

WWE
MEMORANDUM

To: WWE Clients and Colleagues
Via Email

From: Wright Water Engineers, Inc.
Drew Maraglia

Date: February 2019

Re: Summary of the Proposed Revised Definition of “Waters of the United States”

GENERAL INFORMATION/BACKGROUND

On December 11, 2018, the United States Environmental Protection Agency and the Department of the Army (“the agencies”) published for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). The proposal is the second step in a comprehensive, two-step process intended to review and revise the definition of “waters of the United States” (WOTUS) consistent with the Executive Order signed on February 28, 2017, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” This document summarizes the prepublication version of the proposed rule and is not a reflection of Wright Water Engineers, Inc.’s opinion or interpretation of how any proposal may or should be implemented. Unless an alternative reference is provided, the following content was sourced directly from the December 11, 2018 prepublication version of the proposed rule.

The proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of WOTUS subject to federal regulation under the CWA and water or land that is subject to exclusive state or tribal jurisdiction, consistent with the scope of jurisdiction authorized under the Act and the direction in the Act to “recognize, preserve, and protect the primary responsibilities and rights of States to [...] plan the development and use [...] of land and water resources,” (33 U.S.C. 1251[b]). The proposed definition would replace the approach in the 2015 Rule (2015 Rule) and the pre-2015 regulations. Currently, due to litigation, the 2015 Rule is in effect in 22 states, the District of Columbia, and the United States territories. Regulations issued in the 1980s, prior to the 2015 Rule, govern the remaining 28 states. If finalized, the agencies’ proposed rule would apply nationwide and would replace the patchy framework for CWA jurisdiction that has resulted from litigation challenging the 2015 Rule. The prepublication version of the revised definition of WOTUS can be found at <https://www.epa.gov/wotus-rule>.

The agencies consider their proposal to adhere more closely than the 2015 Rule to guiding principles articulated by the United States Supreme Court in certain previous case decisions. Specifically, *United States v. Riverside Bayview* (2015), which “held that USACE had jurisdiction over discharges into wetlands adjacent to navigable waters, but it expressly left open the question of jurisdiction over wetlands that were not adjacent,” (National Research Council, 1995); *SWANCC v. USACE* (2001), which “held that the provision of the CWA [...] does not extend to isolated, abandoned sand and gravel pits with seasonal ponds, which provide migratory bird habitats,” (Oyez, N.D.); and *Rapanos v. United States* (2006), whereby the definition of WOTUS was agreed to include some waters that are not navigable in the traditional sense. The 2008 guidance on the *Rapanos* decision (“2008 Rapanos Guidance”) clarified that the agencies would assert guidance over traditional navigable waters (TNWs) and their adjacent wetlands, relatively permanent non-navigable tributaries of TNWs and wetlands that abut them, non-navigable tributaries that are not relatively permanent if they have a significant nexus with a TNW, and wetlands adjacent to non-navigable tributaries that are not relatively permanent if they have a significant nexus with a TNW.

THE PROPOSED DEFINITION AND KEY CHANGES

The agencies propose to interpret the term WOTUS as waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and to acknowledge that not all waters are WOTUS. WOTUS will generally encompass traditional navigable waters, including the territorial seas, tributaries that contribute perennial or intermittent flow to such waters, certain ditches, certain lakes and ponds, impoundments of otherwise jurisdictional waters, and wetlands adjacent to other jurisdictional waters.

The agencies' proposal would eliminate the process of determining whether a "significant nexus" exists between a water and a downstream traditional navigable water as directed under the agencies' 2008 Rapanos Guidance or whether a water has a significant nexus to a traditional navigable water, interstate water, or territorial sea, as codified in the agencies' 2015 Rule defining WOTUS.

"Interstate waters" would no longer be a separate category of jurisdictional waters under the proposal. Instead, the agencies argue that those water features falling into the 2015 Rule and pre-2015 practice "interstate water" category would be jurisdictional if they satisfy the conditions of another category of jurisdictional waters, such as a TNW, tributary, or lakes and ponds.

The proposed rule outlines six clear categories of waters that would be considered WOTUS. A discussion of the change of potentially jurisdictional status, if any, from the 2015 Rule or pre-2015 practice is provided:

Traditional Navigable Waters

- *PROPOSAL*: WOTUS would encompass TNWs including the territorial seas. Large rivers and lakes, tidal waters, tidally influenced waterbodies along coastlines including wetlands, and the territorial seas used in interstate or foreign commerce, would be included.
- *CHANGE FROM 2015 RULE/PRE-2015 PRACTICE*: No change, except that the territorial seas are identified in the proposal as a type of traditional navigable water.

