

2015 Clean Water Rule Cheat Sheet

WATERS OF THE U.S.: The term “waters of the United States” means:

- (a)(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (a)(2) All interstate waters, including interstate wetlands;
- (a)(3) The territorial seas;
- (a)(4) All impoundments of waters otherwise identified as waters of the United States under this section;
- (a)(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
 - (c)(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.
- (a)(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
 - (c)(1) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.
 - (c)(2) Neighboring. The term neighboring means:
 - (c)(2)(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
 - (c)(2)(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
 - (c)(2)(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.
- (a)(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.
 - (a)(7)(i) Prairie potholes.
 - (a)(7)(ii) Carolina bays and Delmarva bays.
 - (a)(7)(iii) Pocosins.
 - (a)(7)(iv) Western vernal pools.
 - (a)(7)(v) Texas coastal prairie wetlands.
- (a)(8) All waters located within the 100- year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

2015 Clean Water Rule Cheat Sheet

EXCLUSIONS: 33CFR328.3(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

- (b)(1)** Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- (b)(2)** Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (b)(3)** The following ditches:
 - (b)(3)(i)** Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
 - (b)(3)(ii)** Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
 - (b)(3)(iii)** Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
- (b)(4)** The following features:
 - (b)(4)(i)** Artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - (b)(4)(ii)** Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
 - (b)(4)(iii)** Artificial reflecting pools or swimming pools created in dry land;
 - (b)(4)(iv)** Small ornamental waters created in dry land;
 - (b)(4)(v)** Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
 - (b)(4)(vi)** Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
 - (b)(4)(vii)** Puddles.
- (b)(5)** Groundwater, including groundwater drained through subsurface drainage systems.
- (b)(6)** Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (b)(7)** Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

Take me to the River—How to Identify a WOTUS

Presented By:

Chazen Engineering, Land Surveying, and
Landscape Architecture Co., DPC

Barbara B. Beall, PWS, LEED® AP

&

Whiteman, Osterman & Hanna, LLP

Terresa Bakner, ESQ

September 24, 2019

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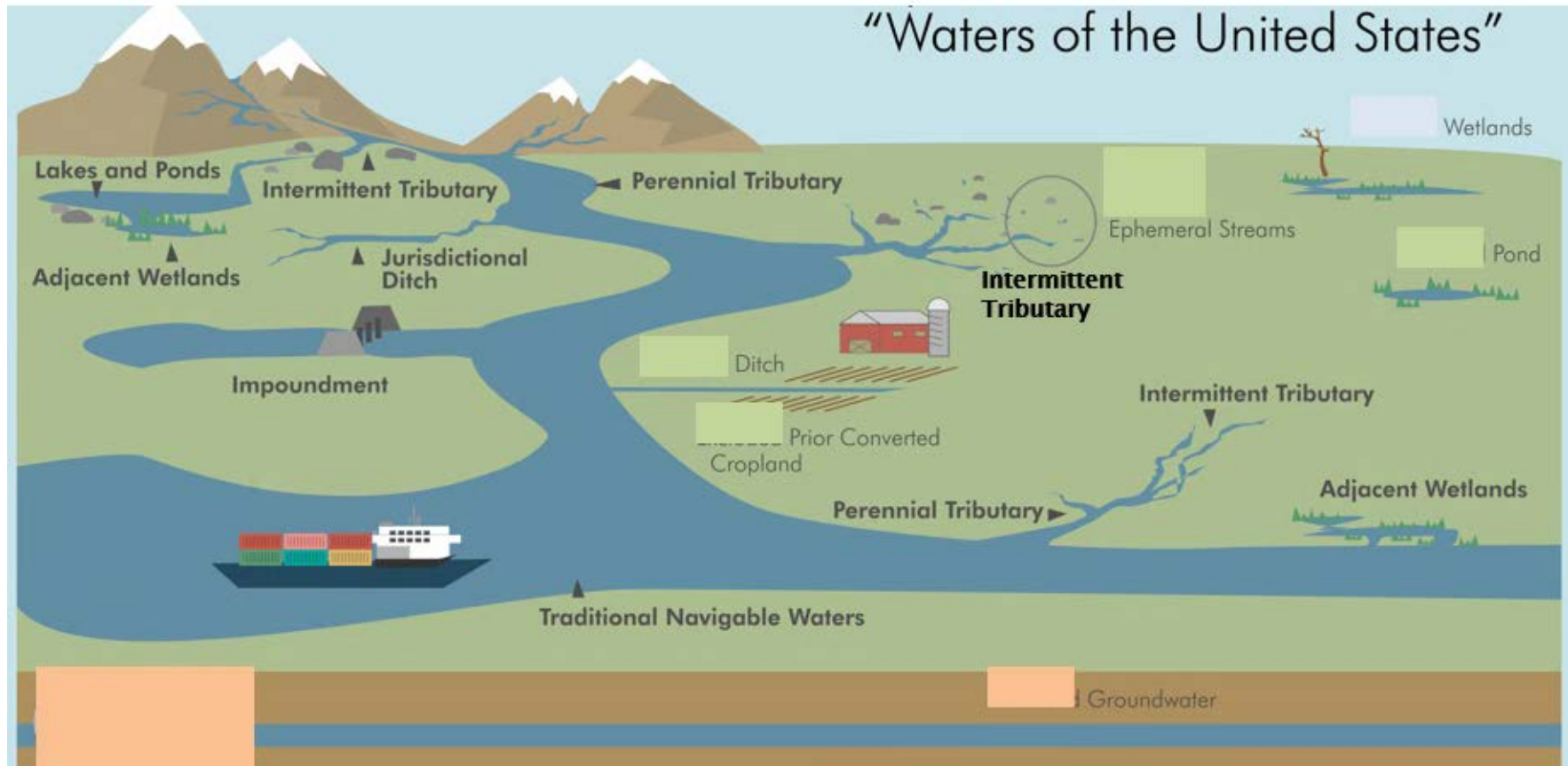
Outline

- Setting the Stage – 1972 to 2007
- 2015 WOTUS regulations
(Sept – Oct 2015; August 2018 to Present)
- 2018 Proposed WOTUS Regulations
- How to Prepare for Changes

Setting the Stage..... 1972 to 2007

What are.....

“Waters of the United States”



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Setting the Stage..... 1972 to 2007

- 1789 – US Constitution – Federal v. States' Rights
- 1899 – Section 10 Rivers and Harbors Act
[Traditionally] Navigable Waters (regulates work, structures)
- 1972 – Clean Water Act Section 404
“Regulates discharge of dredged or fill material into navigable waters of the United States”
- Various lawsuits expand Section 404 jurisdiction
1985 – US v. Riverside Bayview
- Before 1986, no limit headwater fills, 1986 – NWP 26
- 1995 – Lopez Decision – Commerce Clause Bubble

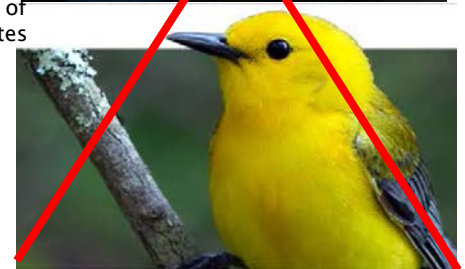
Setting the Stage..... 1972 to 2007

➤ 1997 – WILSON HOMES

United States v. Wilson, 133 F. 3d 251 (4th Cir. 1997)

Isolated wetlands not regulated if commerce connection is migratory birds. People watching birds does not necessarily equate to significant nexus under Commerce Clause. Limited to 4th circuit.

www.doi.gov. Economic impact of waterfowl hunting in United States



➤ 2001 – SWANCC v. US Army Corps of Engineers

531 U.S. 159 (2001). US Supreme Court Nationally, isolated wetlands not regulated if commerce connection is migratory bird rule.

Opened door to questions regarding significant nexus to commerce clause



<https://www.nps.gov/common/uploads/photogallery/mwr/park/cuva/5B597EE-E-155D-4519-3E567FD9C8D29567/5B597EEE-155D-4519-3E567FD9C8D29567-large.JPG>

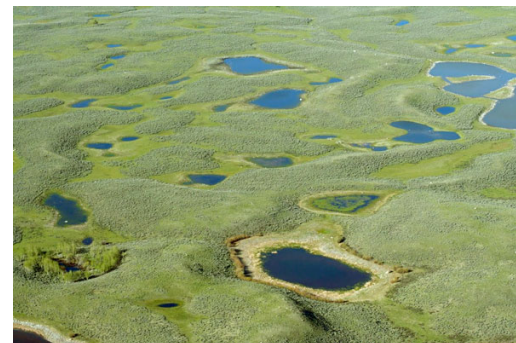
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Setting the Stage..... 1972 to 2007

2006 – Rapanos (and Carabell) v. United States

547 U.S. 715 (2006)

- Rapanos – Four Michigan wetlands near ditches or man-made drains eventually running to TNWs. Carabell is denied permit to fill wetlands adjacent to a ditch.
- Plurality decision.
- Waters of the United States “...includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes..." [and their immediately adjacent wetlands.]
- **“Absent more specific regulations...”** Corps must establish significant nexus on a case by case bases when seeking to regulate wetlands based on adjacency to non-navigable tributaries in order to avoid unreasonable application of the Act.
- Significant nexus determination requires demonstration of more than insubstantial or insignificant physical, chemical, biological inputs to TNWs from low volume waters adjacent wetlands.



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Setting the Stage..... 1972 to 2007

➤ Rapanos and Carabell Guidance – 5/30/2007

- Approved JD versus Preliminary JD
- When significant nexus needed.
- How to complete JD forms.
- Photos:
 - TNW, Wetland adj to TNW.
 - RPWs, non-RPWs
 - Wetlands directly abutting RPWS
 - Wetlands adjacent but not abutting
 - Impoundments
 - Isolated waters
 - Ditches, swales, erosional features
- http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf

U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the *Approved Jurisdictional Determination Form* ("JD form"). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.¹

Caribbean Sea, St. Thomas, U.S. Virgin Islands.



This document was prepared jointly by the U.S. Army Corps of Engineers and the Environmental Protection Agency.

The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

2007 Definition WOTUS

Section 404 – 33 CFR 238.3(a)

Traditionally Navigable Waters (TNW)

1. All waters that are currently used, or were used in the past, or which may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

- ▶ Similar to “Navigable Waters” 33 CFR 329.4 Section 10 Rivers & Harbors Act



<https://www.epa.gov/wetlands/coastal-wetlands>



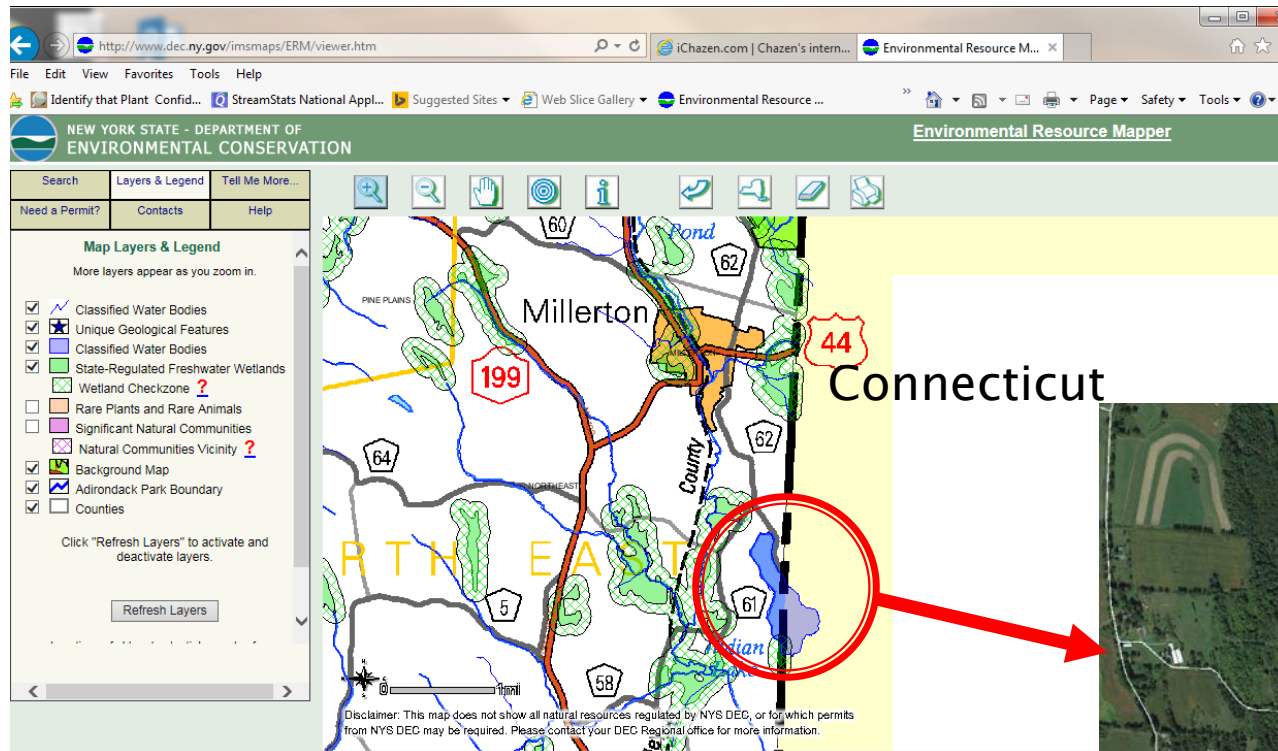
<https://www.nps.gov/voya/learn/historyculture/the-fur-trade.htm>. Artist Frances Anne Hopkins, 1869. National Archives of Canada

www.archives.gov

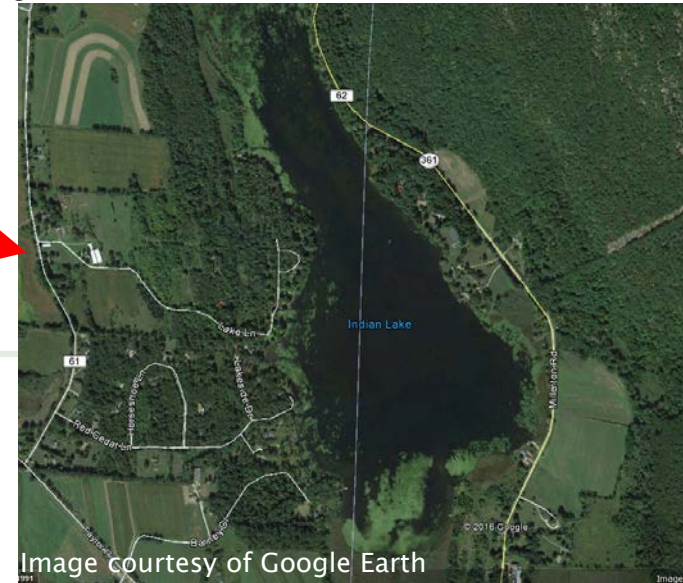
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2007 Definition WOTUS Section 404 – 33 CFR 238.3(a)

2. All Interstate Waters and Wetlands



<http://www.dec.ny.gov/imsmaps/ERM/viewer.htm>



2007 Definition WOTUS

Section 404 – 33 CFR 238.3(a)

COMMERCE CLAUSE CONNECTION

3. All other waters such as intrastate lakes, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce
- (iii) Which are/could be used for industrial purposes by industries in interstate commerce



<http://www.fda.gov/downloads/food/foodbornellnessContaminants/UCM239497.pdf>



<https://www.epa.gov/eg/stream-electric-power-generating-effluent-guidelines>



www.danvilleva.gov



<http://www.fws.gov/birds/surveys-and-data/harvest-surveys/harvest-information-program.php>

www.fws.gov/birdhabitat/img/home-hero/impact-07-desktop.png



2007 Definition WOTUS

Section 404 – 33 CFR 238.3(a)

THE REST OF THE DEFINITION

4. All impoundments of waters otherwise defined as waters of the U.S.
5. Tributaries of waters identified in paragraphs (a)(1)–(4) [above]
6. The territorial seas
7. Wetlands adjacent to waters (other than wetlands that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this definition



<http://www.hoover.archives.gov/research/photos/images/1941-9A.jpg>



http://www.fws.gov/mountain-prairie/refuges/images/partnerImages/WY-PFW-UG-Wetlands-and_Sage-MG_1996.jpg



http://www.nesdis.noaa.gov/images/wave_big.jpg



https://www.epa.gov/sites/production/files/styles/large/public/2014-03/san_pedro_2.jpg

