



Who Owns Which Ditch: The Basics of Ohio Ditch Law

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Ditches and Drainage in Ohio

Q. Is this a ditch, watercourse or stream?

A. It depends!

Private property and public laws relating to ditches.



Ohio Common Law

Ohio property and tort law recognize three “types” of water that now have similar bodies of defining law:

- Riparian and Littoral
- Groundwater
- Surface Water/Runoff

Ohio Common Law for Surface Water

McGlashan v. Spade Rockledge Corp., 62 Ohio St. 2d 55 (1980).

“

*A possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, not is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. **Each possessor is legally privileged to make reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others.** He incurs liability only when his harmful interference with the flow of surface water is unreasonable.*

Rest.(2d) of Torts 'Reasonableness' Factors

- Purpose of the use
- Suitability of use to waterbody
- Economic value of use
- Social value of use
- Extent and amount of harm caused
- Practicality of avoiding harm
- Protection of existing values in land and investments

Public Ownership and Jurisdiction of Ditches

Ohio Police Power Jurisdiction

- Ohio statutory ditch law

Federal Jurisdiction– WOTUS

- MS4 regulatory overlay
- Nationwide Permits

What is a Ditch?

- Federal authorities define ditches as artificial channels used to convey water.
- Ohio RC Chap. 6131, (“Single County Ditches”) simply lists ‘ditches’ among the list of “Improvements”



Ohio “Waters of the State ” Jurisdiction

6111.01(H)

“

***"Waters of the State"** means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.*

Authority to Regulate Ditches

ORC 6117.45.



“

No person shall tamper with or damage any drainage facility acquired or constructed by the county under this chapter or any apparatus or accessory connected with it or pertaining to it, or make any connection into or with the [drainage] facility, without the permission of the Bd. or in a manner or for a use other than as prescribed by the Bd.

Ohio Statutory Ditch Law

Revised Code Chapters:

RC 6131

Single
County Ditches

RC 6133

Joint
County Ditches

RC 6135

Interstate
County Ditches

RC 6137

Ditch
Maintenance Fund

RC 6151

Watercourses

The types of “Improvements” under Ohio’s ditch law include:

- 1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, boxing, tiling, filling, walling, arching, or any change in the course, location, or terminus of any **ditch**, drain, watercourse, or floodway;
- 2) The deepening, widening, or straightening or any other change in the course, location, or terminus of a river, creek, or run;
- 3) A levee or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;
- 4) The removal of obstructions such as silt bars, log jams, debris, and drift from any ditch, drain, watercourse, floodway, river, creek, or run;
- 5) The **vacating of a ditch** or drain.

Ohio Statutory Ditch Provisions

- The Procedure
- The Petition
- Comments from Owners
- County Engineer Duties – preparing preliminary report, including benefits, adverse impacts, and estimate of costs of improvement
- The View & the Hearing
- Dismissal or Approval of Petition
- Assessments
- Vacation of a Ditch or Drain

The Benefits

The county engineer estimates the benefits to land and owners, to public corporations as entities, and to the state resulting from drainage, conservation, control and management of water, and environmental, wildlife, and recreational improvements. Factors relevant to whether such advantages result include:

- (1) The watershed or entire land area drained or affected by the improvement;
- (2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;
- (3) The use to be made of the improvement by any owner, public corporation, or the state.

“Benefit” or “benefits” includes any or all of the following factors:

- Elimination or reduction of damage from flood;
- Removal of water conditions that jeopardize public health, safety, or welfare;
- Increased value of land resulting from the improvement;
- Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto;
- Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature

Evolution of Ohio Ditch Law?

<https://www.dispatch.com/news/20190225/archaic-ohio-law-requires-officials-to-view-ditches-in-person>

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BUY PHOTO HIDE CAPTION

Licking County Commissioner Tim Bubba, right, was among eight commissioners from three counties on Thursday who took a tour of drainage issues near Johnstown. [Marc Kovac/Dispatch]

When is a ditch not just a ditch?

- When it is a “watercourse” or “stream”
 - Ohio Law RC 6131.59
 - “When an improvement consisting of a ditch, drain, or watercourse has been established and constructed or used for seven years or more, it shall be considered to be a public watercourse. . . And shall have and possess in and to any such watercourse . . . The rights and privileges that relate or pertain to natural watercourses. . .”
 - A drainage ditch located on private property does not become a public watercourse by reason of RC 6131.59, unless it was established or improved pursuant to RC Chap. 6131 *Caldwell v Goldberg* (Ohio 1975), 43 Ohio St. 2d 48.
 - Federal jurisdiction (WOTUS “ephemeral streams”)

Federal Jurisdiction

- Under the 2015 Rule and in pre-2015 regulation as applied, ditches could be jurisdictional WOTUS where they are a tributary to jurisdictional waters or are ditches in upland with perennial or intermittent flow.

