

Waters of the U.S. (WOTUS)

- **WOTUS Include:**
 - **(a)(1): Traditional navigable waters, the territorial seas, and interstate waters**
 - **(a)(2): Impoundments of Waters of the U.S.**
 - **(a)(3): Tributaries**
 - **(a)(4): Adjacent Wetlands**
 - **(a)(5): Additional Waters**



(a)(3) - Tributaries

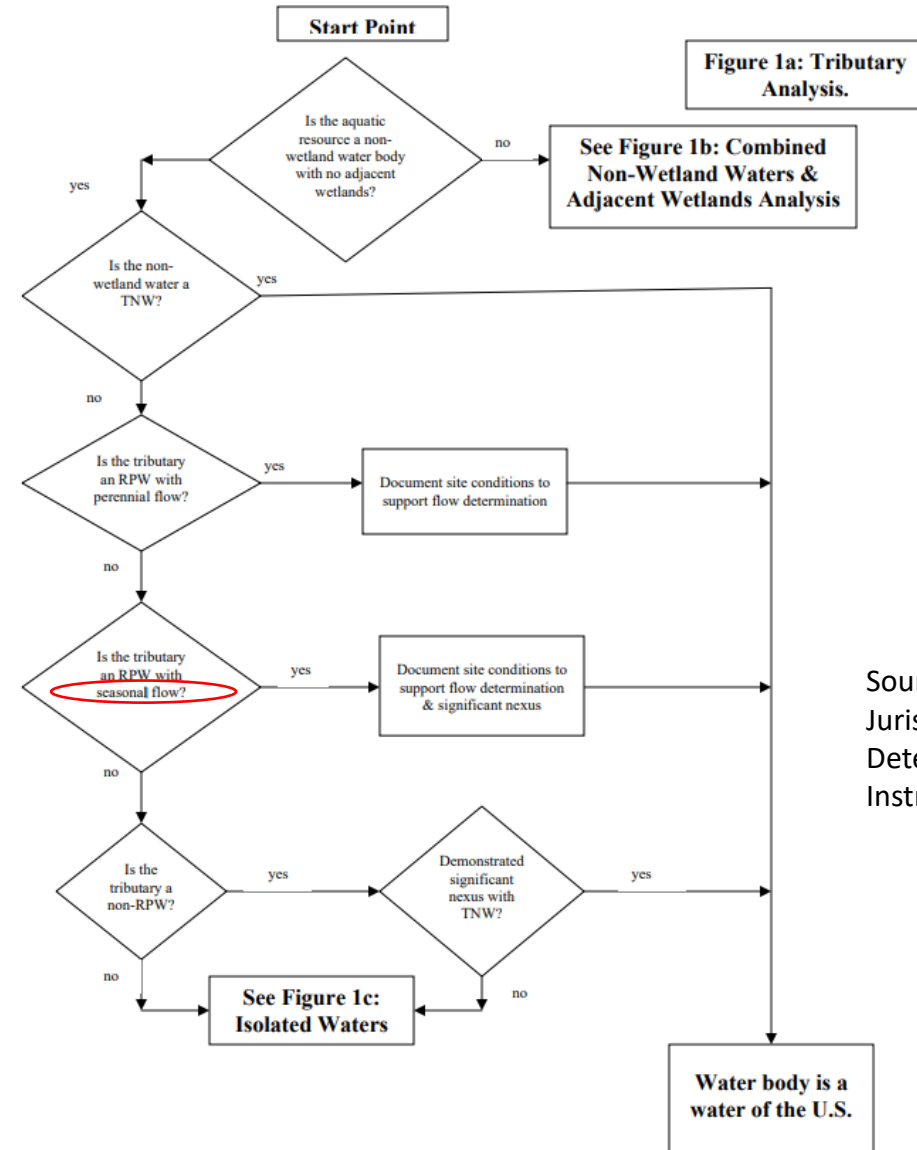
- Tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments...
- When the tributaries meet either:
 - The **Relatively Permanent** standard or
 - The **Significant Nexus** standard
 - *Longstanding approach of applying two standards*



(a)(3) - Tributaries

- **Changes from 1986 Regulations**

- New rule is consistent but has a somewhat different standard for determining if the tributary is “relatively permanent” or has “significant nexus.”



