

***Navigable Waters Protection Rule (NWPR) Implementation Considerations Under Specific Scenarios:
Florida's Administration of the Clean Water Act (CWA), Section 404 Program***

General

Q1: Can a WOTUS (or surface water connection) assessment be made without a field visit, and solely through the review of other sources [e.g., topographic maps, U.S. Geological Survey (USGS) gage station information]?

A1: Yes. The NWPR does not require that a particular data source be used to determine jurisdiction. However, "field work may frequently be necessary to verify whether a feature is a water of the United States" (85 FR 22270). Moreover, the agencies have indicated that "the use of multiple tools, including remote and field-based hydrologic and non-hydrologic indicators" (85 FR 22295), to determine jurisdiction may be necessary. The agencies encourage the use of multiple complementary data sources" (85 FR 22306) "and the burden of proof lies with the agencies" (85 FR 22299).

However, when evaluating typical year, "the agencies cannot always rely on field-based physical indicator methods - for example, when evaluating a site at a time that does not meet the definition of 'typical year.' In some instances, completing a desktop determination with remote tools may supplement or substitute for field-based indicators" (85 FR 22292). "The agencies currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources" (85 FR 22275).

Regarding tributaries, "the agencies agree that a variety of remote tools, methods, and datasets may be used to inform jurisdictional determinations of potential tributaries, particularly when coupled with site specific information. The agencies also understand that the accuracy, completeness, and availability of remote tools varies regionally and based on the source and type of data, will assess jurisdiction based on the most relevant methods and best available data sources. [As such], the agencies are not mandating specific data or tools to implement the rule. The agencies will assess jurisdiction based on the most applicable methods and best available sources of information for the specific site under evaluation. Ultimately, multiple data points and multiple sources of information should be used to inform determinations of flow classification and the agencies will consider the weight of evidence in addition to all relevant sources of information accordingly. The agencies have identified a variety of implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow classifications from ephemeral flow classifications, including remote tools, field indicators, hydrologic observations, and models" (The Navigable Waters Protection Rule – Public Summary Document).

"Visual observations of surface hydrology are a useful primary method to identify flow classifications. The agencies also recognize that a single visual observation may not always be sufficient to accurately determine flow classification, and visual observations should generally be combined with precipitation and other climate data and expected flow seasonality to accurately determine flow classification. In addition to visual observations of surface hydrology, the agencies may use field-based indicators and tools as another line of evidence to determine flow classification" (85 FR 22293).

In summary, the NWPR does not require that a particular data source be used to determine jurisdiction. "The agencies will continue to rely on field observations and field data to verify desktop assessments as appropriate and will also consider data and tools developed by academia, the regulated community, and other stakeholders" (85 FR 22294). A more detailed list of some of these tools is included in the answers addressed below.

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Q2: How far does a surface water connection need to be followed in the field to make a proper WOTUS assessment?

A2: There are no set distances identified in the NWPR. The length of observations necessary to characterize a WOTUS may vary based on site specific characteristics. The assessment of the surface water connection should be based on the requirements set forth for each category of jurisdictional waters in the rule. For instance, for tributaries, there needs to be evidence that the feature contributes surface water flow to a downstream (a)(1) water in a typical year.

Tributaries (a)(2)

Q3: How does the concept of tributary reach work?

A3: "The agencies are using the term 'reach' to mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope. If a perennial tributary becomes intermittent and then ephemeral and then perennial again, it may be viewed as four separate reaches (e.g., perennial reach, intermittent reach, ephemeral reach, perennial reach), especially if they also share other similarities with respect to depth, slope, or other factors. In general, a reach can be any length of a stream or river, but the agencies are clarifying for implementation purposes that such length is bounded by similar flow characteristics" (85 FR 22290). Refer to the image below for examples on how to determine reaches.

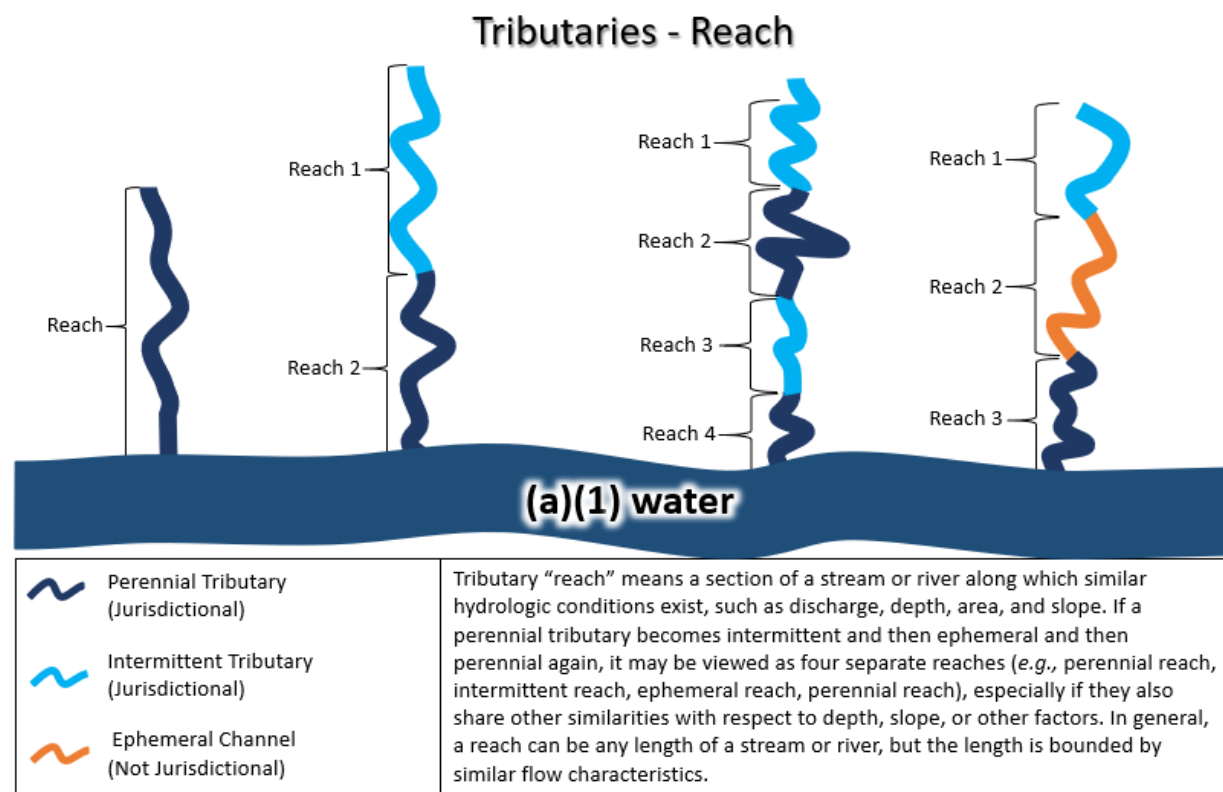


Figure 1: Depiction of Tributary Reaches

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Q4: Do streams with an ephemeral reach, or another non-jurisdictional feature such as a dam or boulder field, occurring between a lower and upper intermittent or perennial reach retain jurisdiction of the upper intermittent or perennial reach?

A4: The non-jurisdictional reach of the stream does not sever jurisdiction of the upstream intermittent or perennial reaches so long as the upstream reaches contribute surface water flow to a downstream jurisdictional water in a typical year. See image below.

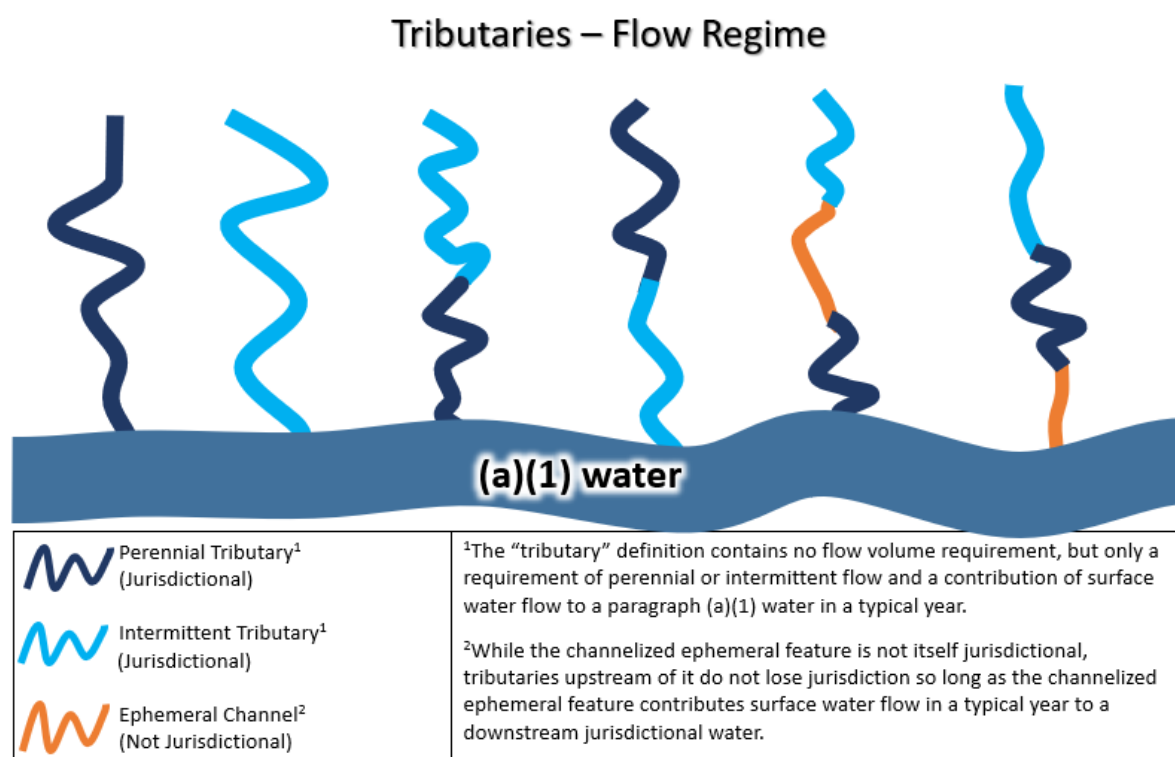


Figure 2: Depiction of Tributary Flow Regimes

“A tributary does not lose its jurisdictional status if it contributes surface water flow in a typical year to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature” [33 CFR 328.3(c)(12)]. See the image below with examples of non-jurisdictional features (e.g., boulder field, culvert, dam) and non-jurisdictional reaches (perennial ditch, subterranean river, or stream) that do not sever jurisdiction.