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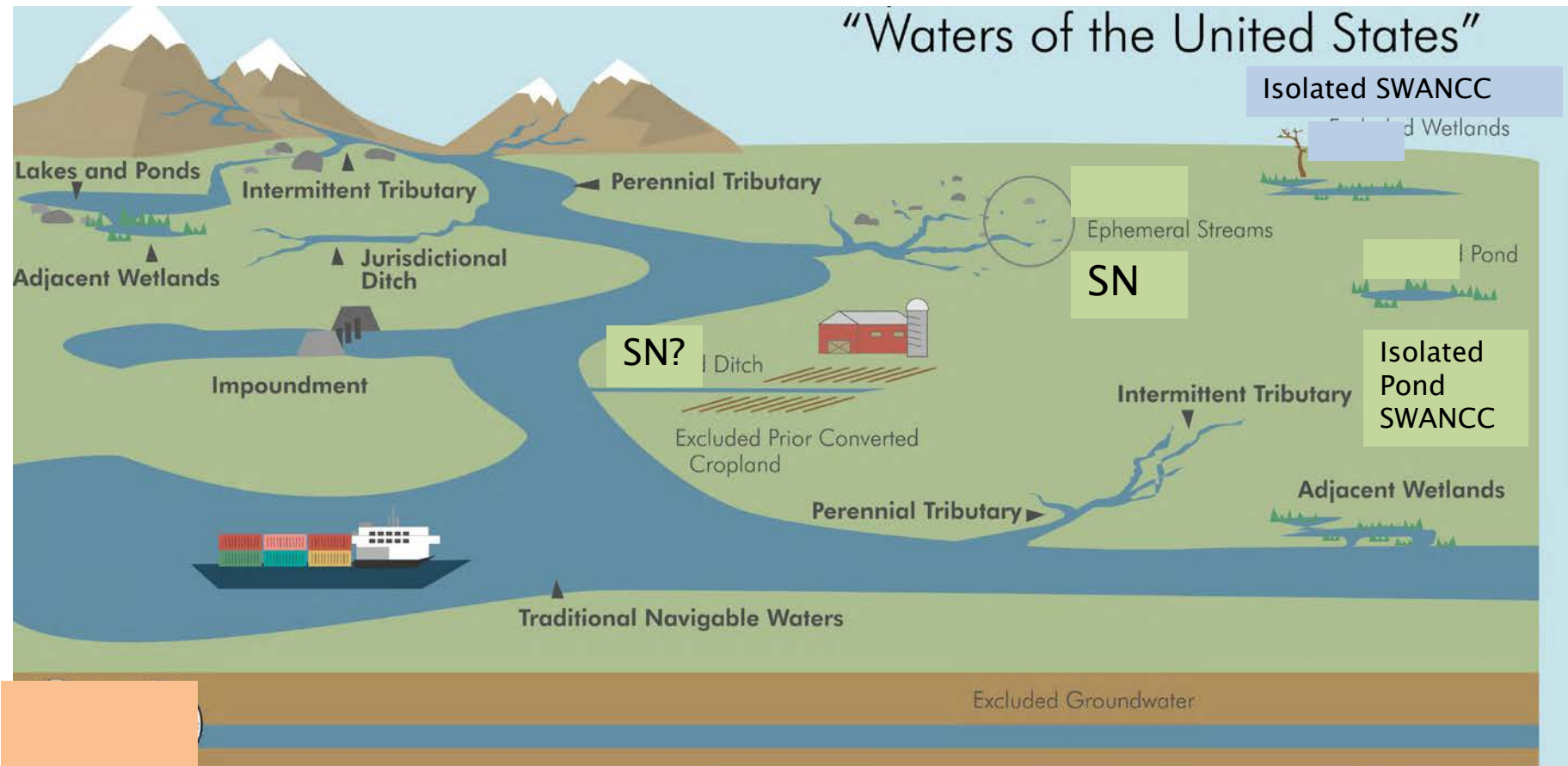
2007 Definition WOTUS

- 2005–05 Regulatory Guidance Letter “Ordinary High Water Mark”
- New Corps Web page dedicated to OHWM
- Focus is on Arid West, Western Mountains, Western Coastal Regions
- OHWM Datasheet
- <http://www.erdc.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/9254/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training.aspx>

<http://media.defense.gov/2014/Aug/04/2000809877/260/200/0/140710-A-DW451-002.JPG>



2007 Definition WOTUS (11 years to 2018)



SN=Significant Nexus Test per Rapanos
Isolated per SWANCC (Migratory Birds)

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2014 – Proposed WOTUS Regulations

- April 21, 2014 Public Notice
- Draft Connectivity of Streams and Wetlands to Downstream Waters Report

WOUS_ERD2_SEP2013.pdf



DRAFT
DO NOT CITE OR QUOTE

EPA/600/R-11/098B
September 2013
External Review Draft

FEDERAL REGISTER

Vol. 79 Monday,
No. 76 April 21, 2014

Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence

Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, et al.
Definition of "Waters of the United States" Under the Clean Water Act;
Proposed Rule

NOTICE

THIS DOCUMENT IS A PRELIMINARY DRAFT. It has not been formally released by the U.S. Environmental Protection Agency and should not be construed to represent Agency policy. It is being circulated for comment on its technical accuracy and policy implications.

Office of Research and Development
U.S. Environmental Protection Agency
Washington, DC

<https://www.epa.gov/cleanwaterrule/final-clean-water-rule>

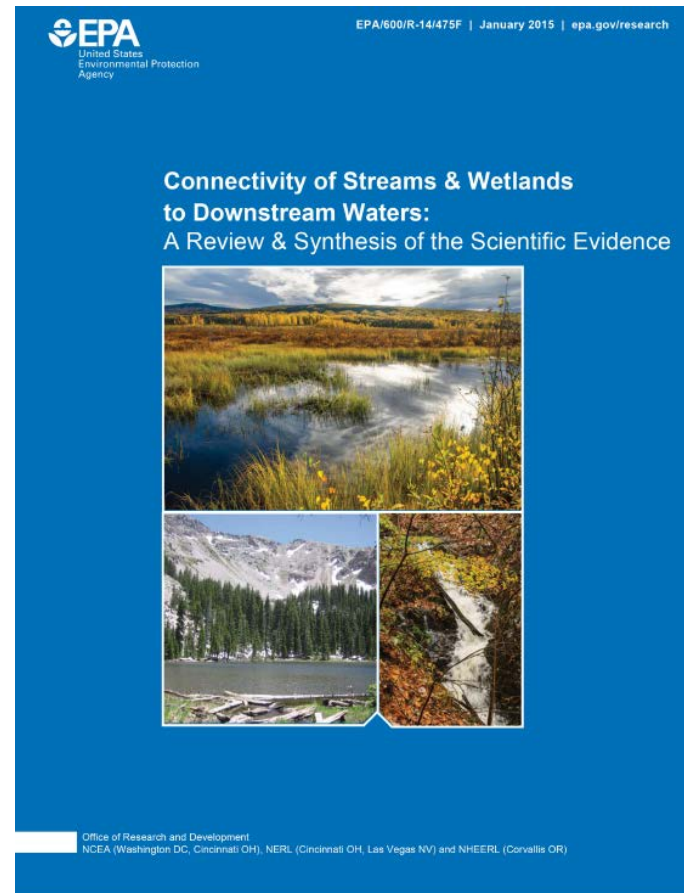
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2014 Proposed WOTUS Regulations

- 2014, 2015 Comment period extended
(July 21, 2014 and October 21, 2015)
- 2015 Final Stream and Wetland Connectivity Report
(January 15, 2015)

<https://www.federalregister.gov/articles/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>

<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=62072551&CFTOKEN=98003338>



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Proposed 2014 WOTUS Regulations

3 Parts:

What's regulated. What's not regulated. Definitions.

Regulated (paragraphs i–v similar to 2007)

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”

(ii) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

2015 WOTUS Regulations (3 mo. – Aug–Oct 2015)

- Published June 29, 2015
- Effective August 28, 2015
- **SIGNIFICANTLY** Different than Proposed Rule



FEDERAL REGISTER

Vol. 80 Monday,
No. 124 June 29, 2015

Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, *et al.*
Clean Water Rule: Definition of "Waters of the United States"; Final Rule

<https://www.federalregister.gov/articles/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>

Other information on same page provided
in support of the rule

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2015 WOTUS Regulations – Stayed

STAYED for 2.5 years OCT. 2015 TO AUG. 2018

- **August 27, 2015** – US District Court for District of North Dakota Southeast Division – Memorandum Opinion and Order Granting Plaintiff’s Motion for Preliminary Injunction – Case 3:15-cv-00059–RRE–ARS, Document 70, Filed 08/27/15
- **October 9, 2015** – National stay on rule via court action – 6th Circuit

The Washington Post

The Volokh Conspiracy | Opinion

Sixth Circuit puts controversial ‘waters of the United States’ (WOTUS) rule on hold

By **Jonathan H. Adler** October 9, 2015

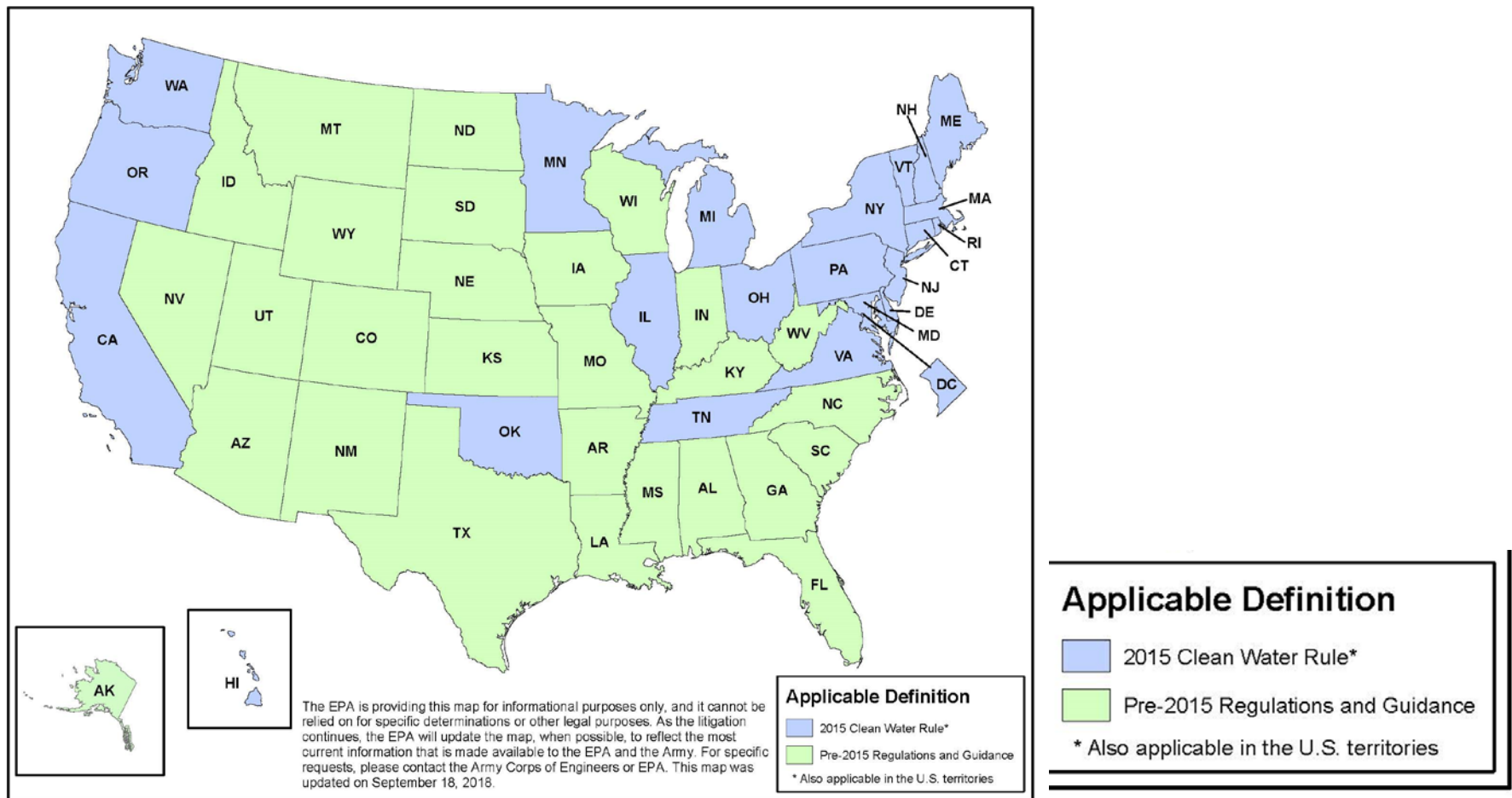
<http://www.washingtonpost.com/volokh-conspiracy/wp/2015/10/09/sixth-circuit-puts...>

2015 WOTUS Regulations – August 2018

Definition of "Waters of the United States": Rule Status and Litigation Update

The EPA and the Army continue to review the U.S. District Court for the District of South Carolina's decision to nationally enjoin the agencies' final rule that added an applicability date to the 2015 Clean Water Rule. Pursuant to the court's order, the 2015 Clean Water Rule is now in effect in 22 states, the District of Columbia, and the U.S. territories. Parties to the case, including the EPA and the Army, have filed motions appealing the order and seeking a stay of the district court's decision. While the litigation continues, the agencies are complying with the district court's order and implementation issues that arise are being handled on a case-by-case basis. The agencies recognize the uncertainty this decision has created and are committed to working closely with states and stakeholders to provide updated information on an ongoing basis regarding which rules are in place in which states. If a state, tribe, or an entity has specific questions about a pending jurisdictional determination or permit, please contact a local U.S. Army Corps of Engineers District office or the EPA.

2015 WOTUS Regulations – August 2018



https://www.usace.army.mil/missions/civil-works/regulatory-program-and-permits/juris_info/

2015 WOTUS Regulations – CURRENT

3 Parts (along with Preamble)

- Regulations defining Waters of the United States (Paragraphs a1 –a8)
- Regulations defining what is not a Water of the United States (Paragraphs b1 –b7)
- Regulations defining terms (Section c)

Biggest Areas of Concern

- Within 4,000 feet of a tributary
- Significant Nexus “A water has significant nexus when any single function or combination of functions performed by the water, alone or with similarly situated waters in the region contribute significantly to the chemical, physical or biological integrity of the nearest water (a)(1) through (a)(3)
- Similarly situated aquatic resources
- What is a “Tributary” relative to Ditches, Ephemeral Streams (OHWM, contribution of flow, was it previously a stream?)
- “Neighboring” relative to tributaries automatically regulated

2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

Baker, Susan L CIV USARMY CELRB (US) <susan.l.baker@usace.army.mil>

2015 Clean Water Rule Cheat Sheet

WATERS OF THE U.S.: The term “waters of the United States” means:

- (a)(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (a)(2) All interstate waters, including interstate wetlands;
- (a)(3) The territorial seas;
- (a)(4) All impoundments of waters otherwise identified as waters of the United States under this section;
- (a)(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
 - (c)(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.

From Definition Section of Regulations

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2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018



Tributaries

- May be natural, modified, constructed including ditches
- May be ephemeral, intermittent or perennial
- Ditches have additional criteria
- Tributaries must contribute flow
Flow can be through a jurisdictional or non-jurisdictional feature or impoundment.
- Must have bed/bank & OHWM
- Upper limit where bed/bank and/or OHWM disappear.
- There may be breaks in OHWM but tributary still jurisdictional. Measure and map breaks.
- Ditches are constructed features.
- Ditches are regulated only if they both meet defn of “tributary” and are not excluded under paragraph (b)(3)

2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

(a)(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

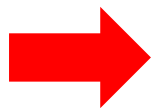
(c)(1) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.

(c)(2) Neighboring. The term neighboring means:

(c)(2)(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(c)(2)(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(c)(2)(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.



