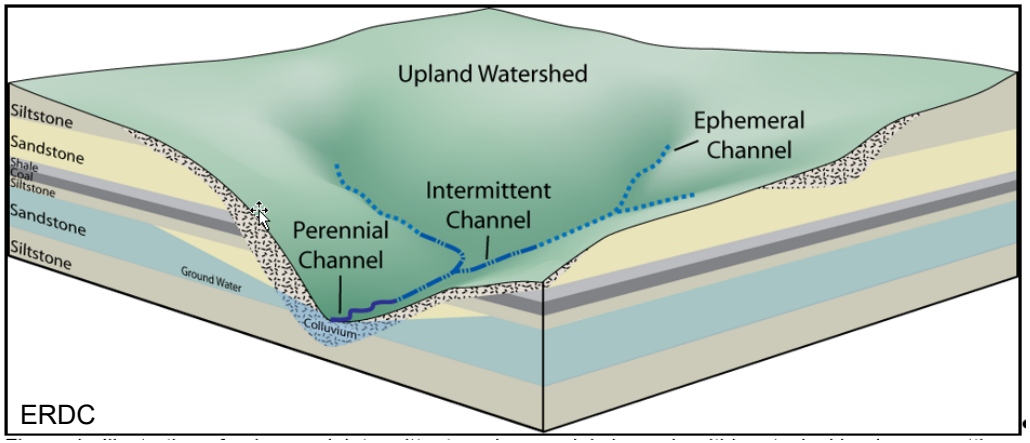
(b)(3) Ephemeral continued…

- (b)(3) Examples, where the requirements of the exclusion have been met:
  - All ephemeral streams
  - Ephemeral swales, gullies, rills
  - Ephemeral lakes, ponds, and impoundments
  - Ephemeral waters that do not meet the (b)(8), (b)(9), (b)(10), or (b)(11) exclusion because the waters were constructed or excavated in jurisdictional waters



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(b)(4) Diffuse stormwater run-off and directional sheetflow over upland

- The exclusion requires these waters be located in upland.
- Does not convey channelized surface flow.
- Cannot serve as a connection between upstream and downstream jurisdictional waters.
- (b)(4) Examples, where the requirements of the exclusion have been met:
  - Non-channelized flow over upland
  - Sheetflow over upland from a lake, pond, impoundment, or wetland to a jurisdictional water

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(b)(5) Ditches that are not waters identified in paragraph (a)(1) or (a)(2), and those portions of ditches constructed in adjacent wetlands that do not satisfy the adjacent wetland definition

- Ditch is defined at paragraph (c)(2)
  - The term *ditch* means a constructed or excavated channel used to convey water
- Excluded ditches do not sever jurisdiction of an upstream water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.

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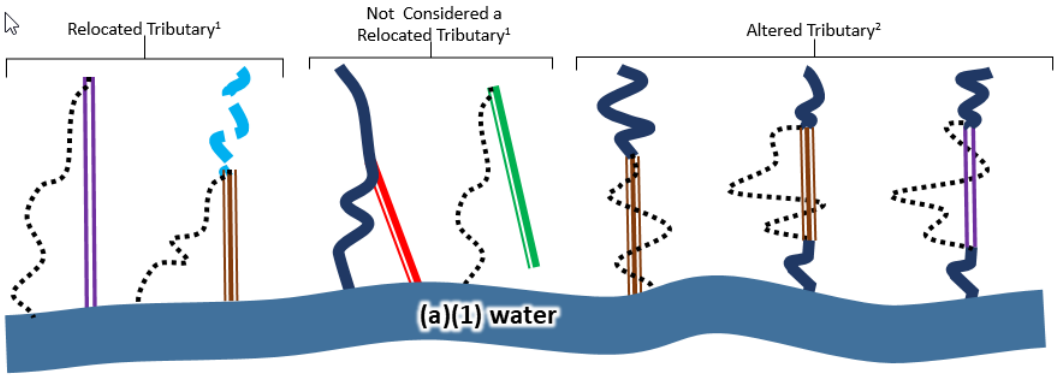
(b)(5) Ditches continued…

- Ditches are not considered tributaries under (a)(2) when at the time a ditch was originally constructed, the ditch did not relocate a tributary, was not constructed in a tributary, or was not constructed in an adjacent wetland.

