



**AMERICAN FISHERIES SOCIETY WEBINAR:
WATERS OF THE US (WOTUS) – WHAT YOU NEED TO KNOW ABOUT THE RULE AND
HOW TO TAKE ACTION**

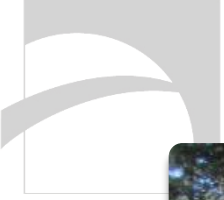
February 27, 2019

Comparison of Proposed Rule to Revise the Definition of “Waters of the United States” and Existing WOTUS Rules and Regulations



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2013/06/02

Photo: G. Davies

EPA and US Army Corps Propose Rule to Revise the Definition of “Waters of the United States”

**WOULD REVISE BOTH 2015
CLEAN WATER RULE AND PRE-
2015 DEFINITIONS OF WOTUS**



CURRENT WOTUS REGULATION

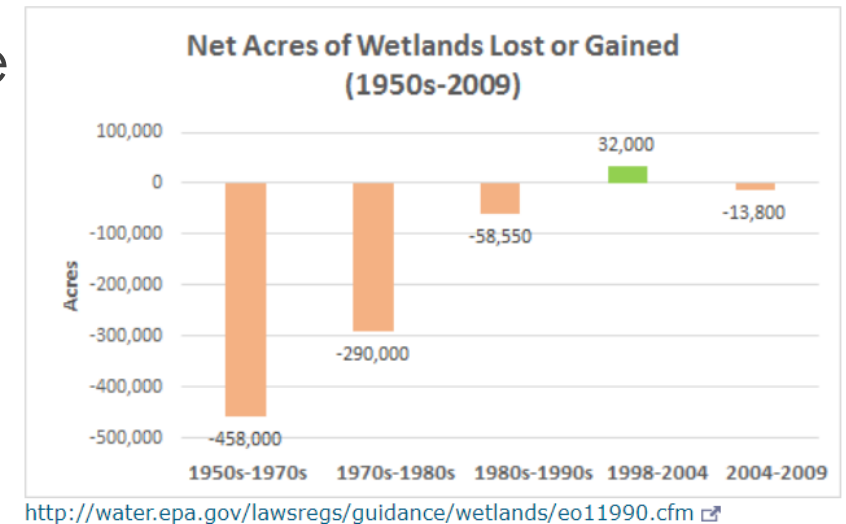


Photo: G. Davies

- ▶ Proposed Rule to Revise the Definition of WOTUS is not in effect.
- ▶ Currently, the 2015 Clean Water Rule is in effect in 22 states, D.C. & US territories.
- ▶ In 28 states, the pre-2015 Regulations and Guidance are in effect.

SCOPE OF RULE TO REVISE CWR

- ▶ Any revised WOTUS definition would apply to the entire Clean Water Act, not just Section 404.
- ▶ Does not consider or address the “No net loss of wetlands” national policy established by George H. W. Bush in 1989.
- ▶ The proposed Rule seeks comment on a wide variety of issues that, if incorporated into the final Rule, could further constrain the definition of WOTUS, thereby limiting the geographic scope of the CWA even more.





SCOPE OF RULE TO REVISE CWR

- ▶ Proposed Rule does not appear to provide documentation as to how the goal of the Clean Water Act, “...to restore and maintain the chemical, physical and biological integrity of the nations’ waters...” would be achievable should the proposed Rule be implemented. The CWA recognizes multi-parameter connectivity (“chemical, physical and biological integrity”), whereas the proposed Rule limits jurisdictional connectivity.

FEDERAL WATER POLLUTION CONTROL ACT

(33 U.S.C. 1251 et seq.)

AN ACT To provide for water pollution control activities in the Public Health Service of the Federal Security Agency and in the Federal Works Agency, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RESEARCH AND RELATED PROGRAMS

DECLARATION OF GOALS AND POLICY

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;



RELATIONSHIP TO SCIENCE

- ▶ The 2015 Clean Water Rule is supported by EPA's 2015 "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" report, which incorporates results from over 1,200 peer-reviewed scientific publications, and which was externally peer-reviewed by the EPA Science Advisory Board, and also by a "Brief of the *Amici Curiae* in Support of Respondents and in Support of the Clean Water Rule", which documents the state of the science in support of the 2015 CWR. See: https://www.stetson.edu/law/international/biodiversity/media/amici_curiae_brief_of_wetland_and_water%20scientists-01-20-17_filed.pdf.
- ▶ The Agencies do not provide any comparable body of peer-reviewed science to support the proposed Rule.