From Definition Section of Regulations

2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

~~(a)(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.~~

~~(a)(7)(i) Prairie potholes.~~

~~(a)(7)(ii) Carolina bays and Delmarva bays.~~

~~(a)(7)(iii) Pocosins.~~

~~(a)(7)(iv) Western vernal pools.~~

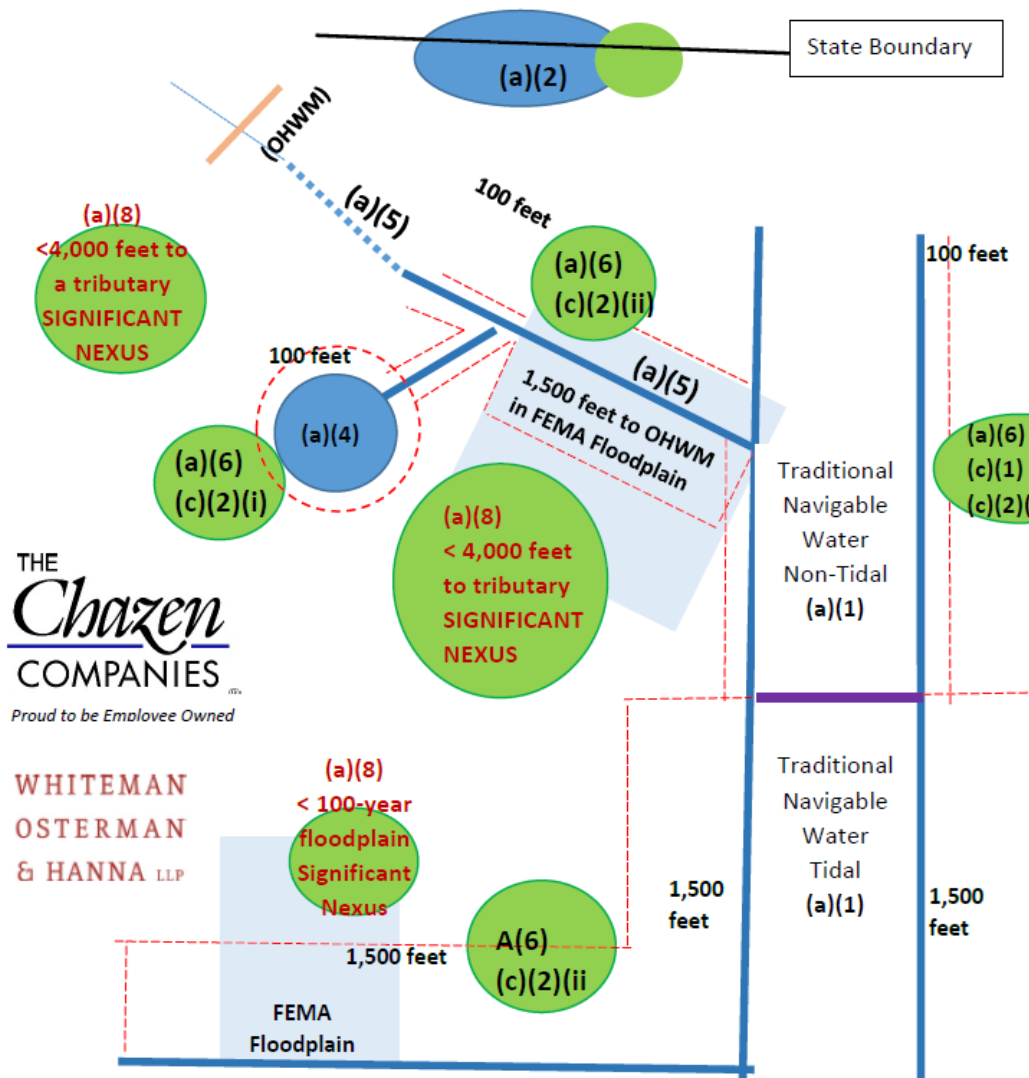
~~(a)(7)(v) Texas coastal prairie wetlands.~~

Not found in NYS

(a)(8) All waters located within the 100- year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

Not an official document; refer to 33CFR328.3 for official information.

2015 WOTUS Schematic



2015 WOTUS Regulations - Regulated

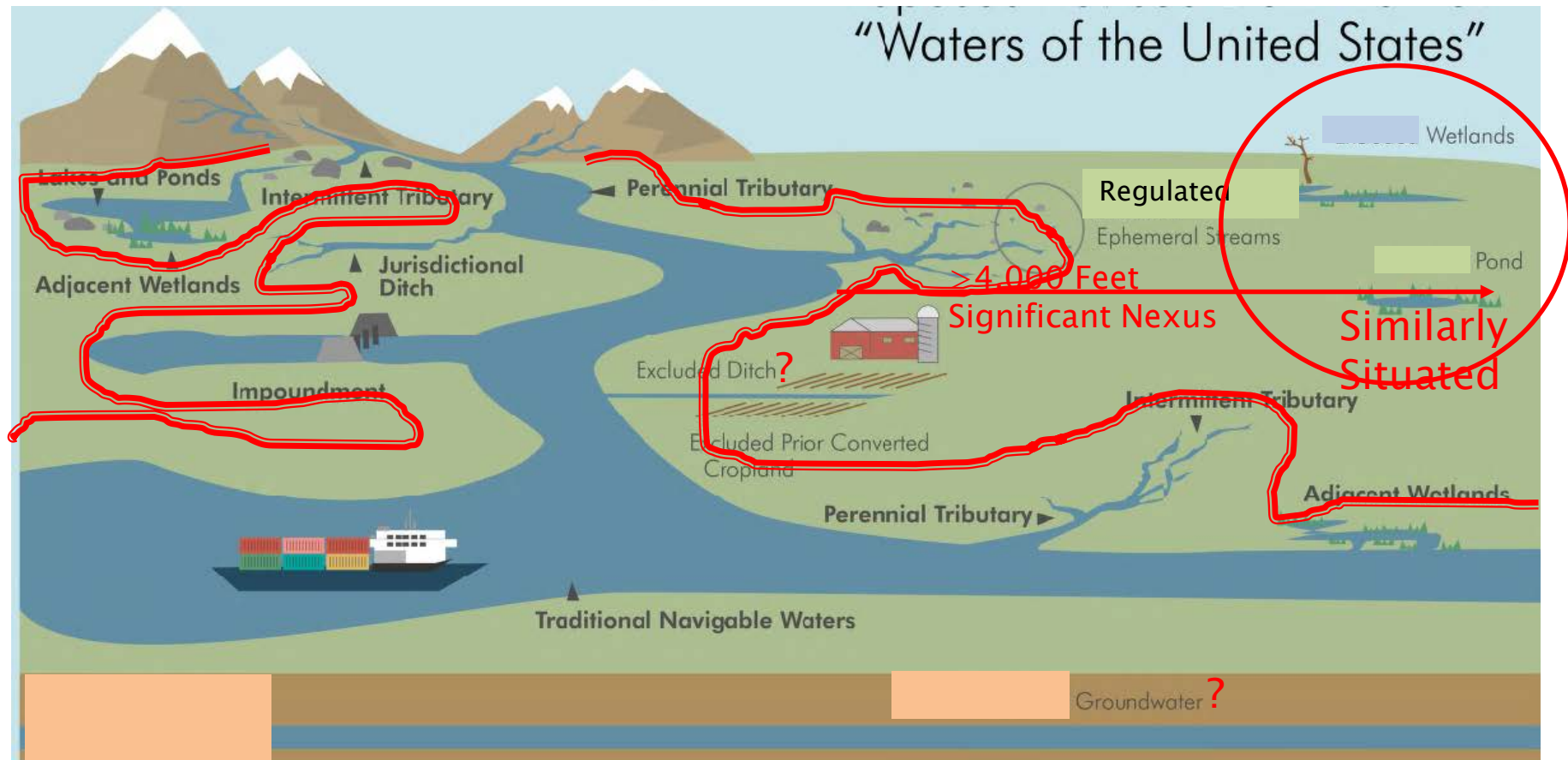
- (a)(1) All waters used or usable for interstate or foreign commerce including those subject to ebb/flow of tide
- (a)(2) Interstate waters/wetlands
- (a)(3) Territorial seas
- (a)(4) All impoundments of WOTUS
- (a)(5) All Tributaries of waters (a)(1) –(a)(3)
- (a)(6) All waters adjacent to waters (a)(1)-(a)(5)
 - (c)(1) Adjacent definition including abutting or separated by a barrier
 - (c)(2) Neighboring definition
 - (c)(2)(i) - Within 100 feet of OHWM of items (a)(1) – (a)(5)
 - (c)(2)(ii) Within 100-year floodplain and within 1,500 feet of OHWM of items (a)(1) –(a)(5)
 - (c)(2)(iii) Within 1,500 feet of High Tide Line of items (a)(1)-(a)(3) or 1,500 feet of Great Lakes.

2015 Regulations – Regulated with Significant Nexus

- (a)(8) Waters within 100-year floodplain of items (a)(1) through (a)(3) and all waters within 4,000 feet of HTL or OHWM of waters (a)(1)-(a)(5) where determined on a case-by-case basis to have a significant nexus to a water identified in paragraphs (a)(1) through (a)(3) of this section.

The Territorial Sea (a)(3)
Or the Great Lakes (a)(1), (a)(2)

2015 WOTUS Regulations



Neighboring – (c)(2) – Automatically Regulated

- W/in 100 feet all tributaries
- W/in 100-year floodplain & w/in 1,500 feet OHWM all tributaries
- W/in 1,500 feet of TNW, Seas, Great Lakes

2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

2015 Clean Water Rule Cheat Sheet

EXCLUSIONS: 33CFR328.3(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

- (b)(1)** Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- (b)(2)** Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (b)(3)** The following ditches:
 - (b)(3)(i)** Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
 - (b)(3)(ii)** Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
 - (b)(3)(iii)** Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
- (b)(4)** The following features:
 - (b)(4)(i)** Artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - (b)(4)(ii)** Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
 - (b)(4)(iii)** Artificial reflecting pools or swimming pools created in dry land;
 - (b)(4)(iv)** Small ornamental waters created in dry land;
 - (b)(4)(v)** Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
 - (b)(4)(vi)** Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

EXCLUSIONS: 33CFR328.3(b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

- (b)(5) Groundwater, including groundwater drained through subsurface drainage systems.
- (b)(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (b)(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

Not an official document; refer to 33CFR328.3 for official information.

BBB–TMB Comment

Take care that an Excluded Feature is not actually a regulated water

2015 WOTUS Regulations – CURRENT

Significant nexus. Means that a water, including wetlands, either alone or in combination with **similarly situated waters in the region**, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (1)(iii) [(a)(1) through (a)(3)] of this definition. For an **effect to be significant, it must be more than speculative or insubstantial**. Waters are **similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters**. For purposes of determining whether or not a water has a significant nexus, the **water's effect on downstream (1)(i) through 1(iii) waters shall be assessed by evaluating the aquatic functions** identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a **significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes to the chemical, physical, or biological integrity of the nearest water identified in paragraphs 1(i) through 1(iii) of this definition. Functions are sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of flood waters, runoff storage, contribution of flows, export of organic matter, export of food resources, life dependent aquatic habitat.**

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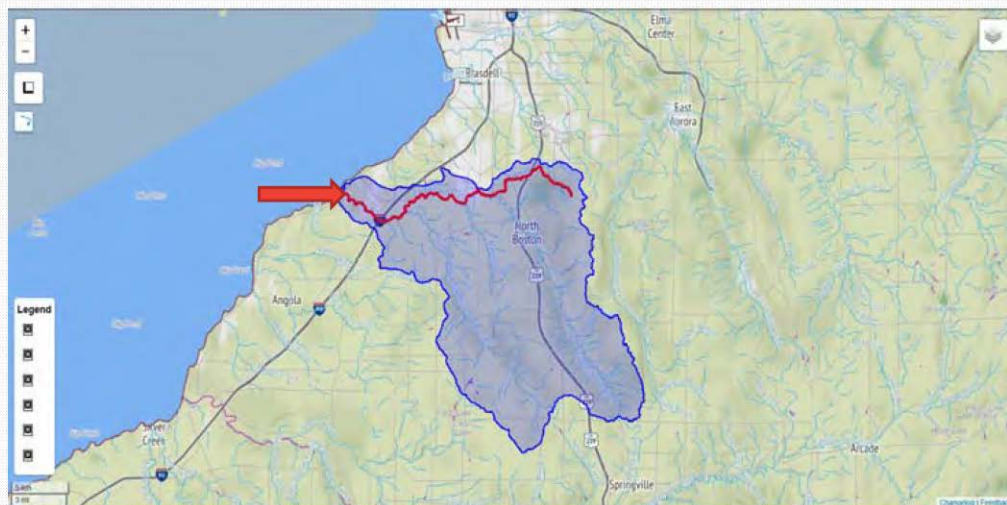
2015 WOTUS Regulations – CURRENT

Significant Nexus Assessment for (a)(8) Waters

From Buffalo Corps District Consultant Training November 2018

Currently no published “step by step” guidance on significant nexus determinations, but ESRI Map Layers identified.

The SPOE watershed is drawn using the ESRI watershed delineation tool.



Identify flowpath from
(a)(8) water to nearest
(a)1 –(a)(5) water

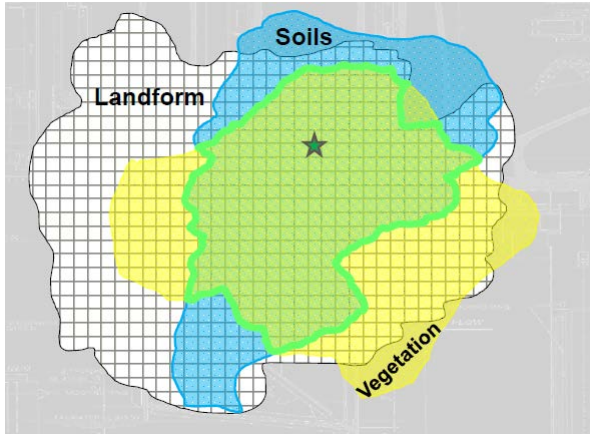
Identify closest TNW

Delineate Single Point of
Entry (SPOE) Watershed to
TNW.

2015 WOTUS Regulations – Current

Significant Nexus Assessment for (a)(8) Waters

From Buffalo Corps District Consultant Training November 2018



What are similarly situated waters

Similarly Situated Waters – Aggregate #1

GIS “Venn Diagram”

- Waters within (a)(8) limits and waters within (a)(6) limits subject to established normal farming ranching or silvicultural activities that
 - Have similar functions (same Cowardin system) palustrine, lacustrine, riverine) **AND**
- Are located sufficiently close to each other:
 - Within the same uninterrupted, contiguous area of land as the subject water, with relatively homogeneous SOILS, VEGETATION, and LANDFORM

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2015 WOTUS Regulations – Current

Significant Nexus Assessment for (a)(8) Waters

From Buffalo Corps District Consultant Training November 2018



What are similarly situated waters

Similarly Situated Waters – Aggregate #2

GIS “Venn Diagram”

- Waters having similar functions (same Cowardin Class) (emergent, forested) **AND**
- Are located sufficiently close to a WOTUS:
 - Waters which lie within (a)(8) water thresholds within the SPOE of subject water & waters within (a)(6) limits that are subject to normal farming, ranching or silvicultural activities.

2015 WOTUS Regulations – CURRENT

- (i) Sediment trapping,
- (ii) Nutrient recycling,
- (iii) Pollutant trapping, transformation, filtering, and transport,
- (iv) Retention and attenuation of flood waters,
- (v) Runoff storage,
- (vi) Contribution of flow,
- (vii) Export of organic matter,
- (viii) Export of food resources, and
- (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1)-(a)(3)



“Lack of connectivity may be the significant nexus”

What are functions of similarly situated waters

What are functions of TNW

What is connection/nexus

Is it significant?

“Significant is more than speculative or insubstantial”

Similarly situation waters do not need to perform all 9 functions – only 1 function of significance required.

Hydrologic connectivity should be considered but not required.