Tributaries

- *PROPOSAL*: Tributaries would include rivers, streams, or other similarly occurring surface water channels that contribute perennial or intermittent flow to a TNW in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands. These naturally occurring surface water channels must not flow only in response to precipitation events.

A tributary does not lose its status if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break.

- *CHANGE FROM 2015 RULE/PRE-2015 PRACTICE*: The proposed definition would limit the definition of WOTUS to those rivers and streams that contribute perennial or intermittent flow to downstream jurisdictional waters. Ephemeral features that flow only in direct response to precipitation, such as ephemeral drainages, dry washes, arroyos, and similar features, would not be considered WOTUS.

Certain Ditches

- *PROPOSAL*: A ditch is defined as, "artificial channel used to convey water." Ditches would be jurisdictional where they are traditional navigable waters or subject to the ebb and flow of the tide. Ditches may also be jurisdictional where they satisfy conditions of the tributary definition as proposed and either 1) were constructed in a tributary or 2) were built in adjacent wetlands.

- *CHANGE FROM 2015 RULE/PRE-2015 PRACTICE:* Fewer ditches will be considered jurisdictional under the proposal, mostly because no ditches constructed in upland and no ditches with ephemeral flow would be considered jurisdictional.

Both the 2015 Rule and pre-2015 practice found ditches jurisdictional where they were a tributary, including ditches constructed in upland with perennial or intermittent flow.

Certain Lakes and Ponds

- *PROPOSAL:* Under the proposal, lakes and ponds would be jurisdictional where they are traditional navigable waters.

Lakes and ponds would be jurisdictional where they contribute perennial or intermittent flow to a traditional navigable water either directly, through other WOTUS, or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream.

Lakes and ponds would be jurisdictional where they are flooded by a WOTUS in a typical year, such as many oxbow lakes.

- *CHANGE FROM 2015 RULE/PRE-2015 PRACTICE:* Lakes and ponds were not a separate category in the 2015 Rule or pre-2015 practice.

The proposal more closely adheres to the pre-2015 practice of regulating lakes and ponds as traditional navigable waters or as part of the tributary network of traditional navigable waters.

Under the proposed definition, fewer lakes and ponds may be jurisdictional than under the 2015 Rule because non-navigable, isolated lakes and ponds were considered adjacent waters together with isolated wetlands under the expanded definition of “neighboring” in the 2015 Rule.

Impoundments

- *PROPOSAL:* Impoundments of WOTUS would be jurisdictional.
- *CHANGE FROM 2015 RULE/PRE-2015 PRACTICE:* No change. Impoundments of jurisdictional waters would remain jurisdictional under the proposal as they were under the 2015 Rule or pre-2015 practice. Alteration of a WOTUS by impounding it would not change the water’s jurisdictional status, consistent with longstanding agency practice, unless jurisdiction has been affirmatively relinquished.

Adjacent Wetlands

- *PROPOSAL:* Wetlands that physically touch/about at either a point or a side or have a direct hydrologic surface connection to other jurisdictional waters (TNWs, tributaries to those waters, jurisdictional ditches, jurisdictional lakes and ponds, and impoundments of otherwise jurisdictional waters) in a typical year that results from 1) inundation from a WOTUS to the wetland or 2) perennial or intermittent flow between the wetland and a WOTUS in either direction would be “adjacent.”

Wetlands that are near a jurisdictional water but do not physically touch that water because they are separated, for example by a berm, levee, or upland, would be adjacent only where they have a surface water connection described in the previous bullet through or over the barrier, including wetlands flooded by jurisdictional waters in a typical year.

- *CHANGE FROM 2015 RULE/PRE-2015 PRACTICE:* Circumstances are more limited under the proposed rule where wetlands would be considered adjacent relative to both the 2015 Rule and pre-2015 practice. The 2015 Rule identified water features located within the 100-year floodplain or within 4,000 feet of the high tide line or ordinary high water mark of certain categories of jurisdictional waters as requiring a case-specific analysis to determine if they have a non-speculative or not insubstantial significant nexus to said

regulated water. Regulated adjacent wetlands are now proposed to only include water features that are inundated by a jurisdictional water in a typical year.

Wetlands separated from downstream WOTUS by a berm or dike were considered adjacent under the 2015 Rule/pre-2015 practice. Under the agencies' new proposal, wetlands must either abut jurisdictional waters or have a direct hydrological surface connection to jurisdictional waters in a typical year to be jurisdictional themselves; wetlands physically separated from jurisdictional waters by a berm, dike, or other barrier are not adjacent if they lack a direct hydrologic surface connection to a jurisdictional water in a typical year.

