

DRAFT: Waters that would require state permit under state Dredge and Fill Bill
Based on 6/5/20 CDPHE draft bill

Clearly included	Clearly excluded	Not clear
Ephemeral “significant nexus” tributaries	Ephemeral tributaries without “significant nexus”	Ditches (other than those excluded under Rapanos guidance)
Wetlands adjacent to ephemeral “significant nexus” tributaries	Wetlands adjacent to ephemeral tributaries without “significant nexus”	MS4s (Municipal stormwater)
“significant nexus” wetlands that no longer qualify as “adjacent” to relatively permanent non-navigable tributaries	Isolated wetlands	Wetlands that no longer qualify as adjacent to relatively permanent tributaries <i>and</i> do not have “significant nexus”
	Swales or erosional features	Non-navigable, isolated water bodies that are not “tributaries” (e.g. some gravel pits, lined or unlined)
	Groundwater	Diffuse stormwater runoff and directional sheet flow over upland
	Prior converted cropland	Areas of depression where irrigation water collects
	Wetlands that abut relatively permanent tributaries (still WOTUS)	
	Waters with “unexpired federal agency JD” ¹	Waters with an expired federal JD received before 6/22/20
		Projects that received 404 permits prior to 6/22/20
		Does this include all “similarly situated” waters?

Overarching questions:

Who determines boundaries e.g. “significant nexus”?

How is prior precedent applied?

How to get predictability in determinations?

Bring in discussion among aquatic experts?

¹ Q – what about Fed position that they may not be able to enforce permits that were issued w/o regard to whether the waters were jurisdictional?