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2018 WOTUS Regulations – PROPOSED

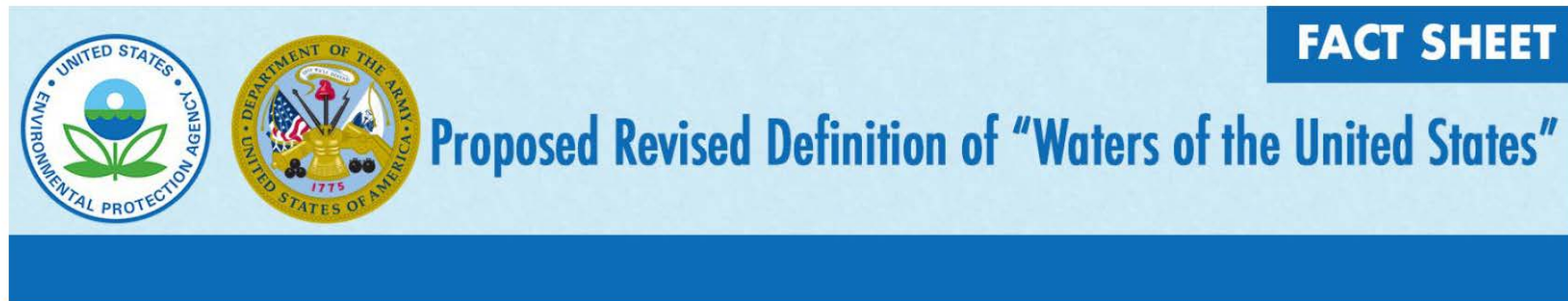
December 11, 2018 USEPA and Corps proposed new Definition of WOTUS

See Fact Sheet material in package

Proposed Rule was published in the Federal Register on February 14, 2019

EPA Expects rule to be finalized in 2020

Much more Scalia than Kennedy

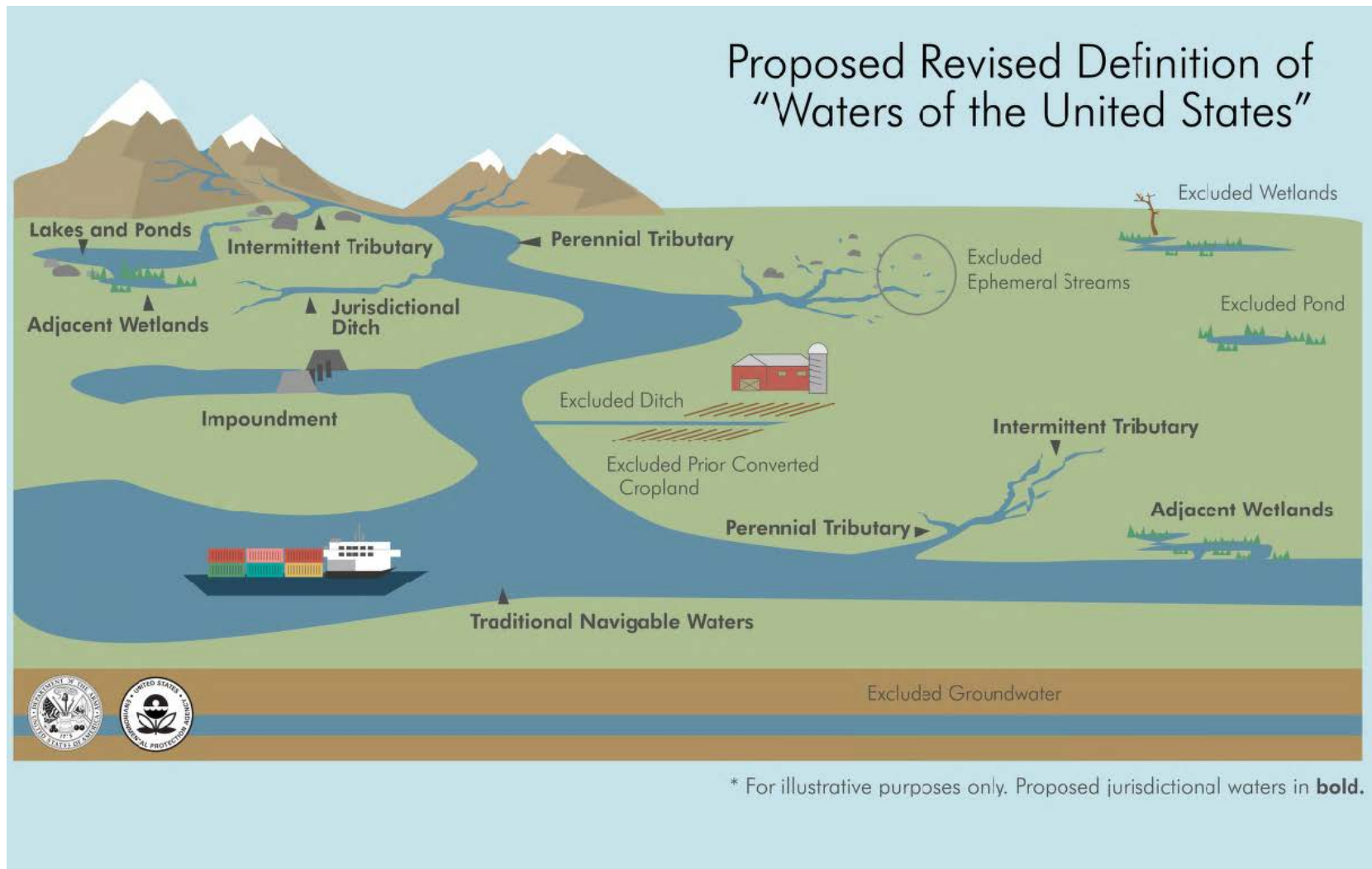


BACKGROUND

- 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.

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2018 WOTUS Regulations – PROPOSED



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How to Prepare for Continuing Flux

- ▶ Review expiration dates for all JD letters, permits, verifications.
- ▶ Manage any authorized non-jurisdictional waters **NOW**.
- ▶ If possible, let NOTHING LAPSE. Keep permits current – do the work.
- ▶ For new Jurisdictional Determinations under 2015 rule –
 - AVOID jurisdictional determinations on potentially “isolated” waters.
 - Obtain JDs for portion of site with no aquatic resources wetlands, or
 - Obtain JD only for those areas with necessary impacts.
- ▶ Review impacts to municipal projects – length of time to ramp up and inability to make changes without substantially “redo” of processes for such projects.
- ▶ Educate clients about rule & manage expectations.
- ▶ Significant nexus process and standards for review will “shake out” with time.

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New York State Freshwater Wetlands Act

- ▶ 12.4 acres or more.
- ▶ Unusual Local Importance.
- ▶ Located in the Adirondack Park.
- ▶ Exceptions for permitting agricultural activities, commercial/recreational fishing, and public health activities.

Freshwater Wetlands Act

- ▶ **Statutory Definition of “Freshwater Wetlands” (§ 24-0107(1)):**
 - ▶ Lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation;
 - ▶ Lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period;
 - ▶ Lands and waters substantially enclosed by aquatic or semi-aquatic vegetation, the regulation of which is necessary to protect said vegetation.

Freshwater Wetlands: N.Y.S. DEC Regulations

6 N.Y.C.R.R. § 664.7(b): Two or more areas of land and/or water may be considered to be a single wetland for regulatory purposes if

- ▶ they are determined by the commissioner to function as a unit, or
- ▶ to be dependent upon each other, and;
- ▶ if they are no more than 50 meters (approximately 165 ft.) apart.

Freshwater Wetlands Delineation Manual: Sets Hydrological Indicators

Freshwater Wetlands: N.Y.S. DEC Regulations

Unusual Local Importance (6 N.Y.C.R.R. §§ 664.5(a), 664.7(c))

- ▶ If it contains any Class I characteristic, or four Class II characteristics, it can be nominated in a ULI petition.
- ▶ For any area not containing a Class I characteristic or four Class II characteristics, DEC considers its benefits enumerated in § 24-0105(7) and takes into account expressed local interest.

Freshwater Wetlands: N.Y.S. DEC

Regulations

Class I Wetlands: a Class I wetland if it has any of these characteristics (6 N.Y.C.R.R. § 664.5(a)):

- ▶ Kettlehole bog;
- ▶ Habitat of an endangered/threatened animal species;
- ▶ Habitat of an endangered/threatened plant species;
- ▶ Supports an unusual animal in abundance or diversity;
- ▶ Tributary to a water which could create flooding for an urban area;
- ▶ Adjacent to a reservoir used for public water supply, or;
- ▶ Contains four or more Class II Characteristics.

Freshwater Wetlands: N.Y.S. DEC Regulations

Class II Wetlands: a Class II wetland if it has any of these characteristics (6 N.Y.C.R.R. § 664.5(b)):

- ▶ Purple loosestrife and/or reed constitutes 2/3rds+ of cover;
- ▶ Two or more wetland structural groups;
- ▶ Contiguous to a tidal wetland;
- ▶ Associated with a permanent open water outside the wetland;
- ▶ Adjacent or contiguous to streams classified as C(t) or higher;
- ▶ A migration habitat of an endangered or threatened animal;
- ▶ Habitat of a vulnerable animal species;
- ▶ Contains a vulnerable plant species.

Freshwater Wetlands: N.Y.S. DEC Regulations

Class II Criteria Continued:

- ▶ Supports an animal unusual in abundance or diversity for the county;
- ▶ Demonstrable archaeological or paleontological significance;
- ▶ Associated with an unusual geological feature;
- ▶ Tributary to a water which could create flooding for an urban area;
- ▶ Hydraulically connected to an aquifer;
- ▶ Acts in a tertiary treatment capacity for a sewage disposal system;
- ▶ Within an urbanized area;
- ▶ One of the three largest wetlands within a municipality, or;
- ▶ Within a publicly-owned recreation area.

Freshwater Wetlands: N.Y.S. DEC Regulations

► Patrick Farm, Town of Ramapo

- ULI petition filed
- 2012/2018: DEC declared that wetland area did not meet the criteria to require designation as a Wetland of Unusual Local Importance
 - No Class 1 Characteristics
 - Also failed to have 4 of the Class II Characteristics
 - No significant benefit under § 24-0105(7) of the Freshwater Wetland Act
- 2015: Two wetland areas, although hydrologically connected, were greater than 50 Meters (164.04 ft.) apart and were considered to be separate wetlands for purposes of mapping.

Freshwater Wetlands: N.Y.S. DEC Regulations

6 N.Y.C.R.R. § 663.5(e)(1): Standards for Freshwater Wetland Permit:

A permit may be issued if it is determined that the activity:

- ▶ would be compatible with the conservation of the wetland;
and
- ▶ would result in no more than insubstantial degradation;
and
- ▶ would be compatible with public health and welfare.

Freshwater Wetlands: N.Y.S. DEC

Regulations

6 N.Y.C.R.R. § 663.5(e)(2): Standards for Permit Issuance Continued:

If the proposed activity cannot meet the three tests for compatibility, then a permit may be issued if:

- ▶ For wetland Classes I, II, III and IV, the proposed activity must be compatible with the public health and welfare and be only practicable alternative;
- ▶ For wetland Classes I, II, and III, the proposed activity must minimize degradation, or;
- ▶ For wetland Class IV, the proposed activity must make a reasonable effort to minimize degradation to wetlands.

Other Items Regulated by the N.Y.S. DEC

Article 15: Water Resources

- **Stream Disturbances**
 - Statutory Authority: § 15-0501
 - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.2
- **Dams and Impoundment Structures**
 - Statutory Authority: § 15-0503
 - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.3
- **Docks, Moorings or Platforms**
 - Statutory Authority: § 15-0503
 - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.4
- **Excavation and Fill in Navigable Waters**
 - Statutory Authority: § 15-0505
 - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.5

Article 25: Tidal Wetlands Act

- Statutory Authority: Article 25
- N.Y.S. DEC Regulations: 6 N.Y.C.R.R. Pt. 661

Water Quality Certification:

- ▶ **Section 401 of the Federal Water Pollution Control Act/Clean Water Act**

Any applicant for a Federal permit to conduct any activity which may result in any discharge into the navigable waters shall provide the permitting agency a certification from the State in which the discharge originates. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the EPA Administrator.

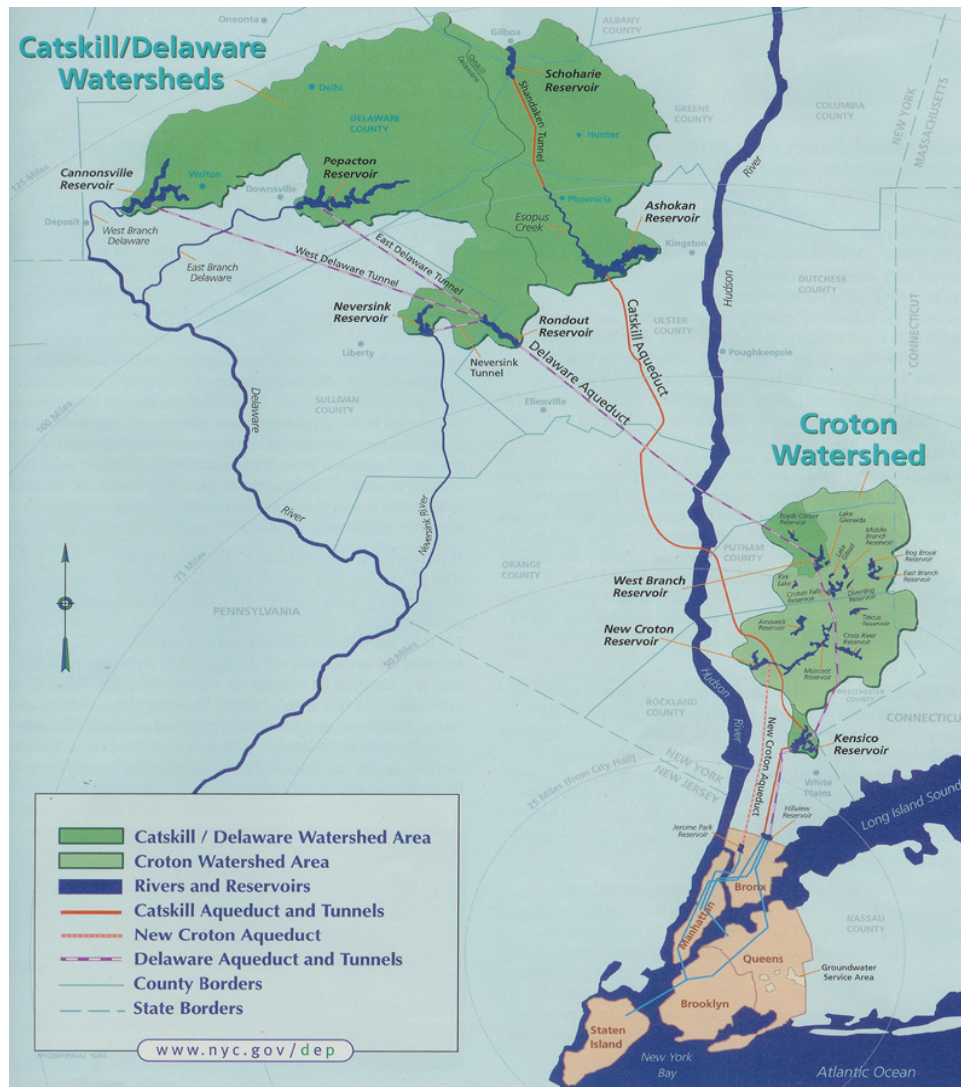
- ▶ 6 N.Y.C.R.R. § 608.9

- ▶ Park Ridge Neighborhood Ass'n v. Crotty, 38 A.D.3d 903, 832N.Y.S.2d 653 (2d Dept 2002)

Regulations for N.Y.C.'s Drinking Water Sources (“Watershed Regulations”)

Statutory Authority:

Art. 11 of the New York State Public Health Law
§ 24-302 of the New York City Administrative Code



Regulations for N.Y.C.'s Drinking Water Sources ("Watershed Regulations")

§ 18-39 of Rules and Regulations for the Contamination, Degradation and Pollution of N.Y.C.'s Water Supply and its Sources:

- ▶ The construction of an impervious surface within:
 - ▶ the limiting distance of 100 ft. of a watercourse or wetland, or;
 - ▶ within the limiting distance of 300 ft. of a reservoir, reservoir stem, or controlled lake, is prohibited.
- ▶ Storm Water Pollution Prevention Plans required for most development proposals within certain distances of water bodies.

LOCAL REGULATIONS OF WETLANDS

Town of Southeast Freshwater Wetlands Law (Ch. 78)

Wetlands shall include:

- ▶ Soil types that are poorly drained.
- ▶ Lands and submerged lands called marshes, swamps, bogs, and flats supporting aquatic or semi aquatic vegetation.
- ▶ Lands and submerged lands containing remnants of vegetation that is not aquatic or semi aquatic because it has died of wet conditions.
- ▶ Lands enclosed by aquatic or semi aquatic vegetation and dead vegetation, the regulation of which is necessary to protect the aquatic and semi aquatic vegetation.
- ▶ Lands possessing such characteristics less than one acre in size, but are hydrologically connected to and within 50 meters (165 ft.) of other wetlands that, together, exceed one acre.

Town of Southeast Freshwater Wetlands Law

Wetland Buffer by Hydrological Soil Group

HSG		Buffer (feet)
A	High infiltration, transmission deeply drained	100
B	Moderate infiltration and transmission and moderately drained	133
C	Slow infiltration, transmission poor to well drained	166
D	Very slow infiltration, transmission, permanent water	200

Watercourse Buffer by Hydrological Soil Group or Slope Percentage

HSG	Slope%	Buffer (feet)
A or A and B	0-3%; 3-8%	100
B or C	8-15%	100
C or D	15-25%	130
D or E	25-35%	170
F	35-60%	200

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NEWS RELEASE

For Release: January 7, 2019
Immediate

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EPA and Army Postpone Public Hearing on Proposed New “Waters of the United States” Definition

WASHINGTON (January 7, 2019) — Due to the lapse in appropriations for the U.S. Environmental Protection Agency (EPA), EPA and the Department of the Army (Army) announced today they will postpone the planned January 23 public hearing on the proposed new “Waters of the United States” definition until after appropriations have passed to fund the EPA. Publication of the proposed rule in the Federal Register is also postponed.