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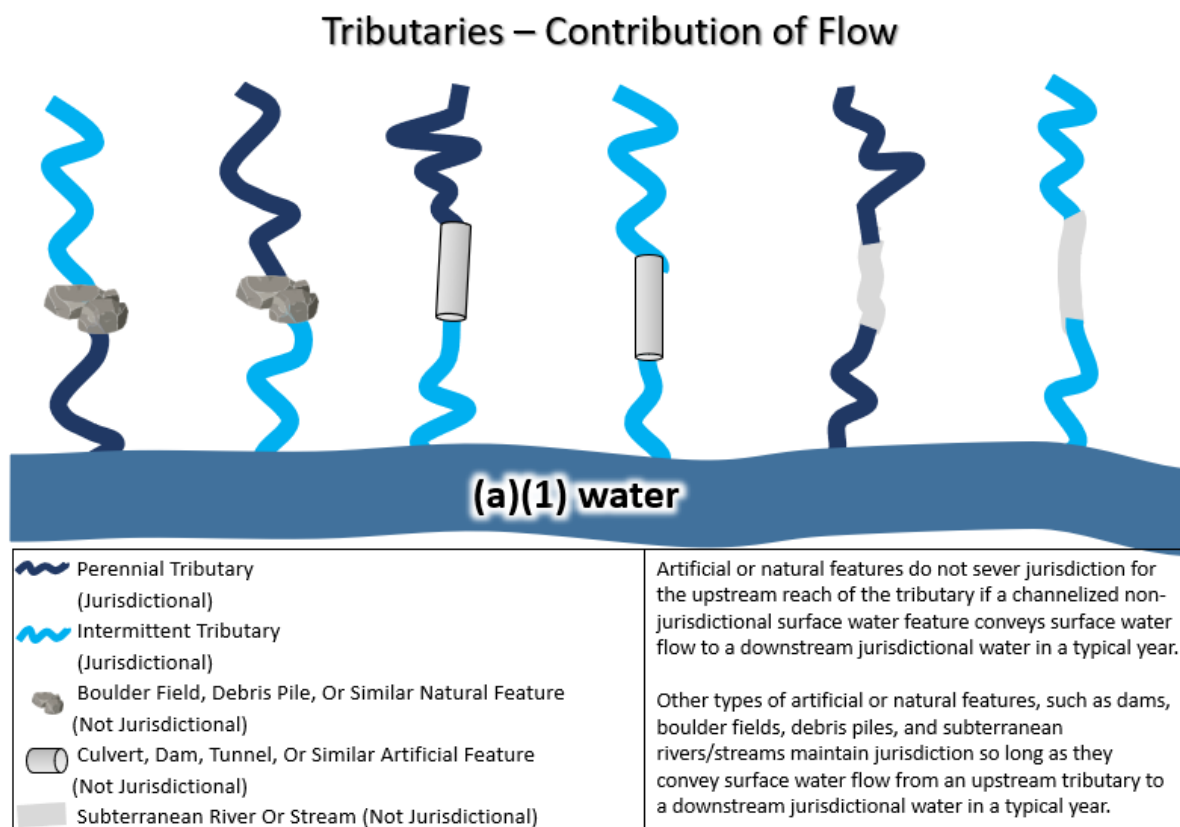


Figure 3: Depiction of Tributary Contribution of Flow

Q5: Are there any hydrologic features that do not maintain jurisdiction between upstream and downstream waters?

A5: “In order to be considered part of the tributary system, the surface water flow ...to a paragraph (a)(1) through (a)(3) water needs to occur with sufficient frequency that the flow is channelized in a typical year” (85 FR 22303). However, channelized features that do not contribute flow in a typical year do not maintain the connection. Additionally, “diffuse stormwater runoff and directional sheet flow by their very nature do not convey channelized surface flow and do not provide regular and predictable surface water connections between upstream relatively permanent bodies of water and downstream jurisdictional waters. Unchannelized surface flow, such as diffuse runoff or overland sheet flow, lacks an adequate physical indicator of regular surface flow and can be ubiquitous across the landscape, occurring over parking lots and lawns, for example” (FR 85 22278). Refer to the image below for examples of such features. Finally, groundwater does not provide for a surface water connection and thus cannot maintain jurisdiction between upstream and downstream waters.

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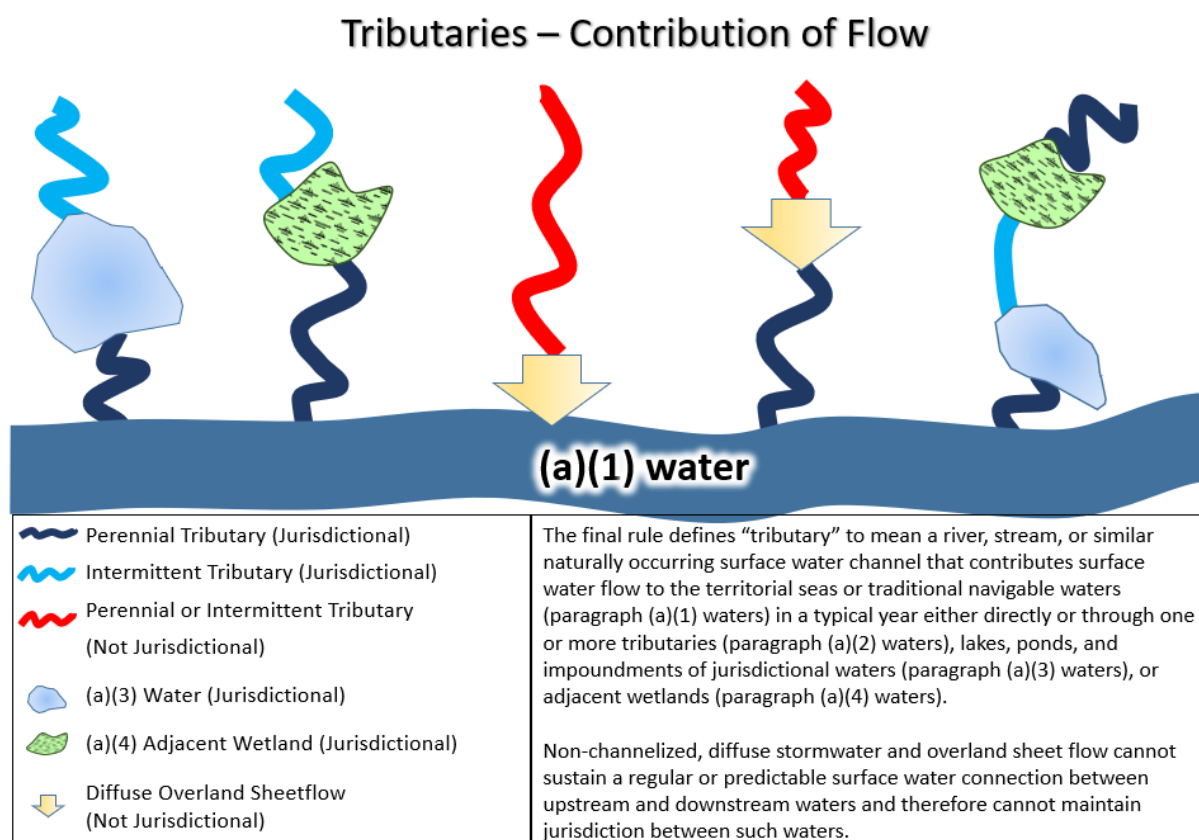


Figure 4: Depiction of Tributary Contribution of Flow

Q6: How do we determine if a tributary is perennial or intermittent?

A6: “A ‘tributary’ is defined in the rule as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary must be perennial or intermittent in a typical year. The term ‘tributary’ 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 is perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year” (85 FR 22251).