2015 CWR & Pre-2015 jurisdiction vs Proposed Rule to Revise

2015 CWR & Pre-2015 Jurisdiction

- ▶ **Based on the Agencies' interpretation of Justice Kennedy's 2006 Rapanos "significant nexus" test** for jurisdiction.
- ▶ **Traditional navigable waters** – no change.
- ▶ **Interstate waters** – independent category of jurisdiction, jurisdictional by virtue of being "interstate".

Proposed Rule to Revise CWR

- ▶ Eliminates Justice Kennedy's 2006 Rapanos "significant nexus" test for jurisdiction. Based on **Justice Scalia's 2006 Rapanos opinion, as directed by President Trump's 2/28/2016 Executive Order.**
- ▶ **Traditional navigable waters** – no change.
- ▶ **Interstate waters** – no longer an independent category, and only jurisdictional if they meet conditions of another category of jurisdictional waters.



2015 CWR & Pre-2015 jurisdiction vs Proposed Rule to Revise

2015 CWR & Pre-2015 Jurisdiction

- ▶ **Tributaries** – Some ephemeral streams are within jurisdiction.
- ▶ **Ditches – jurisdictional when they are tributary**, including ditches with perennial or intermittent flow in upland. Exclusions for maintenance of drainage ditches, and for normal agriculture, silviculture, ranching activities, agricultural stormwater discharges, and irrigation return flows.

Proposed Rule to Revise CWR

- ▶ **Tributaries** – must contribute perennial or intermittent flow to downstream navigable waters in a typical year to be jurisdictional. **Ephemeral features are excluded from jurisdiction.**
- ▶ **Ditches** – Reduction in jurisdictional ditches. **No ditches constructed in upland and no ditches with ephemeral flow are jurisdictional.** Maintains existing exclusions.



2015 CWR & Pre-2015 jurisdiction vs Proposed Rule to Revise

2015 CWR & Pre-2015 Jurisdiction

- ▶ **Lakes and Ponds** – Not in a separate category. Non-navigable, isolated lakes & ponds are jurisdictional if considered adjacent or neighboring, per the Agencies' interpretation of Justice Kennedy's "significant nexus" opinion.
- ▶ **Impoundments of jurisdictional waters** – More waters (with associated impoundments) are jurisdictional under 2105 CWR and Pre-2015 CWR than under Proposed Rule to Revise.

Proposed Rule to Revise CWR

- ▶ **Lakes and Ponds** – Now in a **separate category. Non-navigable, isolated lakes and ponds are no longer jurisdictional** due to elimination of Justice Kennedy's "significant nexus" concept.
- ▶ **Impoundments of jurisdictional waters** – Regulated as they are under 2015 CWR and Pre-2015 regulations and guidance. However, **fewer waters are jurisdictional**, thus likely leading to reduction in jurisdictional impoundments.



2015 CWR & Pre-2015 jurisdiction vs Proposed Rule to Revise

2015 CWR & Pre-2015 Jurisdiction

- ▶ **Adjacent Wetlands – Definition reliant upon Agencies’ interpretation of Justice Kennedy’s “significant nexus” opinion and underlying science, and is consistent with dictionary definition of “adjacent”.**

Wetlands behind berms or dikes may be considered “adjacent” and therefore jurisdictional due to their functional “significant nexus”.

- ▶ **2015 CWR – By categorical treatment of many waters and wetlands, reduces need for case-by-case “significant nexus” analysis, compared to pre-2015 jurisdiction.**

Proposed Rule to Revise CWR

- ▶ **Adjacent Wetlands – More limited jurisdiction over wetlands. Wetlands must either abut jurisdictional waters or have a direct hydrological surface connection to jurisdictional waters in a typical year. Only partially consistent with dictionary definition of “adjacent”.** If wetlands are physically separated from jurisdictional waters by a berm, dike or barrier, and lack a direct hydrologic surface connection in a typical year, they are not jurisdictional.

- ▶ Attempts to **eliminate** need for case-specific “significant nexus” test through categorical treatment of tributaries and adjacent wetlands. “Significant nexus” is no longer a jurisdictional test.