A notification of public hearing was issued in the Federal Register on December 28, 2018 to hold a hearing in Kansas City, Kansas. EPA and Army will notify the public of the revised date for the public hearing, the start of the public comment period, public webcast and other outreach activities after appropriations have passed. Information on the status of the public hearing will be posted on the EPA website at <https://www.epa.gov/wotus-rule/revised-definition-waters-united-states-proposed-rule>.

Background: On December 11, 2018, EPA and Army signed a proposed rule that would provide a clear, understandable, and implementable definition of “waters of the United States” that clarifies federal authority under the Clean Water Act while respecting the role of states and tribes in managing their own land and water resources. The agencies have submitted the proposed rule to the Office of the Federal Register for publication. A pre-publication version publication version of the *Federal Register* notice is available at: <https://www.epa.gov/wotus-rule/step-two-revise>.

EPA and Army will take comments on the proposal for 60 days after publication of the proposed rule in the Federal Register. Comments can be submitted online at <https://www.regulations.gov> or provided orally at the public hearing once rescheduled. Please follow the instructions for submitting comments to Docket ID No. EPA-HQ-OW-2018-0149. In addition, oral comments and supporting information presented at the public hearing will be considered with the same weight as written statements and supporting information submitted during the public comment period.



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

States” under the Clean Water Act to those that are physically and meaningfully connected to traditional navigable waters.

- The proposed rule outlines six clear categories of waters that would be considered “waters of the United States:”
 - Traditional navigable waters (TNWs)
 - Under the proposal, traditional navigable waters would be large rivers and lakes, tidal waters, and the territorial seas—such as the Atlantic Ocean, the Mississippi River, the Great Lakes, and tidally influenced waterbodies, including wetlands, along coastlines—used in interstate or foreign commerce.
 - Tributaries
 - In the agencies’ proposal, tributaries would be rivers and streams that flow to traditional navigable waters—such as Rock Creek, which feeds to the Potomac River in Washington, D.C.
 - Under the proposal, these naturally occurring surface water channels must flow more often than just when it rains—that is, tributaries as proposed must be perennial or intermittent. Ephemeral features would not be tributaries under the proposal.
 - Tributaries can connect to traditional navigable waters directly, through other “waters of the United States,” or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream.
 - Certain ditches
 - A ditch under the proposed rule would be an “artificial channel used to convey water.”
 - Under the proposal, ditches would be jurisdictional where they are traditional navigable waters, such as the Erie Canal, 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.
 - Certain lakes and ponds
 - Lakes and ponds would be jurisdictional where they are traditional navigable waters, such as the Great Salt Lake in Utah or Lake Champlain along the Vermont-New York border.
 - Lakes and ponds would be jurisdictional where they contribute perennial or intermittent flow to a traditional navigable water either directly, through other “waters of the United States,” or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream, such as Lake Pepin in Minnesota or Lake Travis in Texas.
 - Lakes and ponds would be jurisdictional where they are flooded by a “water of the United States” in a typical year, such as many oxbow lakes.
 - Impoundments
 - Under the proposal, impoundments of “waters of the United States” would be jurisdictional.
 - Adjacent wetlands
 - Under the proposal, wetlands that physically touch other jurisdictional waters would be “adjacent wetlands,” such as Horicon Marsh in Wisconsin.

- Wetlands with a surface water connection in a typical year that results from 1) inundation from a “water of the United States” to the wetland or 2) perennial or intermittent flow between the wetland and a “water of the United States” would be “adjacent.”
 - Wetlands that are near a jurisdictional water but don’t 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.
- 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).

FEDERAL-STATE RELATIONSHIP

- In accordance with section 101(b) of the Clean Water Act, EPA and Army’s 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 this proposal, there is a clear distinction between federal waters and waters subject to the sole control of the states and tribes.

- The Clean Water Act 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 Clean Water Act.
- States and many tribes have existing regulations and programs that apply to waters within their borders, whether or not they are considered "waters of the United States."
- 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 Clean Water Act.

EFFECTS OF THE PROPOSAL

- EPA and the Army developed an illustrative economic analysis for the proposed rule that looks at the potential costs, benefits, and economic impacts of the proposed changes to the definition of "waters of the United States" relative to existing regulations.
- EPA and the Army have identified, where possible, how the proposal would affect categories of water resources across the country and potential effects on Clean Water Act programs. The agencies have also highlighted data limitations that prevent quantitative national estimates for most Clean Water Act programs.
- As a result of these data limitations, the agencies conducted a two-stage analysis of the proposed rule using available data to assess the change from the 2015 Rule to the pre-2015 practice, and then the change from pre-2015 practice to the proposed rule. Additional information is included in the economic analysis fact sheet.

PUBLIC COMMENT SOUGHT

- In addition to seeking comments on the specifics of the proposed "waters of the United States" definition itself, the agencies are requesting comment on the discussion and definition of terms within it, such as whether tributaries should be limited to rivers and streams that flow year-round and whether lakes and ponds should be defined more precisely.
- In response to requests from some states, the agencies will be exploring how to develop a data or mapping system to provide a clearer understanding of the presence or absence of jurisdictional waters that landowners and members of the regulated community could rely on in the future.
- The agencies are also taking comment on the underlying legal interpretations that provide the foundation for the proposed rule.
- Finally, the agencies are requesting comment on how the proposed rule can best be implemented so as to maintain clarity when it is used in the field; examples of such implementation questions include whether to establish specific flooding frequency or magnitude to determine when certain wetland features may be jurisdictional.

HOW TO COMMENT

- The agencies will take comment on the proposal for 60 days after publication in the Federal Register. The agencies will also hold an informational webcast on January 10, 2019, and will host a public listening session on the proposed rule in Kansas City, KS, on January 23, 2019. Additional information on both engagements is available at <https://www.epa.gov/wotus-rule>.

- Comments on the proposal should be identified by Docket ID No. EPA-HQ-OW-2018-014 and may be submitted online. Go to <https://www.regulations.gov> and follow the online instructions for submitting comments to Docket ID No. EPA-HQ-OW-2018-0149.
- For additional information, including the full EPA public comment policy, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR MORE INFORMATION

- Additional fact sheets along with copies of the proposed rule and supporting analyses are available on EPA's website at <https://www.epa.gov/wotus-rule>.

The EPA Acting Administrator, Andrew R. Wheeler, along with Mr. R.D James, the Assistant Secretary of the Army for Civil Works, signed the following proposed rule on 12/11/2018, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. It is not a proposed rule, and it is not the official version of the rule for purposes of public notice and comment under the Administrative Procedure Act. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the proposed rule the official version will be published in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OW-2018-0149. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401

EPA-HQ-OW-2018-0149; FRL-XXXX-X-OW

RIN 2040-AF75

Revised Definition of “Waters of the United States”

AGENCIES: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army (“the agencies”) are publishing for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). This proposal is the second step in a comprehensive, two-step process intended to review and revise the definition of “waters of the United States” 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’

This document is a prepublication version, signed by EPA Acting Administrator, Andrew R. Wheeler, along with Mr. R.D. James, the Assistant Secretary of the Army for Civil Works, on 12/11/2018. EPA is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Rule.” This proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of “waters of the United States” federally regulated under the Act. Today’s proposed definition is also intended to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation’s waters while respecting State and tribal authority over their own land and water resources.

DATES: Comments must be received on or before *[insert 60 days after publication in the Federal Register]*.

ADDRESSES: You may submit comments, identified by Docket ID No. **EPA-HQ-OW-2018-0149**, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- E-mail: OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2018-0149 in the subject line of the message.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery / Courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking.

Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional

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information on the rulemaking process, see the “How should I submit comments?” heading of the GENERAL INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Michael McDavit, Oceans, Wetlands, and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-2428; email address: CWAwotus@epa.gov; or Jennifer A. Moyer, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number: (202) 761-5903; e-mail address: USACE_CWA_Rule@usace.army.mil.

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I. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA-HQ-OW-2018-0149. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West,

This document is a prepublication version, signed by EPA Acting Administrator, Andrew R. Wheeler, along with Mr. R.D. James, the Assistant Secretary of the Army for Civil Works, on 12/11/2018. EPA is submitting it for publication in the *Federal Register*. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically under the “**Federal Register**” listings at <http://www.regulations.gov>. An electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at <http://www.regulations.gov> to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <https://www.epa.gov/dockets>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. Under what legal authority is this proposed rule issued?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including sections 301, 304, 311, 401, 402, 404, and 501.

C. How should I submit comments?

Throughout this notice, the agencies solicit comment on a number of issues related to the proposed rulemaking. Submit your comments, identified by Docket ID No. EPA-HQ-OW-2018-0149, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the ADDRESSES section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio,

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video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

This rule is the outgrowth of other rulemakings and extensive outreach efforts, including requests for recommendations and comments, and the agencies have taken recommendations and comments received into account in developing this proposal. In developing a final rule, the agencies will be considering comments submitted on this proposal. Persons who wish to provide views or recommendations on this proposal must provide comments to the agencies as part of this comment process. To facilitate the processing of comments, commenters are encouraged to organize their comments in a manner that corresponds to the outline of this proposal.

II. Background

A. Executive Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) (together, the agencies) are publishing for public comment a proposed rule defining the scope of waters subject to federal regulation under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *United States v. Riverside Bayview Homes (Riverside Bayview)*, *Solid Waste Agency of Northern Cook County v. United States (SWANCC)*, and *Rapanos v. United States (Rapanos)*, and consistent with Executive Order 13778, signed on February 28, 2017, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the

‘Waters of the United States’ Rule.”

The agencies propose to interpret the term “waters of the United States” to 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 propose as a baseline concept that “waters of the United States” are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are “waters of the United States.” Under this proposed rule, a tributary is defined as a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream. 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. Ditches are generally proposed not to be “waters of the United States” unless they meet certain criteria, such as functioning as traditional navigable waters, if they are constructed in a tributary and also satisfy the conditions of the proposed “tributary” definition, or if they are constructed in an adjacent wetland and also satisfy the conditions of the proposed “tributary” definition.

The proposal defines “adjacent wetlands” as wetlands that abut or have a direct hydrological surface connection to other “waters of the United States” in a typical year. “Abut” is proposed to

mean when a wetland touches an otherwise jurisdictional water at either a point or side. A “direct hydrologic surface connection” as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water. Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent under today’s proposal.

The proposal would exclude from the definition of “waters of the United States” waters or water features not mentioned above. The proposed definition specifically clarifies that “waters of the United States” do not include features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage systems; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment systems. In addition, the agencies are proposing to clarify and define the terms “prior converted cropland” and “waste treatment system” to improve regulatory predictability and clarity.

In response to the interest expressed by some States in participating in the federal jurisdictional determination process, the agencies are soliciting comment as to how they could establish an approach to authorize States, Tribes, and Federal agencies to establish geospatial datasets of “waters of the United States,” as well as waters that the agencies propose to exclude, within their respective borders for approval by the agencies. Under a separate action, the agencies may propose creating a framework under which States, Tribes, and Federal agencies could choose

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to develop datasets for approval for all, some, or none of the “waters of the United States” within their boundaries. If the agencies were to pursue such an action, they would do so in coordination with other Federal agencies, State, tribal, and interested stakeholders. This approach would not require State and tribal governments to establish these datasets; it would simply make this process available to those government agencies that would find it useful.

The fundamental basis used by the agencies for the revised definition proposed today is the text and structure of the CWA, as informed by its legislative history and Supreme Court precedent, taking into account agency policy choices and other relevant factors. Today’s proposed definition is intended to strike a balance between Federal and State waters and would carry out Congress’ overall objective to restore and maintain the integrity of the nation’s waters in a manner that preserves the traditional sovereignty of States over their own land and water resources. The agencies believe the proposed definition would also ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. Today’s proposed rule is intended to ensure that the agencies are operating within the scope of the Federal government’s authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution.

B. The Clean Water Act and Regulatory Definition of “Waters of the United States”

1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or Clean Water Act (CWA) as it is commonly called,¹ in 1972 to address longstanding concerns regarding the quality

¹ The FWCPA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977). For ease of reference, the agencies will generally refer to the FWPCA in this notice as the CWA or the Act.

An official website of the United States government.

Due to a lapse in appropriations, EPA websites will not be regularly updated. In the event of an environmental emergency imminently threatening the safety of human life or where necessary to protect certain property, the EPA website will be updated with appropriate information. Please note that all information on the EPA website may not be up to date, and transactions and inquiries submitted to the EPA website may not be processed or responded to until appropriations are enacted.

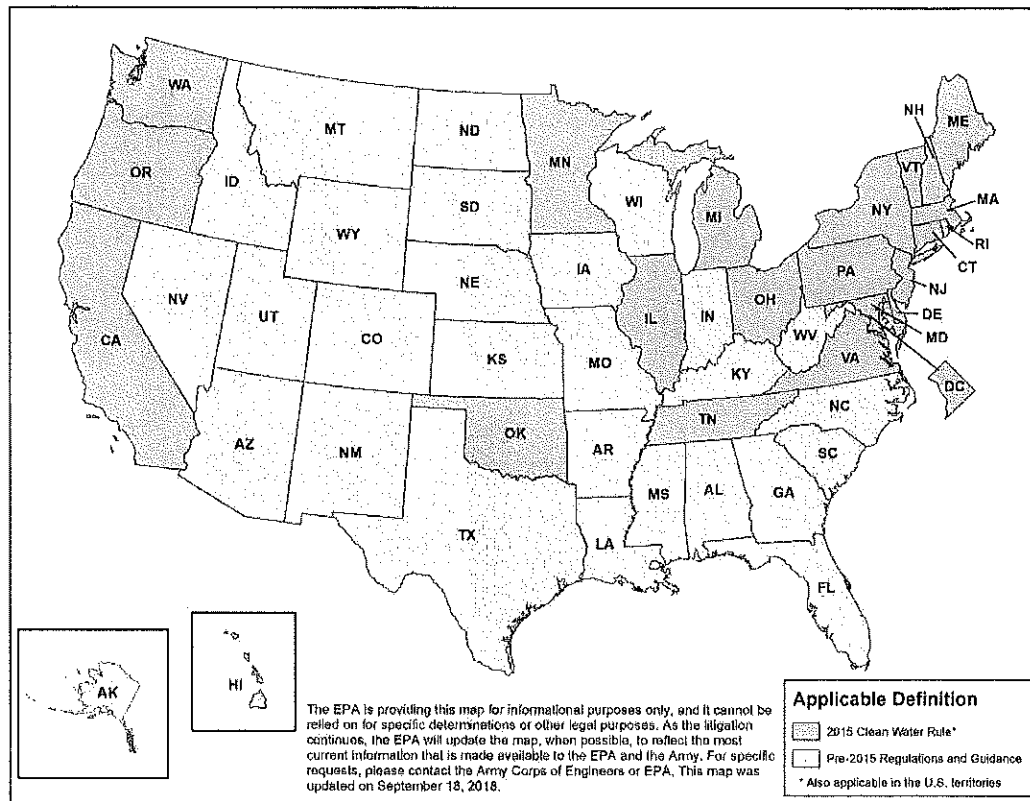
We've made some changes to EPA.gov. If the information you are looking for is not here, you may be able to find it on the EPA Web Archive or the January 19, 2017 Web Snapshot.

Close



Definition of "Waters of the United States": Rule Status and Litigation Update

The EPA and the Army continue to review the U.S. District Court for the District of South Carolina's decision to nationally enjoin the agencies' final rule that added an applicability date to the 2015 Clean Water Rule. Pursuant to the court's order, the 2015 Clean Water Rule is now in effect in 22 states, the District of Columbia, and the U.S. territories. Parties to the case, including the EPA and the Army, have filed motions appealing the order and seeking a stay of the district court's decision. While the litigation continues, the agencies are complying with the district court's order and implementation issues that arise are being handled on a case-by-case basis. The agencies recognize the uncertainty this decision has created and are committed to working closely with states and stakeholders to provide updated information on an ongoing basis regarding which rules are in place in which states. If a state, tribe, or an entity has specific questions about a pending jurisdictional determination or permit, please contact a local U.S. Army Corps of Engineers District office or the EPA.