Figure A: WOTUS tributary in TN farm field as determined by the Corps earlier this year.



Source:

Comments of the National Pork Producers Council on Proposed Rule to Define “Waters of the United States”

Docket #: EPA-HQ-OW-2011-0880

Source:

*Comments of the National Pork Producers Council on
Proposed Rule to Define “Waters of the United States”
Docket #: EPA-HQ-OW-2011-0880*



**Figure B: Drainage feature considered to have bed,
bank and ordinary high water mark under recent
Army Corps guidance on this subject.**



Waters of the US

- The Proposed Revised Definition attempts to clarify what waters are NOT federally regulated
- Fewer ditches will be considered WOTUS
 - Ditches constructed in upland and ditches with ephemeral flow will NOT be considered WOTUS

EPA Fact Sheet: https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_-_wotus_revision_overview_12.10_1.pdf



FACT SHEET

Proposed Revised Definition of "Waters of the United States"

BACKGROUND

- On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) proposed a revised definition for "waters of the United States," which would establish the scope of federal regulatory authority under the Clean Water Act in a more clear and understandable way.
- The agencies' proposal would be clearer and easier to understand than previous regulations. It would help landowners understand whether a project on his or her property would require a federal permit or not—saving Americans time and money.
- Right now, because of litigation, the 2015 Clean Water Rule (2015 Rule) is in effect in 22 states, the District of Columbia, and the U.S. territories, and previous regulations, issued in the 1980s, are in effect in the remaining 28 states.
- If finalized, the agencies' proposed rule would apply nationwide, replacing the patchwork framework for Clean Water Act jurisdiction that has resulted from litigation challenging the 2015 Rule. The proposal would also re-balance the relationship between the federal government, states, and tribes in managing land and water resources.
- The proposal respects the limited powers that the executive branch has been given under the Constitution and the Clean Water Act to regulate navigable waters. The proposal limits where federal regulations apply and gives states and tribes more flexibility to determine how best to manage waters within their borders. Together, the agencies' proposal and existing state and tribal regulations and programs would provide a network of coverage for the nation's water resources in accordance with the objectives and policies of the Clean Water Act.
- The EPA and the Army reviewed and considered the extensive feedback and recommendations the agencies received from states, tribes, local governments, and stakeholders throughout consultations and pre-proposal meetings and webinars. This input helped highlight the issues that are most important to state and tribal co-regulators and stakeholders, including those directly affected by the scope of Clean Water Act jurisdiction.

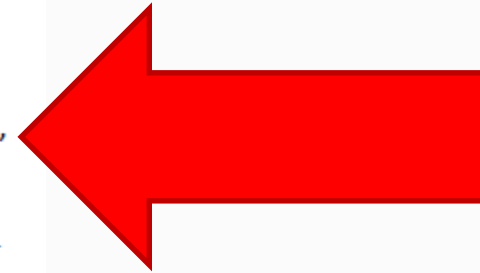
THE PROPOSED DEFINITION

- This proposed rule would provide clarity, predictability, and consistency so that regulators and the public can understand where the Clean Water Act applies—and where it does not. Such straightforward regulations would continue to protect the nation's navigable waters, help sustain economic growth, and reduce barriers to business development.
- The agencies' proposal is consistent with the statutory authority granted by Congress, the legal precedent set by key Supreme Court cases, and the February 2017 Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."
- The role of federal government under the Clean Water Act is ultimately derived from Congress' commerce power over navigation. As a result, this proposal clearly limits "waters of the United