PROPOSED RULE TO REVISE CWR: Redefinition of the term “adjacent”

2015 CWR & Pre-2015 Jurisdiction

- ▶ **Adjacent Wetlands** – consistent with Webster’s (1994) dictionary definition, **meaning “next to”, “adjoining”, “to lie near”, or “close to”**.
- ▶ Definition **reliant upon Agencies’ interpretation of Justice Kennedy’s “significant nexus” opinion and underlying science**. Wetlands behind berms or dikes may be considered “adjacent” and therefore jurisdictional due to their functional “significant nexus”.
- ▶ Wetlands have “significant nexus” if ecological connection can be reasonably inferred. Based on scientific assessment.

Proposed Rule to Revise CWR

- ▶ **Adjacent Wetlands** – Wetlands must either abut jurisdictional waters or have a direct hydrological surface connection to jurisdictional waters in a typical year.
- ▶ **Redefines the term “adjacent” to exclude “next to”, “to lie near” and “close to”, and instead to be synonymous with “abut”,** which requires that the wetland touch a water of the United States at least at one point or on one side.
- ▶ **Excludes some types of wetlands that have ecological connection to waters of the United States.**

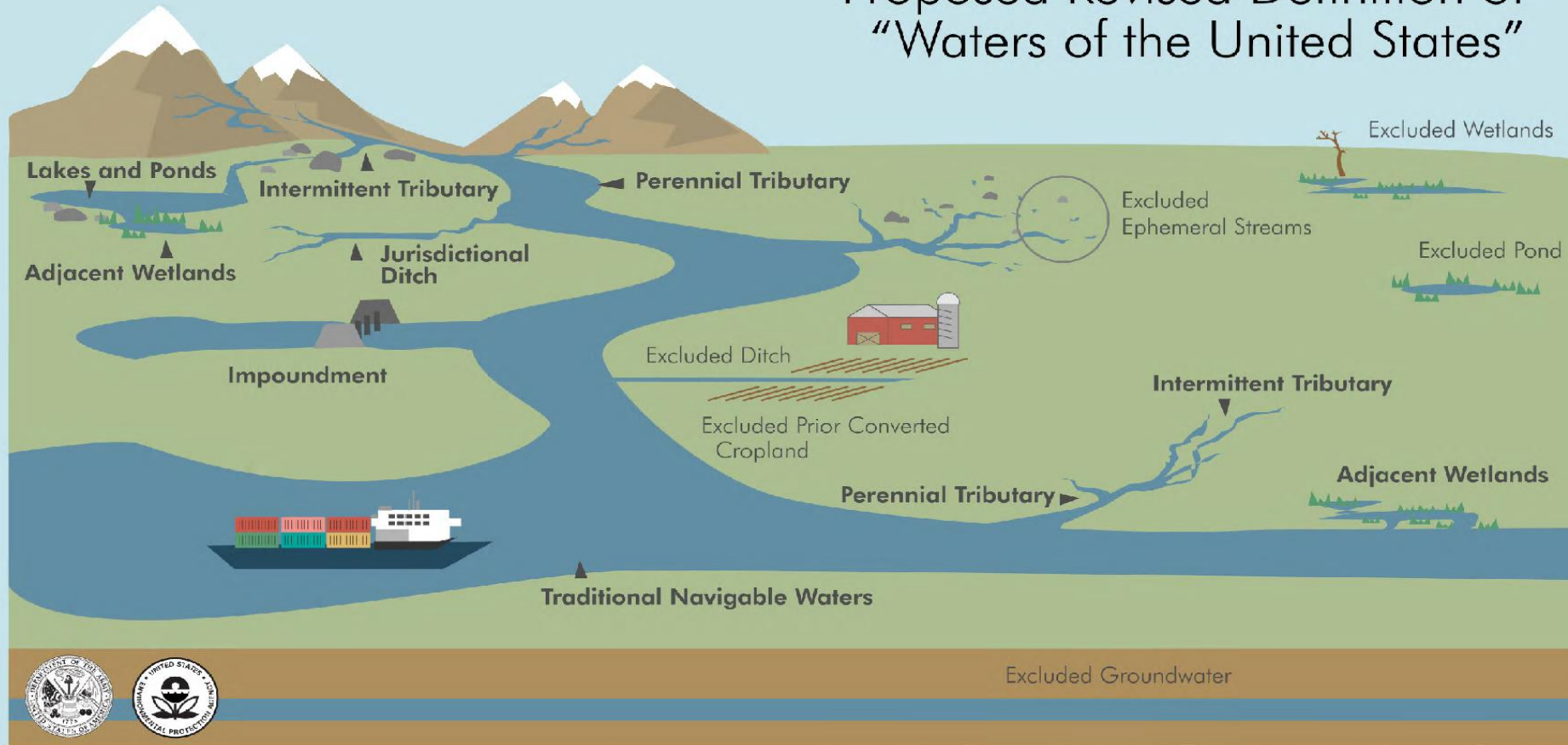


CONNECTIVITY AND FIELD ASSESSMENT

The proposed Rule

- Excludes the concept of connectivity beyond a direct hydrologic connection or “abutting”, and thus excludes chemical, biological, ecological and indirect hydrologic connectivity (“significant nexus”) for determining jurisdiction and excludes non-floodplain, “geographically isolated” wetlands, and ephemeral features.
- Eliminates case-specific *significant nexus* tests, however, the proposed Rule acknowledges the need for case-specific site analysis, and for complex, professional-level site evaluations to determine jurisdiction in a variety of situations.
- **The 2015 CWR** uses readily visible characteristics such as banks, bed and ordinary high water marks to determine tributary jurisdiction, whereas the proposed Rule would require a determination of the source of stream water, excluding ephemeral features that are fed only by precipitation and regulating intermittent and perennial features fed by groundwater and snowmelt, thus necessitating monitoring duration of flow and origin of flow to distinguish between ephemeral, intermittent and perennial.

Proposed Revised Definition of "Waters of the United States"



EPA infographic showing jurisdiction of proposed Rule to Revise the definition of WOTUS. Proposed jurisdictional waters are in **bold**.

Note that coastal waters are not addressed in the infographic.

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





Exclusions from Jurisdiction

Pre-2015 Rules

Codified Exclusions:

- Prior converted cropland
- Existing normal farming, silviculture, & ranching activities
- Maintenance of drainage ditches
- Agricultural stormwater discharges and irrigation return flows