LAST UPDATED ON OCTOBER 23, 2018

Final Rule: Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule

Please visit [“Definition of ‘Waters of the United States’: Rule Status and Litigation Update”](#) for updates regarding the status of this final rule. On January 31, 2018, the Environmental Protection Agency and U.S. Department of the Army (the agencies) [finalized a rule](#) adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule will not be applicable until February 6, 2020.

Given uncertainty about litigation in multiple district courts over the 2015 Rule, this action provides certainty and consistency to the regulated community and the public, and minimizes confusion as the agencies reconsider the definition of the “waters of the United States” that should be covered under the Clean Water Act.

The agencies’ new rule is separate from the [two-step process](#) the agencies propose to take to reconsider the 2015 Rule.

The proposed rule [published in the *Federal Register*](#) on November 22, 2017. The public comment closed on December 13, 2017. Comments can be found in the [docket](#). The [final rule](#) was signed on January 31, 2018, and was published in the *Federal Register* on February 6, 2018.

- [Read the Final Rule](#)
- [Read the Memorandum: Consideration of Potential Economic Impacts for the Final Rule](#)
- [Access All Materials in the Docket](#)
- [Read the Proposed Rule](#)

LAST UPDATED ON DECEMBER 11, 2018



FEDERAL REGISTER

Vol. 80 Monday,
No. 124 June 29, 2015

Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, *et al.*

Clean Water Rule: Definition of "Waters of the United States"; Final Rule

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 328****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401**

[EPA-HQ-OW-2011-0880; FRL-9927-20-OW]

RIN 2040-AF30

Clean Water Rule: Definition of "Waters of the United States"

AGENCY: U.S. Army Corps of Engineers, Department of the Army, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA or the Act), in light of the statute, science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), and *Rapanos v. United States* (Rapanos), and the agencies' experience and technical expertise. This final rule reflects consideration of the extensive public comments received on the proposed rule. The rule will ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of "waters of the United States" protected under the Act.

DATES: This rule is effective on August 28, 2015. In accordance with 40 CFR part 23, this regulation shall be considered issued for purposes of judicial review at 1 p.m. Eastern time on July 13, 2015.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202-566-2428; email address: CWAwaters@epa.gov v. Ms. Stacey Jensen, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number 202-761-5856; email address: USACE_CWA_Rule@usace.army.mil.

SUPPLEMENTARY INFORMATION: This final rule does not establish any regulatory

requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the Clean Water Act (CWA), Supreme Court precedent, and science. Programs established by the CWA, such as the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and response programs, all rely on the definition of "waters of the United States." Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction.

State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Forty-six states and the U.S. Virgin Islands have been authorized by EPA to administer the NPDES program under section 402, and two states have been authorized by the EPA to administer the section 404 program. All states and forty tribes have developed water quality standards under the CWA for waters within their boundaries. A federal advisory committee has recently been announced to assist states in identifying the scope of waters assumable under the section 404 program.

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.

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 - M. Judicial Review

I. General Information**A. How can I get copies of this document and related information?**

1. **Docket.** An official public docket for this action has been established under Docket Id. No. EPA-HQ-OW-2011-0880. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The official public docket also includes a Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule, and the Response to Comments document. Although a part of the official docket, the public docket does not include Confidential Business Information or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m.

to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. Electronic Access. You may access this **Federal Register** document electronically under the “**Federal Register**” listings at <http://www.regulations.gov>. An electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at <http://www.regulations.gov> to view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. Under what legal authority is this rule issued?

The authority for this rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, including sections 301, 304, 311, 401, 402, 404 and 501.

II. Executive Summary

In this final rule, the agencies clarify the scope of “waters of the United States” that are protected under the Clean Water Act (CWA), based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience in implementing the statute. This rule makes the process of identifying waters¹ protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” section 101(a), and to complement statutes that protect the navigability of waters, such as the Rivers and Harbors Act. 33 U.S.C. 401,

403, 404, 407. The CWA is the nation’s single most important statute for protecting America’s clean water against pollution, degradation, and destruction. To provide that protection, the Supreme Court has consistently agreed that the geographic scope of the CWA reaches beyond waters that are navigable in fact. Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies’ technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation of the CWA consistent with its purposes through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis. The agencies emphasize that, while the CWA establishes permitting requirements for covered waters to ensure protection of water quality, these requirements only apply with respect to discharges of pollutants to the covered water. In the absence of a discharge of a pollutant, the CWA does not impose permitting restrictions on the use of such water.

Additionally, Congress has exempted certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of “waters of the United States” to make it clear that this rule does not add any additional permitting requirements on agriculture. The rule also does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from

NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers. CWA section 402(l)(1); CWA section 402(l)(2); CWA section 502(14); 40 CFR 122.3(f); 40 CFR 122.2.

Finally, even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures. The agencies will continue to develop general permits and simplified procedures, particularly as they affect crossings of covered ephemeral and intermittent tributaries jurisdictional under this rule to ensure that projects that offer significant social benefits, such as renewable energy development, can proceed with the necessary environmental safeguards while minimizing permitting delays.

The jurisdictional scope of the CWA is “navigable waters,” defined in section 502(7) of the statute as “waters of the United States, including the territorial seas.” The term “navigable waters” is used in a number of provisions of the CWA, including the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program, the section 311 oil spill prevention and response program,² the water quality standards and total maximum daily load programs (TMDL) under section 303, and the section 401 state water quality certification process. However, while there is only one CWA definition of “waters of the United States,” there may be other statutory factors that define the reach of a particular CWA program or provision.³

² While section 311 uses the phrase “navigable waters of the United States,” EPA has interpreted it to have the same breadth as the phrase “navigable waters” used elsewhere in section 311, and in other sections of the CWA. See *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324–25 (6th Cir. 1974). In 2002, EPA revised its regulatory definition of “waters of the United States” in 40 CFR part 112 to ensure that the language of the rule was consistent with the regulatory language of other CWA programs. *Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities*, 67 FR 47042, July 17, 2002. A district court vacated the rule for failure to comply with the Administrative Procedure Act, and reinstated the prior regulatory language. *American Petroleum Ins. v. Johnson*, 541 F. Supp. 2d 165 (D. D.C. 2008). However, EPA interprets “navigable waters of the United States” in CWA section 311(b), in the pre-2002 regulations, and in the 2002 rule to have the same meaning as “navigable waters” in CWA section 502(7).

³ For example, the CWA section 402 (33 U.S.C. 1342) program regulates discharges of pollutants

¹ The agencies use the term “water” and “waters” in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows, and other types of natural or man-made aquatic systems, identifiable by the water contained in these aquatic systems or by their chemical, physical, and biological indicators. The agencies use the terms “waters” and “water bodies” interchangeably in this preamble.

Existing regulations (last codified in 1986) define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. 33 CFR 328.3; 40 CFR 122.2.⁴

However, the Supreme Court has issued three decisions that provide critical context and guidance in determining the appropriate scope of "waters of the United States" covered by the CWA. In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." *Id.* at 134. The Court observed that the broad objective of the CWA to restore and maintain the integrity of the Nation's waters "incorporated a broad, systemic view of the goal of maintaining and improving water quality. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 132–33 (citing Senate Report No. 92–414, p. 77 (1972)).

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the

exercise of federal regulatory authority under the CWA. Although the *SWANCC* decision did not call into question earlier decisions upholding the CWA's coverage of wetlands or other waters "adjacent" to traditional navigable waters, it created uncertainty with regard to the jurisdiction of other waters and wetlands that, in many instances, may play an important role in protecting the integrity of the nation's waters. The majority opinion in *SWANCC* introduced the concept that it was a "significant nexus" that informed the Court's reading of CWA jurisdiction over waters that are not navigable in fact.

Five years later, in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), all Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. In addition, Justice Kennedy's opinion indicated that the critical factor in determining the CWA's coverage is whether a water has a "significant nexus" to downstream traditional navigable waters such that the water is important to protecting the chemical, physical, or biological integrity of the navigable water, referring back to the Court's decision in *SWANCC*. Justice Kennedy's concurrence in *Rapanos* stated that to constitute a "water of the United States" covered by the CWA, "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC*, 531 U.S. at 167, 172). Justice Kennedy concluded that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780.

In this rule, the agencies interpret the scope of the "waters of the United States" for the CWA using the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience as support. In particular, the agencies looked to the objective of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and the scientific consensus on the strength of the effects of upstream tributaries and adjacent waters, including wetlands, on downstream traditional navigable waters, interstate waters, and the

territorial seas. An important element of the agencies' interpretation of the CWA is the significant nexus standard. This significant nexus standard was first informed by the ecological and hydrological connections the Supreme Court noted in *Riverside Bayview*, developed and established by the Supreme Court in *SWANCC*, and further refined in Justice Kennedy's opinion in *Rapanos*. The agencies also utilized the plurality standard in *Rapanos* by establishing boundaries on the scope of "waters of the United States" and in support of the exclusions from the definition of "waters of the United States." The analysis used by the agencies has been supported by all nine of the United States Courts of Appeals that have considered the issue.

The agencies assess the significance of the nexus in terms of the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." When the effects are speculative or insubstantial, the "significant nexus" would not be present. The science demonstrates that the protection of upstream waters is critical to maintaining the integrity of the downstream waters. The upstream waters identified in the rule as jurisdictional function as integral parts of the aquatic environment, and if these waters are polluted or destroyed, there is a significant effect downstream.

In response to the Supreme Court opinions, the agencies issued guidance in 2003 (post-*SWANCC*) and 2008 (post-*Rapanos*). However, these two guidance documents did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a "significant nexus" exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies. As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.

Members of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster. Chief Justice Roberts' concurrence in *Rapanos* underscores

from "point sources" to "waters of the United States," whether these pollutants reach jurisdictional waters directly or indirectly. The plurality opinion in *Rapanos* noted that "there is no reason to suppose that our construction today significantly affects the enforcement of § 1342. . . . The Act does not forbid the 'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" 547 U.S. at 743.

⁴ There are numerous regulations that utilize the definition of "waters of the United States" and each is codified consistent with its place in a particular section of the Code of Federal Regulations. For simplicity, throughout the preamble the agencies refer to the rule as organized into (a), (b), (c) provisions and intend the reference to encompass the appropriate cites in each section of the Code of Federal Regulations. For example, a reference to (a)(1) is a reference to all instances in the CFR identified as subject to this rule that state "All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

the importance of this rulemaking effort.⁵ In this final rule, the agencies are responding to those requests from across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The agencies proposed a rule clarifying the scope of waters of the United States April 21, 2014 (79 FR 22188), and solicited comments for over 200 days. This final rule reflects the over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule, as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others. The agencies sought comment on a number of approaches to specific jurisdictional questions, and many of these commenters and stakeholders urged EPA to improve upon the April 2014 proposal, by providing more bright line boundaries and simplifying definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities.

The agencies' interpretation of the CWA's scope in this final rule is guided by the best available peer-reviewed science—particularly as that science informs the determinations as to which waters have a “significant nexus” with traditional navigable waters, interstate waters, or the territorial seas.

The relevant science on the relationship and downstream effects of waters has advanced considerably in recent years. A comprehensive report prepared by the EPA's Office of Research and Development entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”⁶

(hereafter the Science Report) synthesizes the peer-reviewed science.

The Science Report provides much of the technical basis for this rule. The Science Report is based on a review of more than 1,200 peer-reviewed publications. EPA's Science Advisory Board (SAB) conducted a comprehensive technical review of the Science Report and reviewed the adequacy of the scientific and technical basis of the proposed rule. The Science Report and the SAB review confirmed that:

- Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.
- These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.
- The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their functions considered over time.

The Science Report and the SAB review also confirmed that:

- Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.
- Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.
- Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.

Although these conclusions play a critical role in informing the agencies' interpretation of the CWA's scope, the agencies' interpretive task in this rule—determining which waters have a “significant nexus”—requires scientific and policy judgment, as well as legal interpretation. The science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional

navigable waters, and it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. In making this determination, the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years. In addition, the agencies are guided, in part, by the compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act, including brighter line boundaries where feasible and appropriate.

Major Rule Provisions

In this final rule, the agencies define “waters of the United States” to include eight categories of jurisdictional waters. The rule maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice. The rule reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule recognizes jurisdiction for three basic categories: Waters that are jurisdictional in all instances, waters that are excluded from jurisdiction, and a narrow category of waters subject to case-specific analysis to determine whether they are jurisdictional.

Decisions about waters in each of these categories are based on the law, peer-reviewed science, and the agencies' technical expertise, and were informed by public comments. This rule replaces existing procedures that often depend on individual, time-consuming, and inconsistent analyses of the relationship between a particular stream, wetland, lake, or other water with downstream waters. The agencies have greatly reduced the extent of waters subject to this individual review by carefully incorporating the scientific literature and by utilizing agency expertise and experience to characterize the nature and strength of the chemical, physical, and biological connections between upstream and downstream waters. The result of applying this scientific analysis is that the agencies can more effectively focus the rule on identifying waters that are clearly covered by the CWA and those that are clearly not covered, making the rule easier to understand, consistent, and environmentally more protective.

The jurisdictional categories reflect the current state of the best available science, and are based upon the law and Supreme Court decisions. The agencies will continue a transparent review of the science, and learn from on-going

⁵ Chief Justice Roberts' concurrence in *Rapanos* emphasized that “[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.” *Id.* at 758. Chief Justice Roberts made clear that, if the agencies had undertaken such a rulemaking, “the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.” *Id.* (Emphasis in original.)

⁶ U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the*

Scientific Evidence (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, (2015)). <http://www.epa.gov/ncea>.

experience and expertise as the agencies implement the rule. If evolving science and the agencies' experience lead to a need for action to alter the jurisdictional categories, any such action will be conducted as part of a rule-making process.

The first three types of jurisdictional waters, traditional navigable waters, interstate waters, and the territorial seas, are jurisdictional by rule in all cases. The fourth type of water, impoundments of jurisdictional waters, is also jurisdictional by rule in all cases. The next two types of waters, "tributaries" and "adjacent" waters, are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. For waters that are jurisdictional by rule, no additional analysis is required.

The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region. Justice Kennedy acknowledged the agencies could establish more specific regulations or establish a significant nexus on a case-by-case basis, *Rapanos* at 782, and for these waters the agencies will continue to assess significant nexus on a case-specific basis.

The major elements of the final rule are briefly summarized here.

Traditional Navigable Waters, Interstate Waters, Territorial Seas, and Impoundments of Jurisdictional Waters

Consistent with existing regulations and the April 2014 proposed rule, the final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of "waters of the United States." These waters are jurisdictional by rule.

Tributaries

Previous definitions of "waters of the United States" regulated all tributaries without qualification. This final rule more precisely defines "tributaries" as waters that are characterized by the presence of physical indicators of flow—bed and banks and ordinary high water mark—and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas. The rule concludes that such tributaries are "waters of the United States." The great majority of tributaries as defined by the rule are headwater streams that play an

important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency, and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus. "Tributaries," as defined, are jurisdictional by rule.

The rule only covers as tributaries those waters that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard. The agencies identify these functions in the definition of "significant nexus" at paragraph (c)(5). Features not meeting this legal and scientific test are not jurisdictional under this rule. The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries or, in certain circumstances drain wetlands, or that science clearly demonstrates are functioning as a tributary. These jurisdictional waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation. Further, the rule explicitly excludes from the definition of "waters of the United States" erosional features, including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark.

Adjacent Waters

The agencies determined that "adjacent waters," as defined in the rule, have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters. Under this final rule, "adjacent" means bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are "adjacent" to that stream or river. "Adjacent waters" include wetlands, ponds, lakes, oxbows, impoundments, and similar water features. However, it is important to note that "adjacent waters" do not include waters that are subject to

established normal farming, silviculture, and ranching activities as those terms are used in Section 404(f) of the CWA.

The final rule establishes a definition of "neighboring" for purposes of determining adjacency. In the rule, the agencies identify three circumstances under which waters would be "neighboring" and therefore "waters of the United States":

(1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary, as defined in the rule.

(2) Waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary, as defined in the rule ("floodplain waters").

(3) Waters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.

The agencies emphasize that the rule has defined as "adjacent waters" those waters that currently available science demonstrates possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters. The agencies also emphasize that the rule does not cover "adjacent waters" that are otherwise excluded. Further, the agencies recognize the establishment of bright line boundaries in the rule for adjacency does not in any way restrict states from considering state specific information and concerns, as well as emerging science to evaluate the need to more broadly protect their waters under state law. The CWA establishes both national and state roles to ensure that states specific circumstances are properly considered to complement and reinforce actions taken at the national level.