“Because the definition of ‘tributary’ specifically uses and relies on the terms ‘perennial’ and ‘intermittent,’ but not ‘ephemeral,’ the agencies are clearly defining these terms” (85 FR 22274). “The agencies define the term ‘perennial’ to mean surface water flowing continuously year-round. The term ‘intermittent’ means surface water flowing continuously during certain times of the year and more than in direct response to precipitation” (85 FR 22275). As an example, “continuous surface water flow during certain times of the year may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained. The term ‘ephemeral’ means surface water flowing or pooling

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only in direct response to precipitation, such as rain. The phrase 'certain times of the year' is intended to include extended periods of predictable, continuous surface flow occurring in the same geographic feature year after year" (85 FR 22275).

"The time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions. The 'typical year' construct captures that variability, however, and provides for regional and local variations in the actual application of a uniform nationwide definition" (85 FR 22292).

When evaluating whether a tributary has intermittent or perennial flow "the agencies conclude that physical indicators of flow, absent verification of the actual occurrence of flow, may not accurately represent the flow classifications required for tributaries. Physical indicators, however, may be one line of evidence the agencies could use to evaluate whether a stream meets the flow requirements to be a tributary under this definition" (85 FR 22292).

"The agencies recognize that some states have developed [streamflow duration assessment methods, or] SDAMs that use physical and biological field indicators, such as the presence of hydrophytic vegetation and benthic macroinvertebrates, to determine the flow duration class of a stream reach as perennial, intermittent, or ephemeral. Because SDAMs use indicators that are robust to seasonal and short-term climatic variability, these methods can be applied in a single site visit to distinguish streamflow duration when a channel is flowing or in the absence of flow" (85 FR 22294).

Some specific SDAMs currently used in Region 4 include:

- *"North Carolina Division of Water Quality, 'Methodology for the Identification of Intermittent and Perennial Streams and Their Origins, Version 4.11',*
- *State of Tennessee, 'Stream Hydrologic Determination Method',*
- *EPA: 'Field Operations Manual for Assessing the Hydrologic Permanence and Ecological Condition of Headwater Streams'" (The Navigable Waters Protection Rule – Public Comment Summary).*

Although EPA is not aware of a Florida-specific SDAM, the above list may provide some assistance if the Florida Department of Environmental Protection (FDEP) determines that the methods are applicable in the state.

In addition to the SDAMs identified above, "the agencies have identified a variety of implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow classifications from ephemeral flow classifications. Methods and tools used by the agencies to identify and determine whether a feature meets the definition of 'tributary' under the rule could include:

- *USGS topographic maps,*
- *USGS stream gage data (available at <https://waterdata.usgs.gov/nwis/rt>),*
- *StreamStats by the USGS (available at <https://streamstats.usgs.gov/ss/>),*
- *Probability of Streamflow Permanence (PROSPER) by the USGS (available at <https://www.usgs.gov/centers/wy-mt-water/science/probability-streamflow-permanence-prosper>),*
- *Natural Resources Conservation Service (NRCS) soil maps (available at <https://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>), and*
- *Aerial imagery" (The Navigable Waters Protection Rule – Public Comment Summary Document).*

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These resources “are available for the public to use so that they can make an informed decision about how to proceed with requests for jurisdictional determinations or authorization for activities under the CWA” (85 FR 22292). “The agencies can also use available models, including models developed by federal, state, tribal and local governments, academia, and the regulated community” (85 FR 22293).

Q7: Could a tributary be considered intermittent if it has water flowing continuously during the rainy season, or would it be considered ephemeral and not jurisdictional?

A7: A tributary must at a minimum have surface water flow continuously during certain times of the year and more than in direct response to precipitation. A key distinction between intermittent and ephemeral flow is “the use of the term ‘direct’ by the agencies in the rule intended to distinguish between flow solely caused by individual precipitation events (including multiple, individual back-to-back storms), and continuous flow resulting, for example, from weeks- or months-long accumulation of precipitation in the form of an elevated groundwater table that provides baseflow to the channel bed” (85 FR 22276). The latter could be an intermittent tributary, while the former could have only ephemeral flow.

Flows or pooling ‘only in direct response to precipitation’ (i.e., ephemeral flow) includes flows that occur immediately after rain events. “Ephemeral flow may occur simply because it is raining or has very recently rained. For example, ephemeral flow could be the result of a small, brief storm event, one long storm event producing rainfall for several days without pause, or several back-to-back storms” (85 FR 22276). An ephemeral stream may flow immediately after a rain event and then another rain event occurs that extends that flow duration. Those back-to-back rain events have a direct response on the flows in the stream through direct surface runoff.

“Streamflow that occurs during the monsoon season in certain parts of the country (typically June through September in the arid West) may be ephemeral or intermittent, with the distinction made according to the definition of each term in the rule. For example, a stream in the arid West is ephemeral if it flows only in direct response to rainfall, even if the flow may appear relatively continuous as a result of multiple, individual storms during the monsoon season. On the other hand, when monsoon floodwaters locally recharge the riparian aquifer through bank infiltration and supply sustained baseflow to streams in the arid West when it is not raining or has not recently rained, such streams meet the rule’s definition of ‘intermittent’ if they flow seasonally, for example, or ‘perennial’ if they flow continuously year-round” (85 FR 22276).

Q8: What type of field indicators should be considered when determining if a tributary is ephemeral, intermittent, or perennial?

A8: EPA encourages FDEP staff to follow their methodologies approved as part of their 404-assumed program. In addition, “multiple data points and multiple sources of information should be used to determine flow classification” (85 FR 22294). See also the response to question Q6.

In addition to direct observations or measurements of flow, certain wetland hydrology indicators can help clarify whether water is present in the area only immediately following precipitation events, or whether longer-term saturation has likely occurred. An example of an indicator is the presence of oxidized rhizospheres along living root channels, which can take four to eight weeks of continuous saturation to form. This indicator alone cannot be conclusive of water flowing above the surface, but multiple positive indicators could provide an increased degree of confidence in these situations. Other

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indicators that are suggestive of perennial or intermittent flow conditions (e.g., presence of aquatic macroinvertebrates) may be used as lines of evidence that can support a determination.

The agencies currently use some existing rapid, field-based SDAMs developed by states and federal agencies that use physical and biological indicators suggestive of typical flow conditions, to determine the flow duration class of a stream reach. The agencies will continue to use these methods where they are available and whenever they are determined to be a reliable source of information for the specific water feature of interest.

Even where we don't have SDAMs yet, "indicators that are suggestive of perennial or intermittent flow conditions (e.g., presence of aquatic insects, prevalence of hydrophytic vegetation) may still be used as lines of evidence that can support a determination" (EPA State/Tribal Training Webinar on Tributaries & Ditches).

Q9: What information should be used to supplement field indicators, to reinforce determinations that a tributary is ephemeral, intermittent, or perennial?

A9: Methods for implementation for determining perennial or intermittent flow, may use a combination of the best available mapping sources, including the National Hydrography Dataset (NHD) or local maps, as well as other remote tools and datasets such as aerial photographs, NRCS hydrologic tools and soil maps, desktop tools that estimate the discharge sufficient to generate intermittent or perennial flow, or modeling tools. Keep in mind that NHD at high resolution does not distinguish intermittent from ephemeral features in most parts of the country and may not accurately identify on-the-ground flow conditions.

Evidence to document tributary flow regime may also include, stream gage data, elevation data, historic or current water flow records, flood predictions, statistical evidence, and other USGS maps. See also response to Q1.

Also refer to the previous list of resources identified in the response to Q6.

Q10: What is the difference between an altered tributary and a relocated tributary? When is a ditch a relocated tributary?

A10: "An altered tributary is one in which the flow or geomorphic conditions have been modified in some way, for example, by straightening a sinuous tributary, adding concrete or riprap to stabilize the banks of a tributary, reducing flow conditions from perennial to intermittent flow due to water withdrawals, or widening or adding physical features (such as riffle/pool complex restoration or check dams) to the tributary to reduce the velocity of flow" (85 FR 22290).

"A relocated tributary is one in which an entire portion of the tributary may be moved to a different location, as when a tributary is rerouted around a city center to protect it from flooding or around a mining complex to enable extraction of commercially valuable minerals. To be considered a tributary, such features must continue to meet the flow conditions of the 'tributary' definition. In a relocated tributary, the reach that has been relocated may meet the definition of 'ditch' or may be colloquially called a ditch, which is why, for simplicity and clarity, the agencies have included these ditches in the definition of 'tributary'" (85 FR 22290-22291).

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"A ditch is considered to have 'relocated' a tributary when it moves the tributary channel to a different location; the focus is on the location of the channel, not on the proportion of flow. A ditch that relocates a tributary must continue to meet the flow conditions of the 'tributary' definition to remain jurisdictional. Ditches that are constructed in upland to divert water for use, and that do not relocate an entire portion of the tributary, are not considered relocated tributaries. Only the portion of a ditch that is constructed in or that relocates a tributary is jurisdictional (if the ditch satisfies the flow conditions of the 'tributary' definition)" (The Navigable Waters Protection Rule – Public Comment Summary Document). The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to be perennial or intermittent and it contributes surface water flow to a traditional navigable water or territorial sea in a typical year. Refer to the image below for examples of relocated and altered tributaries.