- Waste treatment systems

2015 CWR

Pre-2015 Exclusions Maintained:

- Prior converted cropland
- Existing normal farming, silviculture, & ranching activities
- Maintenance of drainage ditches
- Agricultural stormwater discharges and irrigation return flows
- Waste treatment systems

Proposed Rule

Pre-2018 Exclusions Maintained:

- Prior converted cropland, **but new definition and explanation**
- Existing normal farming, silviculture, & ranching activities
- Maintenance of drainage ditches
- Agricultural stormwater discharges and irrigation return flows
- Waste treatment systems, **but defined for first time and add settling basins and cooling ponds**



Exclusions from Jurisdiction

Pre-2015 Rules

Excluded By Practice, But Not Codified:

- Groundwater
- Some ditches
- Water-filled depressions in uplands incidental to construction or resulting from fill, sand or gravel extraction
- Wastewater recycling structures constructed in uplands
- Groundwater recharge basins
- Artificially irrigated areas (such as rice & cranberry fields) that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland and not meeting jurisdictional requirements

2015 CWR

Newly Codified Exclusions:

- Groundwater
- Some ditches
- Stormwater management systems constructed in uplands

Maintains Pre-2015 Exclusion By Practice, But Not Codified:

- Water-filled depressions in uplands incidental to construction or resulting from fill, sand or gravel extraction
- Wastewater recycling structures constructed in uplands
- Groundwater recharge basins
- Artificially irrigated areas (such as rice & cranberry fields) that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland and not meeting jurisdictional requirements

Proposed Rule

2015 CWR Exclusions Maintained:

- Groundwater, **but clarifies that groundwater drained through subsurface drainage system is an exclusion**
- Some ditches
- Stormwater management systems constructed in uplands



Exclusions from Jurisdiction

Pre-2015 Rules

Excluded By Practice, But Not Codified:

- Groundwater
- Some ditches
- Water-filled depressions in uplands incidental to construction and resulting from fill, sand or gravel extraction
- Wastewater recycling structures constructed in uplands
- Groundwater recharge basins
- Artificially irrigated areas (such as rice & cranberry fields) that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland and not meeting jurisdictional requirements

2015 CWR

Maintains Pre-2015 Exclusion By Practice, But Not Codified:

- Water-filled depressions in uplands incidental to construction and resulting from fill, sand or gravel extraction
- Wastewater recycling structures constructed in uplands
- Groundwater recharge basins
- Artificially irrigated areas (such as rice & cranberry fields) that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland and not meeting jurisdictional requirements