"Adjacent" waters as defined are jurisdictional by rule. The agencies recognize that there are individual waters outside of the "neighboring" boundaries stated above where the science may demonstrate through a case-specific analysis that there exists a significant nexus to a downstream traditional navigable water, interstate water, or the territorial seas. However, these waters are not determined jurisdictional by rule and will be evaluated through a case-specific analysis. The strength of the science and

the significance of the nexus will be established on a case-specific basis as described below.

Case-Specific Significant Nexus

The rule identifies particular waters that are not jurisdictional by rule but are subject to case-specific analysis to determine if a significant nexus exists and the water is a “water of the United States.” This category of case-specific waters is based upon available science and the law, and in response to public comments that encouraged the agencies to ensure more consistent determinations and reduce the complexity of conducting jurisdictional determinations. Consistent with the significant nexus standard articulated in the Supreme Court opinions, waters are “waters of the United States” if they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters where waters function together.

In this final rule, the agencies have identified by rule, five specific types of waters in specific regions that science demonstrates should be subject to a significant nexus analysis and are considered similarly situated by rule because they function alike and are sufficiently close to function together in affecting downstream waters. These five types of waters are Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. Consistent with Justice Kennedy’s opinion in *Rapanos*, the agencies determined that such waters should be analyzed “in combination” (as a group, rather than individually) in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific analysis of whether these waters have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

The final rule also provides that waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule. The science available today does not establish that waters beyond those

defined as “adjacent” should be jurisdictional as a category under the CWA, but the agencies’ experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters.

In circumstances where waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark are subject to a case-specific significant nexus analysis and such waters may be evaluated as “similarly situated,” it must be first demonstrated that these waters function alike and are sufficiently close to function together in affecting downstream waters. The significant nexus analysis must then be conducted based on consideration of the functions provided by those waters in combination in the point of entry watershed. A “similarly situated” analysis is conducted where it is determined that there is a likelihood that there are waters that function together to affect downstream water integrity. To provide greater clarity and transparency in determining what functions will be considered in determining what constitutes a significant nexus, the final rule lists specific functions that the agencies will consider.

In establishing both the 100-year floodplain and the 4,000 foot bright line boundaries for these case-specific significant nexus determinations in the rule, the agencies are carefully applying the available science. Consistent with the CWA, the agencies will work with the states in connection with the prevention, reduction and elimination of pollution from state waters. The agencies will work with states to more closely evaluate state-specific circumstances that may be present within their borders and, as appropriate, encourage states to develop rules that reflect their circumstances and emerging science to ensure consistent and effective protection for waters in the states. As is the case today, nothing in this rule restricts the ability of states to more broadly protect state waters.

Exclusions

All existing exclusions from the definition of “waters of the United States” are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time.

Prior converted cropland and waste treatment systems have been excluded

from the definition of “waters of the United States” definition since 1992 and 1979 respectively, and continue to be excluded. Ministerial changes are made for purposes of clarity, but these two exclusions remain substantively and operationally unchanged. The agencies add exclusions for waters and features previously identified as generally exempt (e.g., exclusion for certain ditches that are not located in or drain wetlands) in preamble language from **Federal Register** documents by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction, including ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies’ intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions reflect the agencies’ current practice, and their inclusion in the rule as specifically excluded furthers the agencies’ goal of providing greater clarity over what waters are and are not protected under the CWA.

Role of States and Tribes Under the Clean Water Act

States and tribes play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator’s authority under the CWA.

Of particular importance, states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404. Forty-six states and the U.S. Virgin Islands are authorized to administer the NPDES program under section 402, while two states administer the section 404 program. The CWA identifies the waters over which states may assume section 404 permitting jurisdiction. See CWA section 404(g)(1). The scope of waters

that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for "waters of the United States" within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Agreement between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). EPA has initiated a separate process to address how the EPA can best clarify assumable waters for dredged and fill material permit programs pursuant to the Clean Water Act section 404(g)(1). 80 FR 13539 (Mar. 16, 2015). Additional CWA programs that utilize the definition of "waters of the United States" and are of importance to the states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load (TMDL) programs under section 303, and the section 401 state water quality certification process.

States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state to establish more protective standards or limits than the Federal CWA. Congress has also provided roles for eligible Indian tribes to administer CWA programs over their reservations and expressed a preference for tribal regulation of surface water quality on Indian reservations to ensure compliance with the goals of the CWA. See 33 U.S.C. 1377; 56 FR 64876, 64878–79 (Dec. 12, 1991)). Tribes also have inherent sovereign authority to establish more protective standards or limits than the Federal CWA. Where appropriate, references to states in this document may also include eligible tribes. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but outside the jurisdiction of the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

Overview of the Preamble

The remainder of this preamble is organized as follows. Section III (Significant Nexus Standard) provides additional background on the rule, including a discussion of Supreme Court precedent, the science underpinning the rule, and the agencies' overall interpretive approach to applying the significant nexus standard. Section IV (Definition of Waters of the United States) explains the provisions of the final rule, including subsections on each of the major elements of the rule. Section V summarizes the economic analysis of the rule and Section VI addresses Related Acts of Congress, Executive Orders and Agency Initiatives.

III. Significant Nexus Standard

With this rule, the agencies interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience. The key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: Waters are "waters of the United States" if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The agencies interpret specific aspects of the significant nexus standard in light of the science, the law, and the agencies' technical expertise: The scope of the region in which to evaluate waters when making a significant nexus determination; the waters to evaluate in combination with each other; and the functions provided by waters and strength of those functions, and when such waters significantly affect the chemical, physical, or biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas.

In the rule, the agencies determine that tributaries, as defined ("covered tributaries"), and "adjacent waters", as defined ("covered adjacent waters"), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are "waters of the United States." In the rule, the agencies also establish that defined sets of additional waters may be determined to have a significant nexus on a case-specific basis: (1) Five specific types of waters

that the agencies conclude are "similarly situated" and therefore must be analyzed "in combination" in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus analysis; and (2) waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, or waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries. The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations.

Significant nexus is not a purely scientific determination. The opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, while science does not provide bright line boundaries with respect to where "water ends" for purposes of the CWA. Therefore, the agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them. With this context, this section addresses, first, the Supreme Court case law and the significant nexus standard, second, the relevant scientific conclusions reached by analysis of existing scientific literature, and third, the agencies' significant nexus determinations underpinning the rule. Section IV of the preamble addresses in more detail the precise definitions of the covered waters promulgated by the agencies to provide the bright line boundaries identifying "waters of the United States."

A. The Significant Nexus Standard

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a). The agencies' longstanding regulations define "waters of the United States" for purposes of the Clean Water Act, and the Supreme Court has addressed the scope of "waters of the United States" protected by the CWA in three cases. The significant nexus standard evolved through those cases.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), which involved wetlands adjacent to a traditional navigable water in Michigan, the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are "inseparably bound up" with the waters

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Joe Martens
Commissioner

May 17, 2012

Attorneys at Law

Re: Determination on Petition to Designate Freshwater Wetlands
of Unusual Local Importance at the Patrick Farm Site.

Dear

I write in response to your December 12, 2011 petition brought pursuant to Environmental Conservation Law Sections 24-0301 and 24-0105. Specifically, the petition requested that the Department designate an unmapped wetland area in the Town of Ramapo, Rockland County New York as freshwater wetlands of unusual local importance. A project known as the Patrick Farm Development Project has been proposed for the property where the wetlands are located (the "Site"). Department staff has also reviewed the additional information provided in your February 9, 2012 correspondence, and has reviewed the "White Paper" in support of your request. For the following reasons, the Department is not granting your petition.

The Environmental Conservation Law gives the Department authority to regulate freshwater wetlands in the state of New York which have an area of at least 12.4 acres or more. It is the policy of the state

to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetland to secure the nature benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state.

ECL § 24-0103. Regulation of smaller wetlands is possible as either a discretionary or mandatory action under authority given to the Commissioner by law. Regulation of freshwater wetlands smaller than 12.4 acres is at the discretion of the Commissioner if it is determined by the Commissioner that the wetlands have "unusual local importance for one or more of the specific benefits set forth in subdivision seven of [Environmental Conservation Law] section 24-0105." See ECL § 24-0301. The Commissioner, however, shall designate an area of land or water of less than 12.4 acres as a wetland having unusual local importance if it contains any Class I characteristics. See 6 NYCRR § 664.7(c)(1).

THE PETITION FOR THE PATRICK FARM WETLANDS

On January 3, 2012, in my correspondence responding to your initial December 12, 2011 petition, I noted that Department staff have conducted field inspections of the Site and at that time determined that the wetland area does not meet the minimum legal threshold of 12.4 acres in area necessary for the Department to map and designate the wetland as regulated under the Environmental Conservation Law. At that time, the Department also determined that the wetland does not meet the established criteria as a freshwater wetland of unusual local importance. This initial determination was based upon Department staff observations during field inspections of the Site.

On February 9, 2012, Department staff received additional information in support of the petition to designate the Patrick Farm wetland as a freshwater wetland of unusual local importance. Department staff has reviewed that information and has revisited the January 3, 2012 determination declining to designate the wetland as a freshwater wetland of unusual local importance.

THE UNUSUAL LOCAL IMPORTANCE ANALYSIS

The Department's regulatory jurisdiction is generally limited to wetlands 12.4 acres or larger, unless a smaller wetland is determined to have "unusual local importance." The Department is obligated to designate a freshwater wetland as having "unusual local importance" if it can be classified as a Class I wetland. See 6 NYCRR § 664.7.

Is it a Class I Freshwater Wetland?

The six Class I freshwater wetland characteristics include:

- it is a classic kettlehole bog,
- it is resident habitat of an endangered or threatened animal species,
- it contains an endangered or threatened plant species,
- it supports an animal species in abundance or diversity unusual for the state or for the major region of the state in which it is found,
- it is tributary to a body of water which could subject a substantially developed area to significant damage from flooding or from additional flooding should the wetland be modified, filled, or drained, and
- it is adjacent or contiguous to a reservoir or other body of water that is used primarily for public water supply, or it is hydraulically connected to an aquifer which is used for public water supply.

Department staff found no evidence of endangered animal or plant species, or animal species in unusual abundance or diversity in the wetland. The wetland is not a kettlehole bog. There is no evidence demonstrating that alterations of the wetland would impact the flooding risks to the area, so the fifth characteristic is also not present. Regarding the first part of the sixth characteristic, the wetland is not adjacent to or contiguous with a reservoir or other body of water that is used for public water supply, and moreover, it does not appear that the water bodies downstream from the area are used "primarily" for water supply purposes. Regarding the second part of the sixth criteria, Department staff has determined that the wetland is not hydraulically connected to an aquifer. Although the property is near an aquifer used for public water supply, the wetland is not within the boundaries of the aquifer according to the Department's Geological Information Survey data and therefore cannot be considered "hydraulically connected." There is a stream that leaves the wetland, flows down-slope for a considerable distance, and then runs over that aquifer, but there is no evidence that this stream connects to the aquifer either underground or via surface flow, based upon Department staff's review of the geologic conditions of the Site.

For these reasons, Department staff has concluded that the petitioned Patrick Farm wetland does not possess any characteristics of a Class I wetland, and therefore, the wetland is not required by law to be designated as having "unusual local importance."

Does the Wetland Contain 4 or More Class II Characteristics Authorizing it to be considered Class I?

A freshwater wetland also may be considered a Class I wetland if "it contains four or more of the

enumerated Class II characteristics." 6 NYCRR § 664.5(a)(7). There are seventeen Class II characteristics. The most relevant characteristics for this inquiry include:

- it contains two or more wetland structural groups,
- it is associated with permanent open water outside the wetland,
- it is adjacent or contiguous to streams classified C(t) or higher, and
- it is within an urbanized area.


Portions of the wetland area on the Site possess three of the four characteristics. The area contains at least two wetland structural groups, is adjacent or contiguous to a Class B stream, and is located in an "urbanized area." However, a review by Department staff has determined that the wetland is not associated with permanent open water outside the wetland. Thus, the wetland does not possess the necessary four of the seventeen Class II characteristics required for designation as having "unusual local importance."

The Commissioner of the Department also has the discretion to determine that freshwater wetlands have "unusual local importance for one or more of the specific benefits set forth in subdivision seven of [Environmental Conservation Law] section 24-0105." ECL § 24-0301(1)(a). Such specific freshwater wetland benefits include, among others, flood and storm control, wildlife habitat, protection of subsurface water resources recreation, pollution treatment, erosion control and open space. ECL § 24-0105(7). Department staff have thoroughly reviewed the information submitted with the petition, and while there is no question that the Patrick Farm wetland provides some of these valuable wetlands benefits, it provides benefits that can be attributed to nearly any wetland and there is no evidence to suggest that any of these wetlands benefits provided rise to the level of having "unusual local importance" warranting such a designation.

Therefore, based on Department Staff's review of the petition and the additional information submitted for our consideration regarding the wetland on the Patrick Farm Site, the regulatory criteria are not sufficiently met authorizing us to designate the freshwater wetland as having "unusual local importance." On behalf of the Department staff, I thank you for your thoughtful submission and for your interest in protecting wetlands in the Hudson Valley area that you value.

Please feel free to contact me if I can be of any further assistance.

Sincerely,


William C. Janeway
Regional Director

CC: John Parker
Roy Jacobson
Dan Whitehead

New York State Department of Environmental Conservation
Hudson Valley Catskill Region, Region 3
21 South Platt Corners Road, New Paltz, NY 12561
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Joe Martens
Commissioner

November 16, 2012

Ramapo Organized for Sustainability and a Safe Aquifer (ROSA, Inc.)

Re: Determination on Petition to Designate Freshwater Wetlands of Unusual Local Importance at the Patrick Farm Site.

Dear

I write in response to the December 12, 2011 petition brought pursuant to Environmental Conservation Law Sections 24-0301 and 24-0105 and ROSA Inc.'s March 16, 2012 "Memorandum & Exhibits in Support of the Proposed Amendment of the Department's Freshwater Wetlands Map of Rockland County to Confirm Additional Wetlands on the Property Known as the Patrick Farm." Specifically, the petition requested that the Department designate an unmapped wetland area in the Town of Ramapo, Rockland County New York as freshwater wetlands of unusual local importance. A project known as the Patrick Farm Development Project has been proposed for the property where the wetlands are located (the "Site").

Department staff reviewed the additional information provided in the February 9, 2012 correspondence from Susan and Milton Shapiro, and the "White Paper" in support of the petition. Department staff has also reviewed the information provided in the March 16, 2012 correspondence from Suzanne Mitchell of ROSA, Inc. and the aforementioned Memorandum and Exhibits.

Based on Department Staff's review of the petition and the additional information submitted regarding the wetland on the Patrick Farm Site, the Department staff has determined that the Site did not sufficiently meet the regulatory criteria to authorize the Department to designate the freshwater wetland as having "unusual local importance." The Department set forth the basis for its decision to not grant the petition request in a letter dated May 17, 2012 to Susan and Milton Shapiro, which is enclosed for your reference. In arriving at that determination, Department staff thoroughly reviewed the February 9, 2012 submissions made by Susan and Milton Shapiro and March 16, 2012 submission by Suzanne Mitchell of ROSA, Inc., as well as the findings of Department staff regarding the geological and hydrological conditions of the Site. Department staff has also visited the site as part of its consideration of the submission by Petitioners.

Thank you for providing a thoughtful and well reasoned petition to the Department. Please feel free to contact me if I can be of any further assistance.

Sincerely,

William C. Janeway
Regional Director

Encs.

CC: Kelly Turturo
Dan Whitehead

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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September 1, 2015

ROSA 4 Rockland Inc.

Re: Petition to Amend Environmental Conservation Law (ECL) Article 24 Freshwater Wetland Map on the Patrick Farm Property

Dear

The New York State Department of Environmental Conservation (NYSDEC or Department) has reviewed your petition dated January 13, 2015 to amend the Thiels Quadrangle for the Rockland County Article 24 Freshwater Wetland Regulatory Map. The petition requests the inclusion and subsequent regulation of wetlands associated with an existing farm pond on the "Patrick Farm" property that is located in the Town of Ramapo, Rockland County. The request was predicated on the United States Army Corps of Engineers Jurisdictional Determination (ACOE JD) entitled *Patrick Farm Wetland Delineation Map* dated 6/17/2104 [2014] by Carpenter Environmental Associates, Inc.

Environmental Conservation Law Article 24 Freshwater Wetland Law requires that for the Department to assert jurisdiction over a wetland that the wetland be included on the regulatory map. Wetlands are eligible to be included or added to the regulatory map if they are greater than 5 Hectares (12.4 acres) in total area. The intent of the regulatory map is to provide notice to landowners and the public about what wetlands are subject to regulation under Article 24. There is a formal process outlined in 6 New York Codes Rules and Regulations Part 664 for amending the regulatory map.