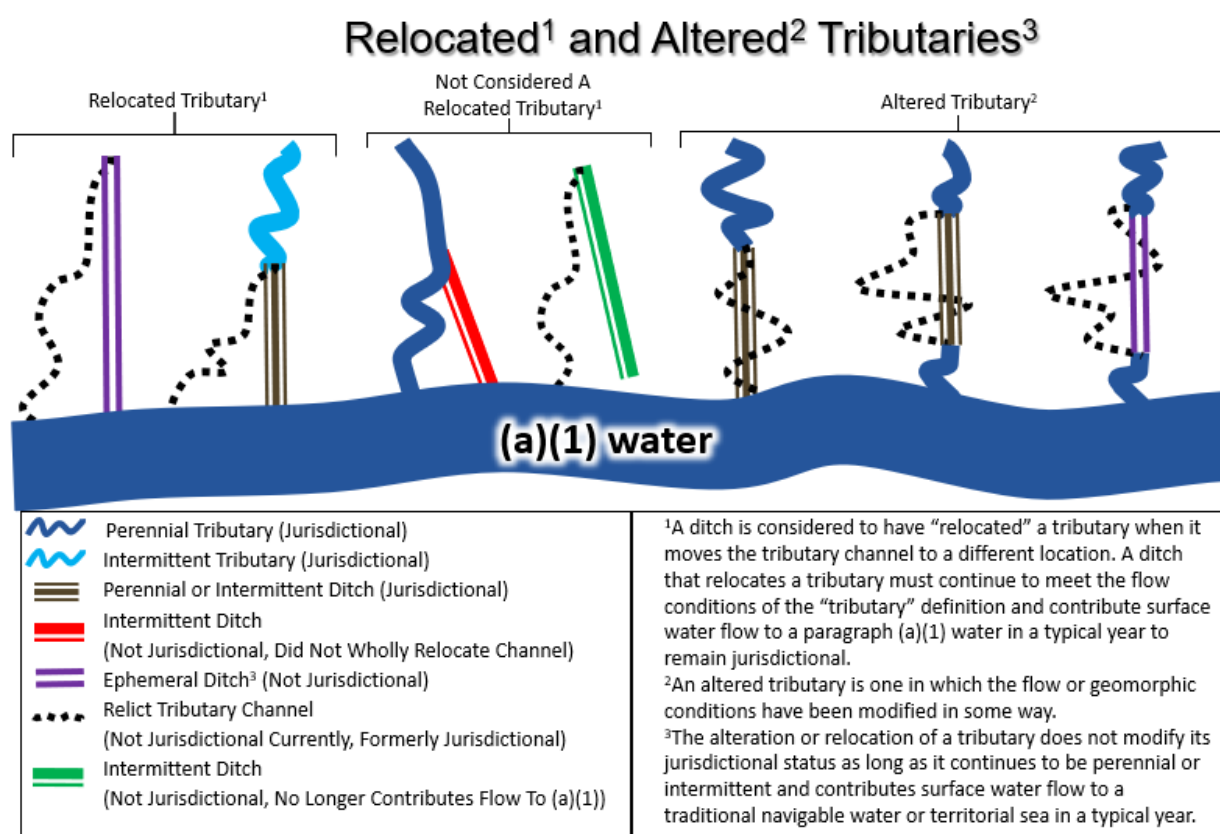


Figure 5: Depiction of Relocated and Altered Tributaries

Adjacent Wetlands (a)(4)

Q11: Can a wetland be jurisdictional if it contributes surface water flow to a downstream jurisdictional water, in a typical year, through a channelized, non-jurisdictional surface water feature (e.g., an ephemeral swale or ditch), and when wetlands are connected to a WOTUS by a swale, does it matter if there's no standing water in the swale?

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A11: “Adjacent wetlands are subject to a different jurisdictional test than tributaries, lakes, ponds, and impoundments of jurisdictional waters” (85 FR 22279), and the wetland would need to be evaluated under the definition of an adjacent wetland. “The rule defines ‘adjacent wetlands’ as wetlands that abut a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water; are inundated by flooding from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water in a typical year; are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by a natural berm, bank, dune, or similar natural feature; or are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrological surface connection to the territorial sea or traditional navigable water, tributary, or lake, pond, or impoundment of a jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature” (85 FR 22251). “Jurisdiction of the wetland is severed when, in a typical year, an artificial feature does not allow for a direct hydrologic surface connection between the wetland and the jurisdictional water, or the wetland is not inundated by flooding from a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water” (85 FR 22279). See Figure 6.

A wetland that is connected to a jurisdictional water by a non-jurisdictional ephemeral swale or ditch would not be jurisdictional unless it met one of the criteria for adjacent wetlands in paragraph (a)(4), listed above, regardless of whether there was water observed in the non-jurisdictional feature or not. Figure 6 demonstrates that wetlands connected to jurisdictional features by ditches are not necessarily jurisdictional unless the ditch itself is jurisdictional as an (a)(1) or (a)(2) water.

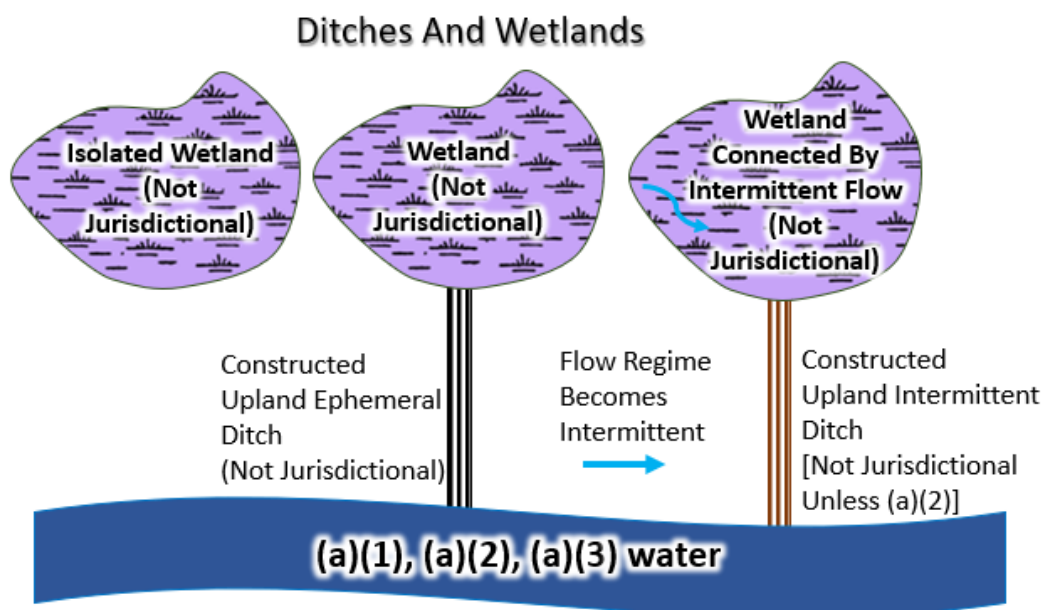


Figure 6: Effects of Ditches on the Determination of Wetland Adjacency

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Q12: If historical resources (e.g., aerial photos) demonstrate a connection between an adjacent wetland and a downstream WOTUS, but the connection is via a ditch constructed in uplands, would the upstream wetland be non-jurisdictional?

A12: If the ditch is not constructed in or did not relocate a tributary and the wetland is not adjacent, the construction of the upland ditch would not render the wetland or ditch jurisdictional (Figure 6). "Note that under the rule, a ditch cannot render an otherwise isolated wetland an 'adjacent wetland' and thus jurisdictional on that basis, unless the ditch itself is a tributary" (85 FR 22299). In contrast, if the ditch relocates a tributary and satisfies the flow conditions of paragraph (a)(2), then the ditch is itself a tributary and the abutting wetlands could be found to be adjacent wetlands.

Q13: If there's a wetland connected to a non-jurisdictional swale, that's then connected to a ditch constructed in uplands, that's then connected to a downstream WOTUS, would that upstream wetland be jurisdictional?

A13: A wetland that is connected to a jurisdictional water by a non-jurisdictional swale would not be jurisdictional unless it met one of the criteria for adjacent wetlands listed in paragraph (a)(4) (e.g., abuts a jurisdictional water or is inundated by flooding in a typical year).

Q14: If a wetland is adjacent to a paragraph (a)(2) water, and that adjacent wetland has been segmented by a grid of roads (all with culverts that provide a surface water connection in a typical year) is the entire wetland still considered adjacent, or has adjacency been severed for the portions that are separated by more than one road?

A14: The agencies would "need to consider the conditions on the ground in order to determine whether the divided parts of the wetland should be considered one adjacent wetland, where it otherwise meets the terms of the definition" (85 FR 22316). If the feature is a single wetland then it would be jurisdictional in its entirety as long as it meets adjacency criteria [i.e., has a direct hydrologic surface connection through or over the artificial structure to an (a)(1) through (a)(3) water in a typical year]. This principle applies whether the wetland is bifurcated by a single road or by multiple roads.

As the preamble explains, "a road that divides one wetland into two parts (or multiple roads that divide one wetland into multiple parts) does not change the jurisdictional status of an 'adjacent wetland' under this final rule so long as a direct hydrologic surface connection is maintained through a culvert or similar feature or over the structure (e.g., water overtopping the road at an engineered low point) which enables a direct hydrologic surface connection in a typical year between the otherwise separated portions of the adjacent wetland" (85 FR 22313).

See the figure below for how the agencies interpret wetlands separated by artificial structures.

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Adjacent Wetlands – Separated by Artificial Structure

33CFR328.3(c)(1): 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.