Source: USACE
Jurisdictional
Determination Form
Instruction Guidebook

(a)(3) - Tributaries

- **Changes from the 2020 NWPR**
 - New rule provides more protections with regards to the “relatively permanent” standard.
 - 2020 NWPR also excluded ephemeral waters and did not protect interstate waters not connected to a traditional navigable water or territorial sea.

(a)(3) - Tributaries

- **Relatively Permanent Standard**

- Relatively permanent, standing or continuously flowing waters connected to (a)(1) waters
- Waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters
- *“Provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters”*
- Standard encompasses surface waters that have flowing or standing water year-round or continuously during **certain times of the year.**
 - *“Extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.”*
- **RPWs do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation**

(a)(3) - Tributaries

- **Significant Nexus Standard**

- Waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.

More on this later!

Relatively Permanent

- **Changes from 1986 Regulations**

- New rule adds the territorial seas to the list of waters to which a water may be a tributary
- Deletes intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4)
- New rule is consistent but has a somewhat different definition.
 - RPW standard encompasses surface waters that have flowing or standing water year-round or continuously during **certain times of the year**, where pre-2015 tributaries are considered relatively permanent if they typically flow year-round or have continuous flow at least **seasonally**.

- **Changes from the 2020 NWPR**

- New rule adds protections back
 - Ephemeral waters are not excluded.
 - 2020 NWPR also only covered adjacent wetlands that had a regular surface water connection to (or touched) jurisdictional waters.

Significant Nexus

- **Changes from 1986 Regulations**

- New rule adds specific factors and functions to consider as part of the analysis.
- Changes the area to analyze to the “region” – similarly situated waters in the region.

- **Changes from the 2020 NWPR**

- 2020 NWPR removed significant nexus standard.

(a)(3) – Tributaries

Other Information

- Tributaries are not required to have a specific flow regime; however, flow characteristics like **duration** and **timing of flow** will be considered in determining whether tributaries met the relatively permanent or significant nexus standard.
 - Agencies decided not to establish a minimum duration because flow duration varies extensively by region
- USACE's well-established definition of an ordinary high water mark (OHWM) to assist with identifying tributaries.
- Agencies will assess discontinuity in the OHWM. A natural or human-made discontinuity in the OHWM does not necessarily sever jurisdiction upstream.

(a)(3) – Tributaries

Other Information

- Swales and erosional features characterized by low volume, infrequent, or short duration flow are not tributaries and are not jurisdictional.
- Agencies decided to explain directly the way that the relatively permanent standard should be implemented, rather than use terms such as “intermittent” and “perennial.”
- Does not require that relatively permanent flow come from particular sources.

Implementation – What to Expect

- **IT DEPENDS!!!**

- Court challenges
 - 17 farm, construction, mining groups filed suit
 - AG Paxton (TX) filed suit
- USACE District variation and typical practices
- Timing of guidance from USACE Headquarters
- New rule still has a lot of room for interpretation which equates to different practices in different Districts/geographies (nothing new here!)
 - Ex: “streamflow that occurs during the monsoon season in certain parts of the country may be relatively permanent or non-relatively permanent, depending on the conditions at the location.”
- Definitions of streamflow classifications are not included in this rule



- **Time delays**

- Waiting on USACE Headquarters guidance to be distributed
- Waiting on court challenges to be settled, stay issued, etc.
- Rollout of regionalized streamflow duration assessment methods (SDAMs)



Carland G. Holstead, PWS

Kimley-Horn and Associates, Inc.

Office: 469-914-8717

Mobile: 504-452-4791

Email: carland.holstead@kimley-horn.com