The agencies also propose eleven exclusions from the definition of WOTUS, some of which were previously considered exempt/preamble water features:

- Ephemeral Features: Ephemeral features that flow only in direct response to precipitation, such as ephemeral drainages, dry washes, arroyos, and similar features. These features lack the required perennial or intermittent flow regimes to satisfy the tributary definition under the proposal and therefore would not be jurisdictional.
- Diffuse Stormwater Run-Off such as Directional Sheet Flow Over Upland
- Groundwater: Groundwater, including groundwater drained through subsurface systems.
- Certain Ditches: 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.
- Certain Lakes and Ponds: Artificial lakes and ponds constructed in upland, such as water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds, as long as they are not subject to jurisdiction under other parts of the proposed rule.
- Water-Filled Depressions Created in Upland Incidental to Mining or Construction Activity
- Pits Excavated in Upland for the Purposes of Obtaining Fill
- Certain Stormwater Control Features: Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.
- Certain Wastewater Recycling Structures: 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 WOTUS since 1979 and would continue to be excluded under the 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).

The agencies propose the following definitions:

- Adjacent wetland: Wetlands that abut or have a direct hydrologic surface connection to other WOTUS in a typical year.
- Abut: When a wetland touches a WOTUS at either a point or a side.

- Certain times of a typical year: Intended to include extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year.
- Direct hydrologic surface connection: Occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water.
- Ditch: Artificial channel used to convey flow.
- Ephemeral: Surface water flowing or pooling only in direct response to precipitation, such as rain or snowfall.
- Intermittent: Surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts. Continuous surface flow during certain times of the year (see definition above) may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. The agencies are not proposing a specific duration (e.g., the number days, weeks, or months) of surface flow that constitutes intermittent flow as the agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.
- Navigable-in-fact: Used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Includes waters beyond those capable of navigation by large vessels, as well as waters that are not continuously navigable or are not navigable in all seasons, and waters that have never been used in commerce, so long as they are susceptible for use in commerce.
- Perennial: Surface water flowing continuously year-round during a typical year.
- Traditional navigable waters: All waters that are currently defined in 33 CFR part 329, which implements Sections 9 and 10 of the Rivers and Harbors Act, and by numerous decisions of the federal courts, as well as all other waters that are navigable-in-fact.
- Tributary: A river, stream, or similarly occurring surface water channel that contributes perennial or intermittent discrete and confined flow (as opposed to diffuse overland flow) forming geographic features such as rivers or streams to a TNW in a typical year either directly or indirectly through other jurisdictional waters so long as those water features convey perennial or intermittent flow downstream.
- Typical year: Within the normal range of precipitation over a rolling 30-year period for a particular geographic area. Would generally not include times of drought or extreme flooding.
- Upland: Any land area above the ordinary high water mark or high tide line that does not satisfy all three wetland delineation factors.
- Wetland: Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

FEDERAL-STATE RELATIONSHIP

- In accordance with section 101(b) of the CWA, the agencies' proposed rule would recognize and respect the primary responsibilities and rights of states and tribes to regulate and manage their land and water resources.
- Under the proposal, there is a clear distinction between federal waters and waters subject to the sole control of the states and tribes.

- The CWA envisions an approach whereby states, tribes, and the federal government work in partnership to protect the nation's waters from pollution.
- The agencies' proposal is in line with that intent, and appropriately identifies waters that should be subject to federal regulation under the CWA.
- States and many tribes have existing regulations and programs that apply to waters within their borders, whether or not they are considered WOTUS.
- Together, the agencies' proposed definition and existing state and tribal regulations and programs would provide a network of coverage for the nation's water resources in accordance with the objective and policies of the CWA.

FOR MORE INFORMATION

Although the final rule may be issued in spring/summer 2019, it is unclear if the final rule will actually go into effect as it will likely be challenged in court. The previous WOTUS rule proposed under the Obama administration in 2015 was only recently reinstated in 26 states, with the implementation in the remaining states still on hold due to ongoing litigation. Project proponents should not wait for the new rule to be implemented if projects need a jurisdictional determination or have features that may be considered non-jurisdictional under the proposed rule in the future.

If you would like WWE to assist with questions on the proposed Revised Definition of Waters of the United States, contact these staff at WWE at (303) 480-1700:

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REFERENCES

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