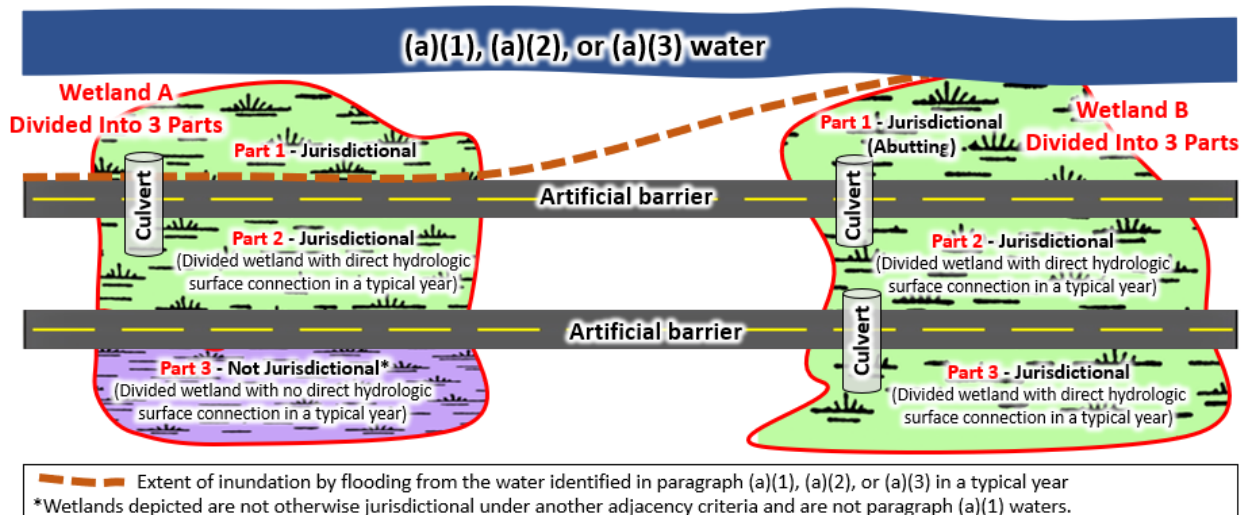


Figure 7: Adjacent Wetlands Separated by Artificial Structures

Q15: When determining if a water is inundated by flooding from an (a)(1) through (a)(3) water (e.g., when considering whether a wetland is adjacent based on the inundation criteria) what flood frequency recurrence interval would be appropriate to inform a typical year assessment?

A15: There is no specific flood recurrence interval that relates to the concept of typical year when assessing inundation by flooding from an (a)(1)-(a)(3) water other than that the inundation must occur at least once in a typical year. The normal "range of climate conditions could correspond to a variety of flood recurrence intervals and flow magnitudes depending on the geographic area, time of year, climate, and other factors. The agencies expect that bankfull discharge flows will occur in a typical year in many riverine systems such that those flooded wetlands will be jurisdictional under the final rule" (85 FR 22311).

An observation that a water feature has been inundated by flooding from an (a)(1)-(a)(3) water should be analyzed to determine whether or not the flood event correlates to typical year conditions versus conditions that are abnormally wet (or, though less likely, abnormally dry). Decisions should be informed by context and site history. Analysis of on-site indicators of inundation by flooding (wrack lines, drift deposits, scour, sediment deposits, etc.) and/or remote data captured over multiple points in time may be necessary in order to conclude a water is inundated by flooding from an (a)(1)-(a)(3) water under typical year conditions.

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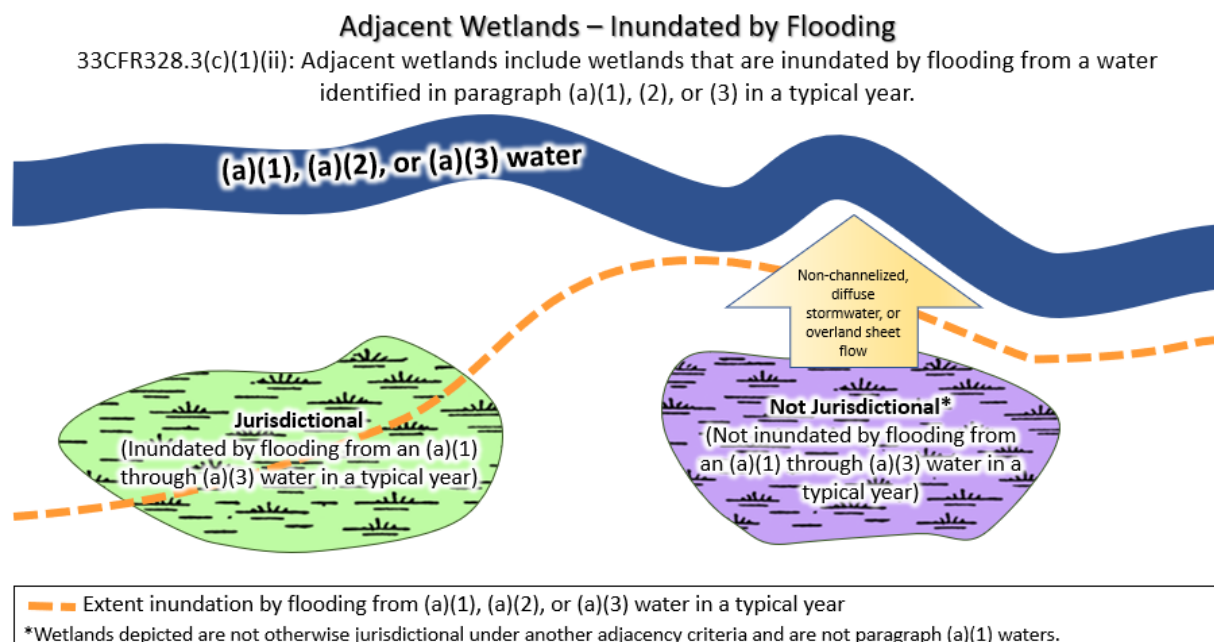


Figure 8: Inundation by Flooding Effects on the Jurisdictional Status of Wetlands

Ditches

Q16: *How do you determine if a ditch was constructed in uplands and therefore not jurisdictional?*

A16: *“The agencies have determined that in order to be jurisdictional under this rule, a ditch or other similar artificial feature would first need to meet the definition of ‘ditch’ (i.e., a constructed or excavated channel used to convey water). Once a feature has been determined to meet the definition of ‘ditch,’ a ditch would be considered a tributary where the ditch 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 the ‘tributary’ definition” (85 FR 22299). “This requirement allows for such ditches to be artificial (as in not ‘naturally occurring’) and still be considered tributaries” (85 FR 22298). Thus, it is important to emphasize that the applicable point in time to consider is the time of ditch construction. In order for a ditch that was constructed in an adjacent wetland to potentially be jurisdictional, the ditch must have been constructed in a wetland that was an adjacent wetland as defined by the NWPR at the time the ditch was constructed.*

“The phrase ‘constructed in an adjacent wetland’ refers to ditches originating in or constructed entirely within an adjacent wetland. The phrase also includes ditches that are constructed through adjacent wetlands, but jurisdiction over those ditches only includes those portions in adjacent wetlands and downstream to other jurisdictional waters, as long as those portions satisfy the flow conditions of paragraph (c)(12). If ditches were tributaries prior to their construction and continue to meet the flow conditions of the ‘tributary’ definition after construction, they are jurisdictional as tributaries. The burden of proof lies with the agencies to demonstrate that a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland. For example, if the agencies are not sure whether a ditch was constructed in a tributary given the physical appearance and functionality of the current ditch, the

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agencies will review the available evidence to attempt to discern when the ditch was constructed and the nature of the landscape before and after construction” (85 FR 22299). For instance, “when a USGS topographic map displays a tributary located upstream and downstream of a ditch, this may indicate that the ditch was constructed in or relocated a tributary. As another example, an NRCS soil survey displaying the presence of specific soil series which are linear in nature and generally parallel to a potential ditch may be indicative of alluvial deposits formed by a tributary in which the ditch was constructed. In addition, high-resolution aerial photographs may be used to identify whether there are or were characteristics of a tributary upstream or downstream of a ditch, indicating that a ditch may have been constructed in or relocated a tributary. In some cases, stream channel morphology is visible on the aerial photograph along with visible persistent water (e.g., multiple dates of aerial photography showing visible water) providing evidence of the flow classification necessary to identify a tributary under this rule at the time of ditch construction. If the evidence does not demonstrate that the ditch was located in a natural waterway, the ditch will be non-jurisdictional” (85 FR 22299).

“The same methods above for ditches constructed in a tributary apply when determining the jurisdictional status of a ditch constructed in an adjacent wetland” (85 FR 22299).

“Along with field data and current information on the subject water [feature], historic tools and resources may be used to determine the presence of a tributary or adjacent wetland at the time of ditch construction, and several sources of information may be required to make such determination. Information sources may include historic and current topographic maps, historic and recent aerial photographs, local and state records and surface water management plans, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydrogeomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts” (85 FR 22299). Other resources could include NRCS soils maps and/or light detection and ranging (LiDAR) data, etc.

Q17: When determining if a ditch was constructed in uplands (and therefore not jurisdictional), is there a certain historical timeframe that should be evaluated to ascertain ditch construction that would automatically make the ditch excluded and non-jurisdictional (e.g., created prior to a specific year or at least 5 years prior)?