Fewer Ditches will be considered WOTUS

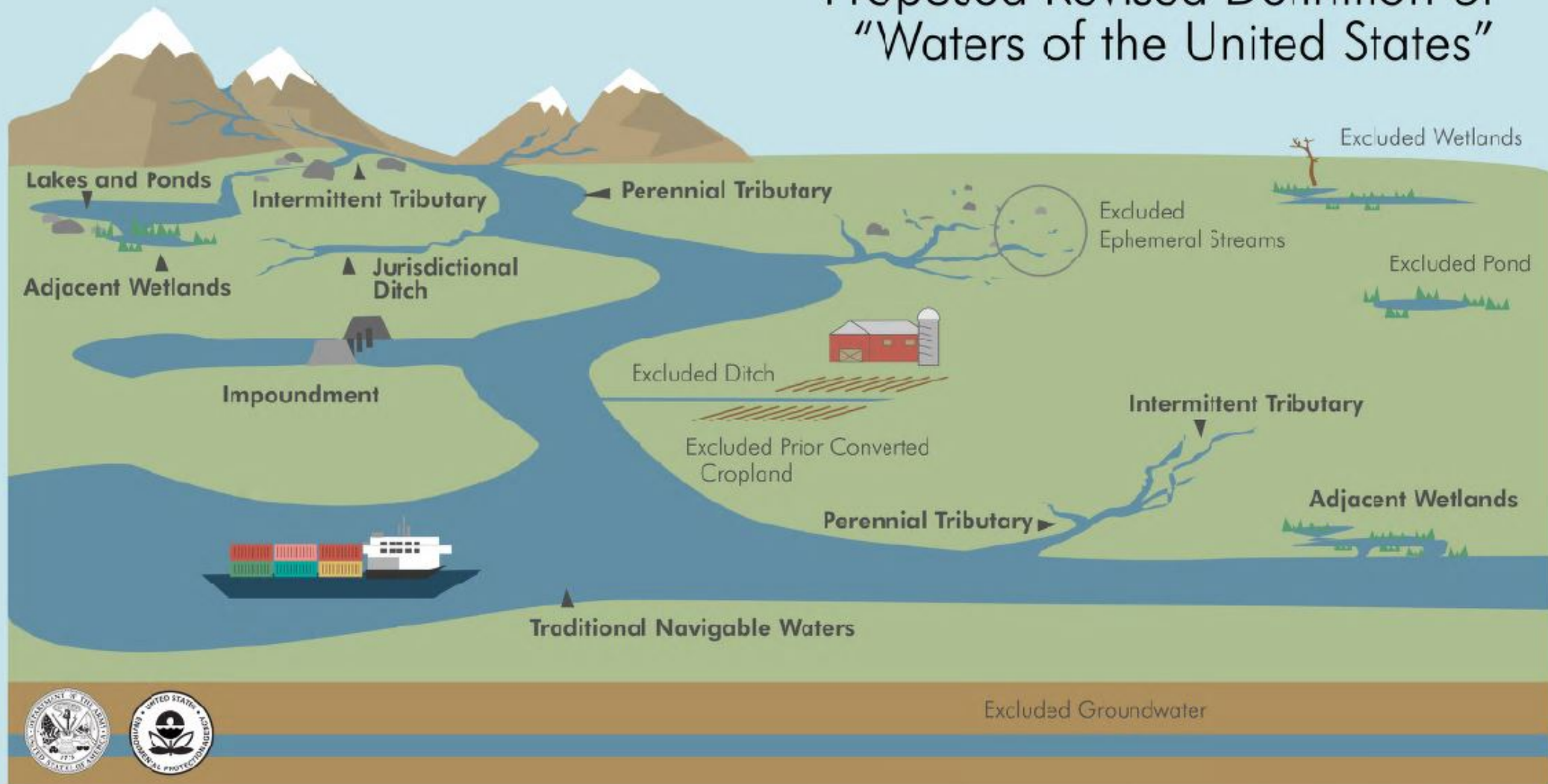
The proposal also clearly outlines what would not be “waters of the United States,” including:

- Waters that would not be included in the proposed categories of “waters of the United States” listed above—this would provide clarity that if a water or feature is not identified as jurisdictional in the proposal, it would not be a jurisdictional water under the Clean Water Act.
- Ephemeral features that contain water only during or in response to rainfall.
- Groundwater.
- Ditches that do not meet the proposed conditions necessary to be considered jurisdictional, including most farm and roadside ditches.
- Prior converted cropland.
 - This longstanding exclusion for certain agricultural areas would be continued under the proposal, and the agencies are clarifying that this exclusion would cease to apply when cropland is abandoned (*i.e.*, not used for, or in support of, agricultural purposes in the preceding five years) and has reverted to wetlands.
- Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.
- Wastewater recycling structures such as detention, retention and infiltration basins and ponds, and groundwater recharge basins would be excluded where they are constructed in upland.
- Waste treatment systems.
 - Waste treatment systems have been excluded from the definition of “waters of the United States” since 1979 and would continue to be excluded under this proposal; however, waste treatment systems are being defined for the first time in this proposed rule.
 - A waste treatment system would include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge).



Ditches constructed in upland and ditches with ephemeral flow will **NOT** be considered WOTUS

Proposed Revised Definition of "Waters of the United States"



* For illustrative purposes only. Proposed jurisdictional waters in **bold**.

Clean Water Act MS4s

The WOTUS Proposal expressly excludes stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater runoff.





Clean Water Act MS4s

MS4 “does not solely refer to municipally owned storm sewer systems, but rather is a term of art with a much broader application that can include [other public entities]. [MS4] is not just a system of underground pipes-it can include roads with drainage systems, gutters and ditches” O.A.C. 3745-39-02 (C).

"Streams" and Nationwide Permits

NW Permit 41

Reshaping Existing
Drainage Ditches

NW Permit 43

Stormwater
Management
Facilities

NW Permit 46

Discharges into
Ditches

Ditches and Drainage in Ohio

Is this a ditch, watercourse or stream?

It depends upon whether:

- *It has defined bed and bank?*
- *Is it on private property?*
- *Has it been subject to an Ohio petition?*
- *Is it tributary or adjacent to WOTUS?*
- *Other case by case factors.*



Questions?
Comments?
Thank You.

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