Proposed Rule

Newly Codified Exclusions:

- Water-filled depressions in uplands incidental to **mining** or construction and resulting from fill, sand or gravel extraction (**mining has been added**)
- Wastewater recycling structures constructed in uplands
- Groundwater recharge basins
- Artificially irrigated areas (such as rice & cranberry fields) that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland and not meeting jurisdictional requirements



Exclusions from Jurisdiction

Pre-2015 Rules

Excluded By Practice, But Not Codified:

- Groundwater
- Some ditches
- Water-filled depressions in uplands incidental to mining or construction and resulting from fill, sand or gravel extraction
- Wastewater recycling structures constructed in uplands
- Groundwater recharge basins
- Artificially irrigated areas (such as rice & cranberry fields) that would revert to upland without irrigation
- Artificial lakes and ponds constructed in upland and not meeting jurisdictional requirements

2015 CWR

Newly Codified Exclusions:

- Groundwater
- Some ditches
- Stormwater management systems



<http://www.landezine.com/index.php/2014/01/qunli-national-urban-wetland-by-turenscape/>

Proposed Rule

Newly Codified Exclusions:

- Ephemeral features
- Interstate waters that do not meet jurisdictional requirements in other categories
- Non-navigable, isolated lakes and ponds
- Impoundments within newly excluded waters
- Wetlands that are physically separated from jurisdictional waters and lack a direct hydrological surface connection to jurisdictional waters in a typical year
- Ditches in uplands

PROPOSED RULE TO REVISE CWR: DITCHES

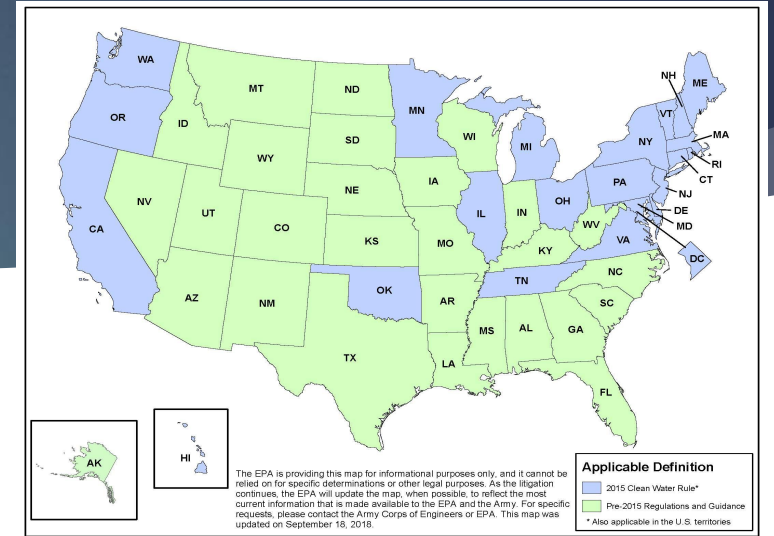
- All ditches are excluded except for three (3) cases:
 - Ditches meeting the definition of (a) (1) “Waters of the United States”: Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide
 - Ditches constructed in a tributary that continue to meet the definition of tributary after alteration
 - Ditches constructed in an adjacent wetland that meet the definition of tributary after alteration



States and Tribes

2015 CWR & Pre-2015 Jurisdiction

- ▶ **States and Tribes** – States and tribes have the option to assume responsibility for the Section 404 permit program. Only two states (MI and NJ) have chosen to do so. Additionally, 21 states have dredge-and-fill permit programs, many relying on federal grant funding and collaboration. Federal technical expertise and financing supports administration of wetlands protection in the majority of states. All states except for MA, NH, and New Mexico administer parts of the Section 402 program.



Proposed Rule to Revise CWR

- ▶ **States and Tribes** – Seeks to develop clear distinction between waters subject to federal authority and those under sole control of states and tribes through more limited federal regulation, more categorical jurisdiction, and provision of additional definitions.



Photo: G. Davies

THANK YOU TO MY FELLOW MEMBERS
OF
THE SOCIETY OF WETLAND SCIENTISTS
PUBLIC POLICY AND REGULATION
SECTION
WOTUS AD HOC COMMITTEE:

SIOBHAN FENNESSY
ROY GARDNER
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MARINUS OTTE
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Photo: G. Davies