A17: No. In order for a ditch that was constructed in an adjacent wetland to potentially be jurisdictional, the ditch must have been constructed in a wetland that was an adjacent wetland as defined by the NWPR at the time the ditch was constructed.

“If ditches were tributaries prior to their construction and continue to meet the flow conditions of the ‘tributary’ definition after construction, they are jurisdictional as tributaries under the rule. ...[I]f the agencies are not sure whether a ditch was constructed in a tributary given the physical appearance and functionality of the current ditch, the agencies will review the available evidence to attempt to discern when the ditch was constructed and the nature of the landscape before and after construction” (85 FR 22299).

The key is to focus on site-specific circumstances to determine where the ditch was constructed. “Along with field data and current information on the subject water, historic tools and resources may be used to determine the presence of a tributary or adjacent wetland at the time of ditch construction, and several sources of information may be required to make such determination” (85 FR 22299).

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Q18: When evaluating a ditch, does the entire ditch need to be constructed in uplands to be non-jurisdictional, or could a portion of the ditch dug in a historical wetland, that ultimately connects to a downstream WOTUS, also be considered non-jurisdictional given that the majority of it was constructed in uplands?

A18: If the ditch was constructed in an adjacent wetland at the time the ditch was constructed and meets the tributary flow conditions (i.e., has perennial or intermittent flow and contributes surface water flow to a downstream jurisdictional water in a typical year), then the portion of the ditch located within the footprint of the adjacent wetland at the time of construction and the portion of the ditch located downstream of the adjacent wetland are jurisdictional as (a)(2) tributaries.

If the ditch constructed within the footprint of an adjacent wetland does not meet the tributary flow conditions (i.e., has only ephemeral flow and/or does not contribute surface water flow to a downstream jurisdictional water in a typical year), portions of the ditch located within the footprint of the adjacent wetland at the time of construction may be jurisdictional as an (a)(4) water when the ditch itself meets the 'wetland' definition. Only the portion of the ditch located within the boundaries of the footprint of the adjacent wetland at the time of construction and meeting the 'wetland' definition would be jurisdictional as an (a)(4) water.

Portions of the upland ditch located upstream of the footprint of the adjacent wetland at the time of construction are not jurisdictional, regardless of the flow regime or whether the upstream portion of the ditch meets the 'wetland' definition. Refer to Figures 9-14.

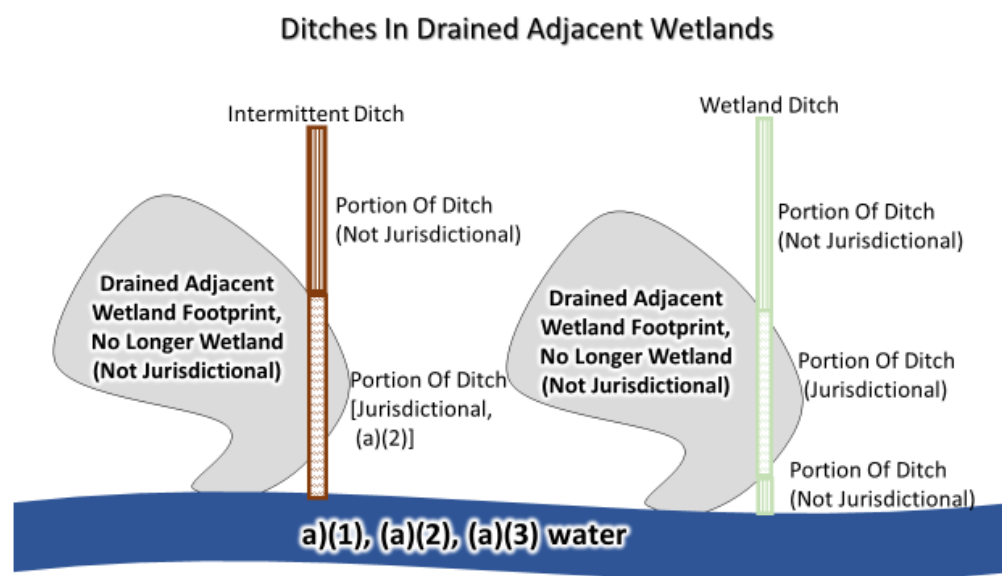


Figure 9: Ditches in Drained Adjacent Wetlands

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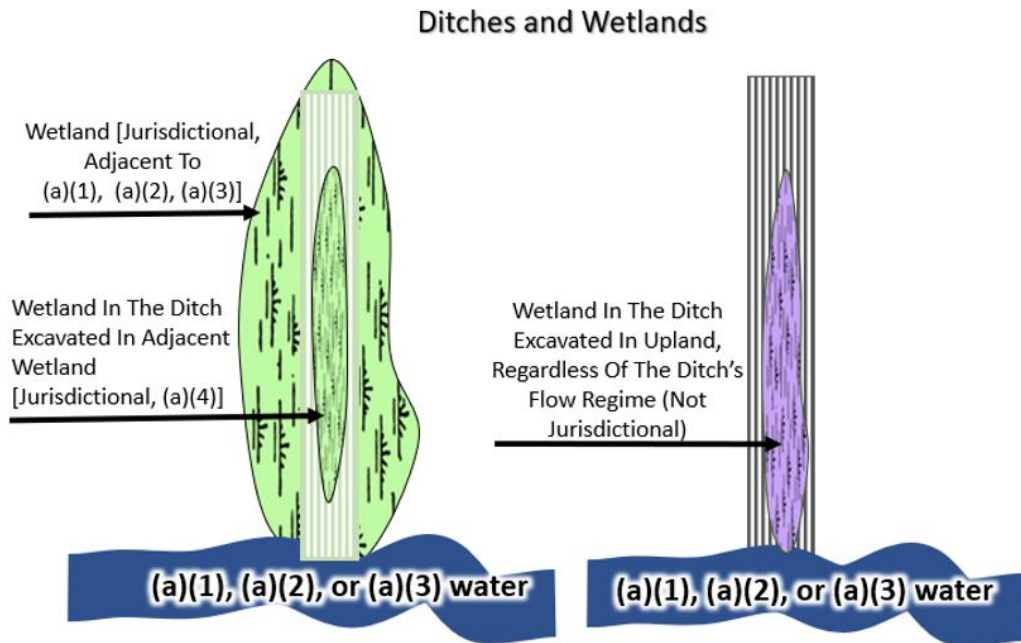


Figure 10: Ditches and Wetlands

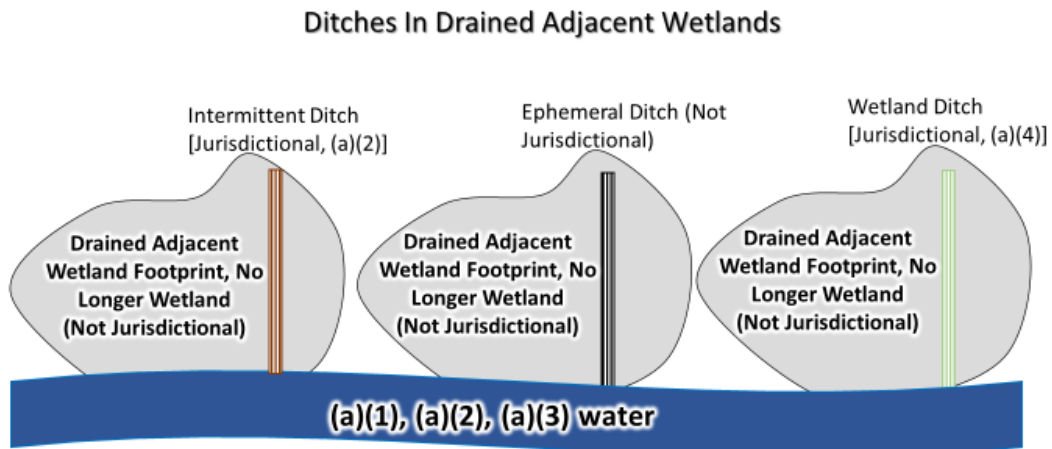


Figure 11: Ditches in Drained Adjacent Wetlands

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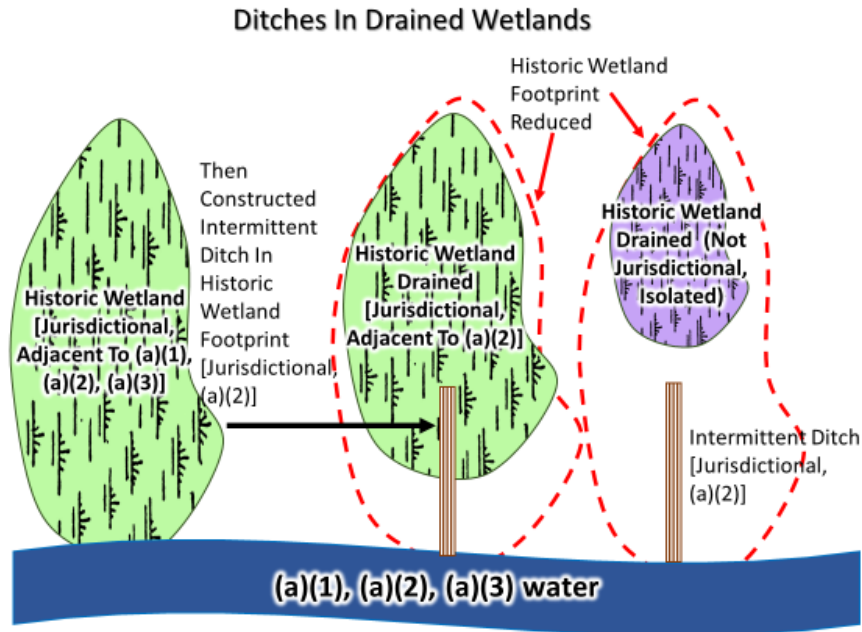