Relocated[1] and Altered[2] Tributaries[3]



Perennial Tributary (jurisdictional) Intermittent Tributary (jurisdictional) Perennial or Intermittent Ditch (jurisdictional) Intermittent Ditch (not jurisdictional- did not wholly relocate channel) Ephemeral Ditch[3] (not jurisdictional) Relict Tributary Channel (not jurisdictional currently; formerly jurisdictional) Intermittent Ditch (not jurisdictional- no longer contributes flow to (a)(1))	[1]A ditch is considered to have "relocated" a tributary when it moves the tributary channel to a different location. A ditch that relocates a tributary must continue to meet the flow conditions of the "tributary" definition and contribute surface water flow to a paragraph (a)(1) water in a typical year to remain jurisdictional. [2]An altered tributary is one in which the flow or geomorphic conditions have been modified in some way. [3]The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to be perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year.

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(b)(5) Ditches continued…

- The (b)(5) exclusion is not applicable to:
  - Ditches that are an (a)(1) or (a)(2) water.
  - Ditches constructed within the boundaries of (a)(4) wetlands at the time of construction where:
    - The ditches have perennial or intermittent flow and are not themselves wetlands. Perennial or intermittent ditches are (a)(2) waters within the boundaries of the (a)(4) wetlands, and portions of the ditches downstream of the (a)(4) wetlands are also (a)(2) waters as long as the downstream portions are perennial or intermittent, and the ditch contributes surface flow directly or indirectly to an (a)(1) water in a typical year. Ditches upstream of the (a)(4) wetlands are not jurisdictional as (b)(5) exclusions regardless of flow conditions unless the upstream ditches are (a)(2) waters.
    - The ditches contain wetlands within the boundaries of the (a)(4) wetland. Wetlands within these ditches that are within the boundaries of the (a)(4) wetland are part of the (a)(4) wetlands. Wetlands within ditches that extend outside the boundaries of the (a)(4) wetlands are jurisdictional as (a)(2) waters only in the downstream portion where the ditch meets the tributary flow condition.

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(b)(5) Ditches continued…

- Ditches should be excluded using the (b)(5) exclusion unless they serve as a component of another excluded water.
- (b)(5) Examples, where the requirements of the exclusion have been met:
  - Perennial or intermittent ditches that are not (a)(1) or (a)(2) waters
  - Perennial or intermittent ditches that do not contribute surface water flow to an (a)(1) water in a typical year
  - Ephemeral ditches
  - Ditches constructed in uplands that are now linear wetlands regardless of their connection to jurisdictional waters

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(b)(6) Prior Converted Cropland

- Prior converted cropland (PCC) is defined for purposes of the CWA at (c)(9).
  - The term *PCC* means that any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of PCC made by the Secretary of Agriculture. An area is no longer considered PCC for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purpose of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.
- The NWPR definition of PCC is more expansive than the USDA Food Security Act (FSA) definition of PCC.
- “Agricultural product” and “agricultural purpose” in the NWPR definition are applied broadly.

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(b)(6) Prior Converted Cropland continued…

- A determination of PCC may include the certified PCC designation from the USDA, but the Corps may independently evaluate the PCC exclusion:
  - If a PCC designation has not been completed or the USDA has declined to complete a designation pursuant to the FSA, the Corps can evaluate if the PCC exclusion applies for purposes of the CWA based on the definition of PCC in the NWPR.
  - For example, if an area was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible prior to December 23, 1985, and has not been abandoned, the exclusion applies to wetlands for the CWA, even in the absence of an FSA PCC designation.
  - The burden of proof lies with the requestor.

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(b)(6) Prior Converted Cropland continued…

- PCC that have been abandoned are those which have not been used for, or in support of, agricultural purposes at least once in the immediately preceding five years.
- Determine abandonment based on a review of all source material, relevant information from USDA and other federal, tribal, and state agencies, as well as other sources of information from the landowner/operator.
- Abandoned PCC that meet the definition of “wetlands” are not excluded as PCC. Note that abandoned PCC is not necessarily subject to CWA jurisdiction; it must first have wetlands that meet the definition of (c)(16) and then be evaluated under paragraphs (b) and (a).

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(b)(6) Prior Converted Cropland continued…

- PCC designation applies even if there would be a change in use (e.g., ag cropland to residential development).
- (b)(6) Examples, where the requirements of the exclusion have been met:
  - Non-adjacent wetlands that meet the PCC definition
  - Adjacent wetlands that meet the PCC definition
  - PCC wetlands that will be developed for agricultural purposes or non-agricultural purposes

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(b)(7) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease

- Areas that are artificially irrigated, including fields flooded for agricultural production, that would revert to upland if the irrigation ceases.
- Upland is defined at paragraph (c)(14).
- The exclusion does not require the artificially irrigated areas to have been constructed or excavated wholly in upland or non-jurisdictional waters.