Figure 12: Ditches in Drained Wetlands

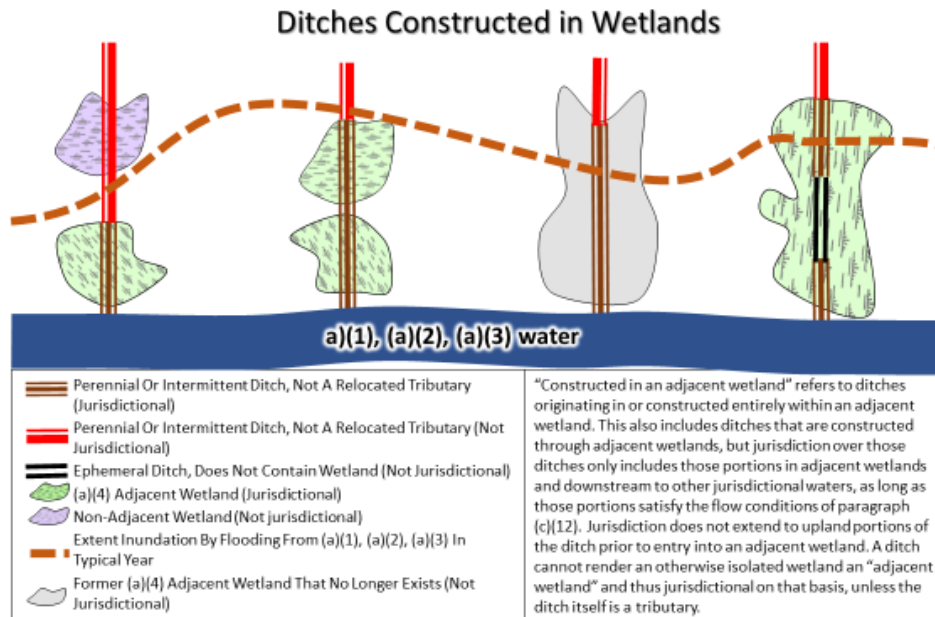


Figure 13: Ditches Constructed in Wetlands

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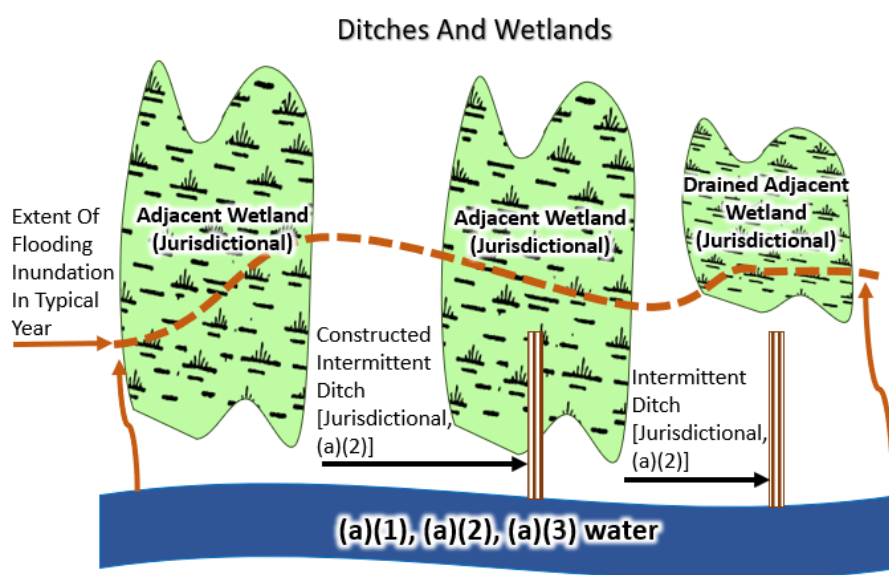


Figure 14: Ditches, Wetlands, and Inundation by Flooding

Q19: When could a man-made ditch constructed in uplands be a WOTUS?

A19: Although upland ditches are generally not jurisdictional under the final rule, ditches that meet the definition of an (a)(1) water may be jurisdictional, even when they did not relocate a tributary, or were not constructed in a tributary or an adjacent wetland. Otherwise, even if it were constructed in uplands, “a ditch would be considered a tributary where the ditch relocates a tributary [or] is constructed in a tributary” (85 FR 22299). “This requirement allows for such ditches to be artificial (as in not ‘naturally occurring’) and still be considered tributaries” (85 FR 22298).

Absent these findings, “the agencies will conclude that the ditch is non-jurisdictional” (85 FR 22299). For example, if a roadside ditch was constructed in uplands it would not be jurisdictional because the feature meets the ditch exclusion in paragraph (b)(5). “Other ditches not constructed in adjacent wetlands, or not otherwise covered by paragraph (a)(1) or (a)(2), are excluded from jurisdiction under paragraph (b)(5)” (85 FR 22298).

Q20: When could a roadside ditch be a WOTUS?

A20: A roadside ditch may be a WOTUS if it meets one of the WOTUS definitions and none of the exclusions. Again, “the agencies have determined that in order to be jurisdictional under this rule, a ditch or other similar artificial feature would first need to meet the definition of ‘ditch’ (i.e., a constructed or excavated channel used to convey water). Once a feature has been determined to meet the definition of ‘ditch,’ a ditch would be considered a tributary where the ditch 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 the ‘tributary’ definition” (85 FR 22299). “This requirement allows for such ditches to be artificial (as in not ‘naturally occurring’) and still be considered tributaries” (85 FR 22298). “The same methods above for ditches constructed in a tributary apply when determining the jurisdictional status of a ditch constructed in an adjacent wetland. Consistent with the exclusion in paragraph (b)(5), a ditch or portions thereof may

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also be considered an adjacent wetland where it was constructed in an adjacent wetland and the portion in that wetland meets the conditions of paragraph (c)(1)” (85 FR 22299).

In other words, if the ditch constructed within the footprint of an adjacent wetland does not meet the tributary flow conditions (i.e., has only ephemeral flow and/or does not contribute surface water flow to a downstream jurisdictional water in a typical year), portions of the ditch located within the footprint of the adjacent wetland at the time of construction may be jurisdictional as an (a)(4) water when the ditch itself meets the ‘wetland’ definition. Only the portion of the ditch located within the boundaries of the footprint of the adjacent wetland at the time of construction and meeting the ‘wetland’ definition would be jurisdictional as an (a)(4) water.

As previously explained, if a roadside ditch was constructed entirely in uplands and is not an (a)(1) water and does not reroute a tributary, it would not be jurisdictional because the feature meets the terms of the ditch exclusion at paragraph (b)(5). “Other ditches not constructed in adjacent wetlands, or not otherwise covered by paragraph (a)(1) or (a)(2), are excluded from jurisdiction under paragraph (b)(5)” (85 FR 22298).

Q21: What would be the jurisdictional status of a roadside ditch or ditch constructed in uplands, dug from an area that was historically permitted for stormwater treatment?

A21: As previously explained, if a roadside ditch was constructed in uplands, and is not otherwise covered by paragraph (a)(1) or (a)(2), it would not be jurisdictional because the feature meets the exclusion of a ditch at paragraph (b)(5).

If the roadside ditch was historically permitted for stormwater treatment, then the ditch may also be excluded under (b)(10) for stormwater control features. “In paragraph (b)(10) of the rule, the agencies exclude stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff” (85 FR 22323). “The agencies’ longstanding practice is to view stormwater control features as non-jurisdictional, when built outside of waters of the United States. A water does not lose its jurisdictional status if it is modified for use as a stormwater control measure” (85 FR 22324).

In either case, the roadside ditch would not be jurisdictional.

Q22: Are there circumstances other than those described above in which a ditch might be considered part of a water of the United States?

A22: Yes. “Certain ditches (such as roadside and agricultural ditches) have been regarded by the Corps as jurisdictional if water from another jurisdictional water, such as a perennial river, overflows into a ditch and extends the ordinary high water mark of the contributing water into the ditch. The Corps has then asserted jurisdiction over the entire ‘reach’ of the ditch regardless of the location of the ordinary high water mark in that portion of the ditch” (85 FR 22299). Under the NWPR, “the agencies will continue the existing practice of regulating portions of otherwise non-jurisdictional ditches as waters of the United States based on the ordinary high water mark of the [downstream] contributing water, but only up to the location of the ordinary high water mark, as mandated by existing Corps regulations. The agencies will not, however, assert jurisdiction over the entire ‘reach’ of the ditch regardless of the location of the ordinary high water mark in that portion of the ditch” (85 FR 22299).

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Prior-Converted Cropland (PCC)

Q23: Any quirks with the U.S. Department of Agriculture (USDA) and WOTUS that we need to know (we might not know enough to ask)?

A23: General PCC Background.

Under the NWPR, “the term prior converted cropland means 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. Historically, the agencies have attempted to create consistency between the CWA and the [Food Security Act] FSA wetlands conservation provisions for prior converted cropland. The agencies continue to believe that consistency across these programs is important for the regulated community, and therefore are continuing to exclude prior converted cropland from the definition of ‘waters of the United States’” (85 FR 22320).

“The USDA is responsible for making determinations as to whether land is prior converted cropland for purposes of the FSA, whereas [the Corps and EPA] are responsible for determining applicability of the exclusion for CWA purposes. The [Corps and EPA] will defer to USDA for purposes of establishing whether a parcel or tract of land has received a prior converted cropland determination and is therefore eligible for the prior converted cropland exclusion under the rule. A landowner without an existing prior converted cropland determination may seek a new determination from the USDA” (85 FR 22326). “In the absence of a USDA determination as to whether a parcel or tract of land is prior converted cropland for FSA purposes, the Corps and EPA will evaluate whether the PCC exclusion applies for purposes of the CWA based on the definition of PCC in the NWPR” [Memorandum to the Field Concerning Implementation of the Navigable Waters Protection Rule, Section 404 of the Clean Water Act and the Food Security Act (FSA) of 1985 (a.k.a., Ag. Memo)].

“Under prior practice, the agencies would apply two different tests to evaluate whether a parcel of land was prior converted cropland” (e.g., abandonment and change in use). The final rule includes a single, clear test that the agencies will use to evaluate whether the prior converted cropland exclusion applies to agricultural land” (e.g., abandonment) (NWPR Fact Sheet, Rural America and the Navigable Waters Protection Rule). “Under the rule, the prior converted cropland exclusion ceases to apply when the cropland is abandoned (i.e., not used for, or in support of, agricultural purposes in the immediately preceding five years). Those lands are then only subject to the CWA if or when they have reverted to wetlands and meet the conditions of the ‘adjacent wetlands’ category under this rule” (NWPR Fact Sheet, Rural America and the Navigable Waters Protection Rule). “The EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned” (85 FR 22339).

“The agencies clarify what they mean by ‘agricultural purposes’ that will maintain a prior converted cropland exclusion” as “land use that makes the production of an agricultural product possible ‘for or in support of agricultural use’. Cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use, and therefore maintains the prior converted cropland exclusion, such as cropland enrolled in long-term and other conservation programs administered by the federal government or by state and local agencies that prevents erosion or other natural resource degradation. The USDA supports a wide range of conservation programs for agricultural land. For more information, see <https://www.fsa.usda.gov/programs-and-services/conservation-programs/>. There are many uses that may be considered ‘for or in support of agricultural purposes,’ including irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling

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land for soil recovery following natural disasters like hurricanes and drought. Conservation practices are critical to the success of agricultural systems across the country and are implemented for or in support of agricultural purposes" (NWPR Fact Sheet, Rural America and the Navigable Waters Protection Rule). "Under the rule, to determine the continuing applicability of the prior converted cropland exclusion, the Corps must first determine whether the land has been 'abandoned'. In making an abandonment determination, the Corps will work with the landowner and USDA, as appropriate, to determine whether the land is currently or has been used for or in support of agricultural purposes at least once in the immediately preceding five years" (85 FR 22326). "The agencies will work closely with USDA and will consider documentation from other federal, state, or local agencies to determine whether cropland qualifies for the prior converted cropland exclusion" (NWPR Fact Sheet, Rural America and the Navigable Waters Protection Rule). "The landowner/operator may provide relevant information or documentation, and consideration may also go to relevant additional sources of information as appropriate, to determine whether an area meets the definition of 'prior converted cropland' under the NWPR and is excluded from the definition of 'waters of the United States'" (Ag. Memo).

Tools and sources of information to consider when evaluating if an area may qualify for the PCC exclusion could include coordination with the USDA to obtain records on USDA certifications of eligibility for program benefits (e.g., determinations by the NRCS that particular areas constitute prior converted cropland). The agencies also tend to rely heavily on available aerial imagery. Imagery libraries for the state of Florida are housed with various agencies and may include the Florida Department of Transportation, FDEP, the Water Management Districts, National Oceanic and Atmospheric Administration, and/or USGS. Land use and cover maps may also be available from USGS or state/county offices that could facilitate an abandonment assessment.

Furthermore, FDEP could consider the opportunity to establish local level agreements (LLAs) between various agencies. "Local level agreements can establish a framework for federal and state agencies to collaborate better, focus on accomplishing mutual goals, further common interests and effectively respond to the increasing ecological challenges and natural resource concerns in Florida" (Florida Forest Service; <https://www.fdacs.gov/News-Events/Press-Releases/2020-Press-Releases/Florida-Forest-Service-U.S.-Forest-Service-Agencies-Sign-Land-Management-Agreement>). For example, "the Florida Forest Service, the Florida Department of Agriculture and Consumer Services, the U.S. Forest Service, the USDA's Natural Resources Conservation Service, the USDA's Farm Service Agency, and the Florida Fish and Wildlife Conservation Commission signed a shared agreement in 2020 on the sustainability and management of public and private lands" (Florida Forest Service).

Q24: What is USDA's involvement in determining whether farm ditches are WOTUS, if any?

A24: The USDA would not be involved in determining whether farm ditches are WOTUS. "The USDA is responsible for making determinations as to whether land is prior converted cropland for purposes of the Food Security Act (FSA), whereas [the Corps and EPA] are responsible for determining applicability" (85 FR 22326) for CWA purposes. The EPA and the Corps are responsible for determining whether any linear feature including a farm ditch meets the definitions of waters of the United States (for example, as a ditch rerouting a tributary) or is excluded from that definition. Furthermore, "the water features in question on prior converted cropland are wetlands, rather than tributaries, canals, impoundments" (The Navigable Waters Protection Rule – Public Comment Summary Document), or ditches.

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Q25: If USDA, Corps and EPA are not involved, can FDEP make a determination as to whether prior PCC no longer meets the WOTUS exclusion (e.g., it has been abandoned) for the purposes of their assumed 404 permitting program or does that responsibility remain with the federal government?

A25: "The USDA is responsible for making determinations as to whether land is prior converted cropland for FSA purposes, whereas the Corps and EPA are responsible for determining applicability of the prior converted cropland exclusion for CWA purposes" (Ag. Memo). "When determining the extent of 'waters of the United States' subject to CWA jurisdiction, the Corps and EPA will exclude waters meeting the definition of 'prior converted cropland'" (85 FR 22326: Ag. Memo). If the prior converted cropland exclusion does not apply, the Corps and EPA are responsible for determining whether the wetlands are 'adjacent wetlands' and therefore 'waters of the United States,' consistent with the NWPR" (Ag. Memo).

While administering FDEP's approved state CWA Section 404 program, FDEP does not make a "jurisdictional determination" or "approved jurisdictional determination" as defined and governed by the Corps' regulations per 33 CFR 331.2. However, the State may identify PCC for purposes of FDEP's 404 program. EPA notes that it has final authority to construe the jurisdictional term "waters of the United States" under the CWA. As such, determinations made by FDEP for 404 permitting purposes are not binding on the federal government.

Under Florida's state-assumed CWA Section 404 Program, FDEP is the lead agency for determining jurisdiction in the assumed areas of the state. EPA acknowledges that to administer FDEP's 404 program, FDEP must be able to identify WOTUS that are part of their approved program, as well as exclusions to WOTUS. EPA understands that FDEP has the appropriate authorities to make such determinations as outlined in Florida Statutes:

"[T]he department has the power and authority to assume, in accordance with 40 C.F.R. part 233, the dredge and fill permitting program established in s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and rules promulgated thereunder. The department may adopt any federal requirements, criteria, or regulations necessary to obtain assumption... This legislative authority is intended to be sufficient to enable the department to assume and implement the federal section 404 dredge and fill permitting program in conjunction with the environmental resource permitting program established in this chapter"

F.S. 373.4146(2).

Q26: If an area has received a USDA determination of PCC, would the entire area included in that determination be considered non-jurisdictional?

A26: Again, "the [excluded] water features in question on prior converted cropland are wetlands, rather than tributaries, canals, impoundments" (The Navigable Waters Protection Rule – Public Comment Summary Document), or ditches.

"The existence of a tributary in or through prior converted cropland does not preclude application of the exclusion to the converted cropland. In other words, if there are wetlands near a tributary, the agencies will first analyze whether they are adjacent wetlands, as defined in the rule. All wetlands will be evaluated by the agencies consistent with the tests provided in the rule and the 1987 Wetlands Delineation Manual. Once wetlands are identified, the agencies would evaluate whether they are 'adjacent wetlands' under this rule and, if so, whether any exclusions apply to remove jurisdiction.

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Isolated wetlands, whether in agricultural areas or not, would not satisfy the definition of 'adjacent wetland' in the rule and are not subject to federal jurisdiction. This exclusion applies to the cropland itself, though other exclusions in the rule may cover ditches, canals, and artificial ponds that may be in or adjacent to the prior converted cropland. If a jurisdictional tributary flows through prior converted cropland, the prior converted cropland does not nullify the jurisdictional status of the tributary" (The Navigable Waters Protection Rule – Public Comment Summary Document).