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(b)(7) Artificially irrigated areas continued…

- Exclusion applies generally to “agricultural production.”
- Agricultural production includes, but is not limited to, rice, cranberry, blueberry, grazing for livestock, hay fields, as well as aquaculture.
- (b)(7) Examples, where the requirements of the exclusion have been met:
  - Irrigated and artificially flooded areas that would revert to upland or non-jurisdictional waters if the irrigation ceases

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(b)(8) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6)

- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- Includes diverse range of artificial lakes and ponds.
- Exclusion applies even if the waters have a surface water connection to a downstream jurisdictional water in a typical year or are inundated by flooding from an (a)(1) through (a)(3) water in a typical year.

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(b)(8) Artificial lakes and ponds continued…

- Includes artificial lakes and ponds created by impounding non-jurisdictional waters.
- Impoundments that were originally constructed in jurisdictional waters but no longer contribute surface water flow in a typical year directly or indirectly to an (a)(1) water should be described as a (b)(1) exclusion.

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(b)(8) Artificial lakes and ponds continued…

- (b)(8) Examples, where the requirements of the exclusion have been met:
  - Waters constructed or excavated in upland or non-jurisdictional waters
  - Abandoned sand and gravel pits that have filled with water
  - Artificial lakes and ponds
  - Water storage reservoirs, farm, irrigation, stock watering, and log cleaning ponds
  - Off-channel reservoirs

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(b)(9) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purposes of obtaining fill, sand, or gravel

- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- The exclusion is specific to certain mining or construction activities to qualify for the (b)(9) exclusion.
- Exclusion does not apply where the specific construction or mining activities have permanently ceased.
- (b)(9) Examples, where the requirements of the exclusion have been met:
  - Water filled depressions associated with on-going construction activities
  - Sand and gravel pits associated with on-going mining operations

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(b)(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off

- Must be constructed or excavated wholly in upland or in non-jurisdictional waters.
- Exclusion applies to stormwater control features that convey, treat, infiltrate, or store stormwater runoff.
- An overall stormwater management system may utilize otherwise jurisdictional waters, such as perennial or intermittent (a)(2) tributaries, as part of the overall system. These otherwise jurisdictional waters do not meet the (b)(10) exclusion as long as the modified water remains otherwise jurisdictional.

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(b)(10) Stormwater control features continued…

- Exclusion applies even if the waters have a surface water connection to a downstream jurisdictional water in a typical year or are inundated by flooding from an (a)(1) through (a)(3) water in a typical year.
- Excluded stormwater control features with channelized surface waters do not sever jurisdiction of an upstream water as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.
- (b)(10) Examples, where the requirements of the exclusion have been met:
  - Curbs, gutters, sewers, and detention and retention ponds
  - Green infrastructure for flood control and water quality improvement

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(b)(12) Waste Treatment Systems

- Waste treatment system is defined at (c)(15)
  - The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).
- Exclusion applies only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments.
- If a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, the exclusion no longer applies.

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(b)(12) Waste Treatment Systems continued…

- Impoundments of jurisdictional waters that are used for waste treatment systems are considered (b)(12) exclusions as long as the waters are used for their permitted purpose.
- Excluded waste treatment systems do not sever jurisdiction of an otherwise jurisdictional water upstream.
- The exclusion applies where a waste treatment system is modified over time to treat new types of waste.
- Documentation, such as a 402 permit, is often necessary to determine the water meets the exclusion.
- The construction of new waste treatment systems in jurisdictional waters require CWA permits.

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(b)(12) Waste Treatment Systems continued…

- (b)(12) Examples, where the requirements of the exclusion have been met:
  - Waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments
  - Cooling ponds created to serve as part of a cooling water system with a valid state or federal permit constructed in waters of the United States
  - Tidal waters that are part of a waste treatment system

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QUESTIONS FROM THE FIELD

- Headquarters is developing Q&A documents to answer questions from the field.

- Written questions should be submitted to Matthew.S.Wilson@usace.army.mil by June 30, 2020. Please include “NWPR Q&A” in the subject line.

- Topics for questions include, but are not limited to:
  - Ditches
  - Tributaries
  - Flow Regimes
  - Downstream flow contribution
  - Adjacency
  - Lakes and ponds, and Impoundments
  - Inundation by flooding
  - Typical year
  - Exclusions
  - Compliance/enforcement
  - Compensatory mitigation
  - Uplands

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