Throughout the Patrick Farm planning and approval process at the local and state level, Department staff have made numerous site visits to this property for the purpose of determining Department jurisdiction under multiple Environmental Conservation Laws and their associated implementing regulations. Based on these site visits, and through the use of GIS and other mapping tools, the Department previously determined that the wetlands associated with the farm pond, tributaries to the farm pond, and the outlet of the impoundment collectively do not meet the criteria necessary to be regulated under



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Article 24. On November 21, 2006 Department Staff validated the wetland boundary for the two wetlands on the property that do appear on the regulatory map for the owner (TH-14 and TH-30). This was renewed on 2009 and is valid for 10 years.

The initial site visit on November 6, 2006 focused specifically on wetlands that were already on the regulatory map labeled TH-14 and TH-30. Subsequently, on 8/11/2011, staff returned to the site to look specifically at the wetlands associated with the farm pond in response to a previous request from ROSA 4 Rockland for the Department to assert Article 24 jurisdiction over these wetlands. During this site visit, staff determined that, based on conditions at that time, there was a little over 200' foot break in wetland vegetation between Wetland 4 and Wetland 5, as also shown on the 2014 ACOE JD provided with the current petition. Based on criteria in 6 NYCRR Part 664.7(b), these two wetland areas, although hydrologically connected, were greater than 50 Meters (164.04 feet) apart and were considered to be separate wetlands for purposes of mapping. Separating these wetland areas for the purpose of determining acreage resulted in the two wetland areas being significantly below the 5 Hectare (12.4 acre) regulatory threshold.

In response to the current ROSA 4 Rockland Petition, and as indicated in my April 3, 2015 initial response to your petition, Department staff performed another site visit with the property owner's environmental consultant on May 12, 2015. The purpose of the site visit was to determine if the ACOE JD mapping in the vicinity of the existing farm pond was consistent with the Department's Freshwater Wetland Delineation Manual and to make observations to determine if these wetlands meet the criteria for New York State DEC jurisdiction as outlined in 6 NYCRR Part 664 Freshwater Wetland Map and Classification Regulations.

During that May 2015 site visit, Department staff thoroughly checked the hydrologic connection between wetlands 4 and 5. Staff determined the length through field measurements of the hydrologic connection (absent wetland vegetation) of Tributary 3 for comparison to the threshold distance in 6 NYCRR Part 664.7(b). While close to the threshold criteria, results of the re-measurement were not compelling enough to allow us to use the cumulative acreage of both wetlands in determining the state's jurisdiction. Therefore, the new information or evidence does not support a determination that the area of the combined wetlands exceeds the regulatory threshold of 12.4 acres.

Additionally, Department staff also observed that the ACOE JD consistently depicts the delineated wetland boundary to be upland of where the guidance established in the Department's Freshwater Wetland Delineation Manual would dictate. Additionally, the ACOE JD does not separate out upland areas located entirely within the wetland boundary. Based on these observations, Department staff have concluded that the wetland boundaries shown on the ACOE JD, and the acreage calculations extrapolated from the ACOE JD, cannot be utilized directly to support the wetland's regulation under ECL Article 24.

Based on the above, the petition and additional information submitted do not provide a sufficient basis for us to overturn our previous determination. We have thus again concluded that this wetland does not meet the criteria to be regulated under ECL Article 24 and therefore cannot amend the regulatory map as requested by ROSA 4 Rockland.

If you have any specific questions regarding this determination, please feel free to contact Bill Rudge, Natural Resources Supervisor, at (845) 256-3094.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Brand", with a long, sweeping horizontal line extending to the left.

Martin D. Brand
Regional Director

cc: Assemblywoman Ellen C. Jaffee
Senator David Carlucci
Assemblyman Kenneth P. Zebrowski
Edwin J. Day, Rockland County Executive
Christopher St. Lawrence, Supervisor, Town of Ramapo
Yechiel Lebovits, Applicant/Sponsor for Patrick Farms

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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January 18, 2018

Village of Pomona

Dear

I write in response to your correspondence related to the parcel of land in Rockland County where Scenic Development LLC has proposed to build a residential development called "Patrick Farm". The New York State Department of Environmental Conservation ("DEC" or "Department") has reviewed the Village of Pomona's request and the information submitted in support of the request that DEC consider certain wetlands on the Patrick Farm property to be Wetlands of Unusual Local Importance so that the wetlands can be added to the Freshwater Wetland Regulatory Map for Rockland County and become regulated by New York State.

Over the past several years, the Department has reviewed six requests to add the wetlands on the Patrick Farm property to the State's official freshwater wetlands maps. Three of those requests were for the Department to designate the wetland as a Wetland of Unusual Local Importance because the wetland area is less than the statutory minimum 12.4 acres required to be a state regulated wetland (see 6 NYCRR Part 664.7(c)). The Department responded to the three requests in 2012 and advised that the wetland area did not meet the regulatory criteria to require designation as a Wetland of Unusual Local Importance and declined to amend the Freshwater Wetland Regulatory Map. I have enclosed those letters for your reference, including January 3, 2012 from DEC Regional Director William C. Janeway to Ms. Susan Shapiro, Esq.; May 17, 2012 from DEC Regional Director William C. Janeway to Milton B. Shapiro and Susan Hito Shapiro; and November 16, 2012 from Regional Director William C. Janeway to Ms. Melanie Golden.

The Department's 2012 determinations were based upon the same facts and issues raised in your correspondence, and reflect that among several other reasons, the subject wetland does not possess any Class I characteristics including that it is not located directly over an aquifer which is used for public water supply nor does it



Department of
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possess at least four Class II characteristics. Therefore, the Department determined in 2012 that the Patrick Farm wetlands did not meet the regulatory criteria to require designation as a Wetland of Unusual Local Importance and declined to amend the regulatory map.

The above referenced letters remain the agency's determination regarding the presence of wetlands of Unusual Local Importance on the Patrick Farm property. DEC therefore declines to make any further determination regarding this issue.

Thank you for your continued interest in the protection of local wetlands and the State's natural resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelly R. Turturro", with a long horizontal flourish extending to the right.

Kelly R. Turturro
Regional Director

Enclosure

38 A.D.3d 903, 832 N.Y.S.2d
653, 2007 N.Y. Slip Op. 02763

****1** In the Matter of Park Ridge
Neighborhood Association et al., Petitioners
v
Erin M. Crotty et al., Respondents. (Proceeding
No. 1.) In the Matter of Westchester Country
Club, Inc., et al., Appellants, v Erin M. Crotty
et al., Respondents. (Proceeding No. 2.)

Supreme Court, Appellate Division,
Second Department, New York
13745/05, 13813/05, 2005-09858
March 27, 2007

CITE TITLE AS: Matter of Park
Ridge Neighborhood Assn. v Crotty

HEADNOTE

[Environmental Conservation](#)
[Water Supply](#)
Water Quality Certification

Respondents, their agents, servants and employees were enjoined from proceeding with any work on certain parcels pending issuance of water quality certification by State Department of Environmental Conservation (Department)—regulations governing Department's response to requests for water quality certifications under section 401 of Clean Water Act (33 USC § 1341 [a] [1]) provide that applicant for such permit “must apply for *and obtain* a water quality certification from the department” (6 [NYCRR 608.9](#) [a] [emphasis supplied]); although applicable federal statute allows state to which permitting authority under Clean Water Act has been delegated to grant waiver of water quality certification (*see* 33 USC § 1341 [a]), Department's regulations, by which it is bound, do not; Department was without authority to grant waiver at issue.

Zarin & Steinmetz, White Plains, N.Y. (Daniel M. Richmond and David S. Steinmetz of counsel), for appellant Westchester

Country Club, Inc., and Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains, N.Y. (William J. Collier, Jr., and William Walsh of counsel), for appellant Harrison-Rye Realty Corp. (one brief filed).

Andrew M. Cuomo, Attorney General, New York, N.Y. (Michael S. Belohlavek and Norman Spiegel of counsel; Tomas Carbonell on the brief), for respondents Erin M. Crotty, as Commissioner of the New York State Department of Environmental Conservation, and New York State Department of Environmental Conservation in proceeding No. 2.




Thacher Proffitt & Wood LLP, White Plains, N.Y. (Kevin J. Plunkett and Darius P. Chafizadeh of counsel), for respondents Atlantic Development, LLC, Iliana Gardens, LLC, Collin Estates, LLC, and Sunshine Properties of Westchester, LLC, in proceeding No. 2.

Friedman, Harfenist, Langer & Kraut, Purchase, N.Y. (Steven Jay Harfenist of counsel), for amicus curiae Town/Village of Harrison.

In two related proceedings pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation dated July 11, 2005, which granted a waiver of water quality certification in connection with an application by Atlantic Development, LLC, to fill federally-regulated wetlands, Westchester Country Club, Inc., and Harrison-Rye Realty Corp. appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Westchester County (Nicolai, J.), dated September 14, 2005, as denied the petition in proceeding No. 2, dismissed proceeding No.2, and vacated a temporary restraining order of the same court dated August 18, 2005, enjoining Atlantic Development, LLC, Iliana Gardens, LLC, Collin Estates, LLC, Sunshine Properties of Westchester, LLC, and Michael DeMartino, and their agents, servants, and employees from proceeding with any work on parcels designated as Blocks 12, 13, and 14 on Westchester County Tax Map No. 3322 until September 15, 2005.

Ordered that the order and judgment is reversed insofar as appealed from, on the law, with costs payable by the respondents *904 appearing separately and filing separate briefs, the petition in proceeding No. 2 is granted, the determination is annulled, and Atlantic Development, LLC, Iliana Gardens, LLC, Collin Estates, LLC, Sunshine Properties of Westchester, LLC, and Michael DeMartino, and their agents, servants, and employees are enjoined from

proceeding with any work on parcels designated as Blocks 12, 13, and 14 on Westchester County Tax Map No. 3322 pending the issuance of a water quality certification by the New York State Department of Environmental Conservation.

The regulations of the New York State Department of Environmental Conservation (hereinafter the Department) that govern the Department's response to requests for water quality certifications under section 401 of the Clean Water Act ( [33 USC § 1341](#) [a] [1]) provide that the applicant for such a permit “must apply for *and obtain* a water quality certification from the department” ([6 NYCRR 608.9](#) [a] [emphasis supplied]). Although the applicable federal statute allows a state to which permitting authority under the Clean Water Act [formerly the Federal Water Pollution Control Act] has been delegated to grant a waiver of water quality certification (*see*  [33 USC § 1341](#) [a]), the Department's regulations, by which it is bound (*see* [Matter of Frick v Bahou](#), [56 NY2d 777, 778 \[1982\]](#);  [Matter of Steck v Jorling](#), [219 AD2d 727, 729 \[1995\]](#)), do not. The Department's argument that its regulations require water quality certification only where the waters in issue fall within its jurisdiction under the Freshwater Wetlands Act (ECL art 24) is inconsistent

with the terms of the regulation, pursuant to which the certification requirement applies to any permit “that may result in any discharge into navigable waters as defined in section 502 of the Federal Water Pollution Control Act” ([6 NYCRR 608.9](#) [a]). In addition, although the regulations authorize the Department to grant statewide water quality certifications in certain circumstances, they provide for no such certification, and no exemption or other such relief, on the ground that the wetland in issue is not subject to the Department's jurisdiction by virtue of federal jurisdiction over the wetland (*see* [6 NYCRR 608.9](#) [b]; *cf.* [6 NYCRR 608.9](#) [a]). The Department was without authority to grant the waiver at issue. Accordingly, the petition in proceeding No. 2 should have been granted and the determination granting the waiver of water quality certification should have been annulled. In light of this determination, it is unnecessary for us to address the appellants' contentions with respect to the applicability of the New York State Environmental Quality Review Act (ECL art 8) to such a determination. Miller, J.P., Spolzino, Goldstein and McCarthy, JJ., concur. *905

Copr. (C) 2019, Secretary of State, State of New York

Chapter 78

FRESHWATER WETLANDS

GENERAL REFERENCES

Conservation Commission — See Ch. 10.

Subdivision of land — See Ch. 123.

Flood damage prevention — See Ch. 74.

Zoning — See Ch. 138.

Stormwater management and erosion and sediment control - See Ch. 119.

§ 78-1. Purpose; findings.

- A. Declaration of policy. It is declared to be the public policy of the Town of Southeast to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of wetlands and watercourses, in order to secure the natural benefits therefrom for the protection of public health and safety and consistent with the general welfare and the beneficial economic, social and agricultural development of the Town.
- B. Findings. The following findings are made:
 - (1) Wetlands and watercourses in the Town of Southeast are invaluable resources for flood protection, wildlife habitat, open space, nutrient retention and sediment trapping, visual/aesthetic reasons, water-based recreation, groundwater protection potential and drinking water.
 - (2) Wetlands and watercourses in the Town have been or are in jeopardy of being lost, despoiled or impaired by unregulated draining, dredging, filling, excavating, building, pollution or other acts inconsistent with the natural uses of such wetlands and watercourses.
 - (3) Recurrent flooding of areas of the Town, aggravated or caused by the loss of wetlands or alteration of watercourses, has serious effects upon natural ecosystems and presents serious hazards to the health, safety, welfare and property of the people in the Town, within and outside such wetlands and watercourses, including loss of life, loss and damage to private and public property, disruption of lives and livelihoods, interruption of commerce, transportation, communication and governmental services, and unsanitary and unhealthful living and environmental conditions.
 - (4) Wetlands and watercourses conservation is a matter of concern to the entire Town, and the establishment of preservation, protection and conservation practices is essential to the public health, safety

and welfare since actions on wetlands and watercourses in one location affect persons and property in other locations.

- (5) Wetlands and watercourses overlap many properties and neighborhoods, and experience has demonstrated that effective wetlands and watercourses protection requires uniformity of preservation, protection and conservation throughout the Town.
- (6) Loss, despoliation or impairment of wetlands deprives people of the Town some or all of the many and multiple benefits to be derived from wetlands, such as the following:
 - (a) Flood and stormwater runoff control by hydrologic adsorption and storage capacity of wetlands;
 - (b) Wildlife habitat by providing for breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare species.
 - (c) Protection of subsurface water resources and provision for valuable watersheds and recharging of groundwater supplies;
 - (d) Recreation by providing resource areas for hunting, fishing, boating, hiking, bird watching, photography, camping and other uses;
 - (e) Pollution treatment by serving as biological and chemical oxidation basins;
 - (f) Erosion control by serving as sedimentation areas and filtering basins, absorbing silt and organic matter, protecting channels and water bodies, dissipating erosive forces and anchoring shorelines;
 - (g) Education and scientific research by providing outdoor biophysical laboratories, living classroom and resources for training and education.
 - (h) Open space and aesthetic appreciation;
 - (i) Sources of nutrients in freshwater food cycles and the nursery ground and sanctuary for fish; and
 - (j) Vegetation providing temperature modification, purification of the air and natural products for harvest.
- (7) Improper use and the despoliation or impairment of water sources deprives people of the benefits thereof, such as the following:
 - (a) Surface draining free from erosion and sedimentation and with capacity to carry runoff without danger of flooding;
 - (b) Fresh waters for potable water supply and for boating, swimming, fishing and other recreation; and

- (c) Continuity of water flows and supplies throughout the year.
- (8) Regulation of wetlands and watercourses is consistent with the legitimate interests of farmers and other landowners to graze and water livestock, make reasonable use of water resources, harvest natural products of the wetlands and selectively cut timber.

§ 78-2. Definitions.

As used in this chapter, the following terms shall have the meanings indicated below:

CONSERVATION COMMISSION — That municipal body heretofore created by the Town Board in accordance with the General Municipal Law of the State of New York and pursuant to Chapter 10 of the Town Code.

CONTROLLED AREA — Shall include all wetlands and the area surrounding the same based on hydrological soil grouping and all watercourses and adjacent contributory surfaces based on hydrological soil grouping and slope percentage as indicated by the distances on the chart below. "Hydrological soil grouping" (HSG) is defined as a system of grouping soils according to the water infiltration and transmission rate characteristics when the soil is thoroughly wet.

Wetland Buffer by Hydrological Soil Group

		Buffer
HSG		(feet)
A	High infiltration, transmission deeply drained	100
B	Moderate infiltration and transmission and moderately drained	133
C	Slow infiltration, transmission poor to well drained	166
D	Very slow infiltration, transmission, permanent water	200

Watercourse Buffer by Hydrological Soil Group or Slope Percentage

		Buffer
HSG	Slope%	(feet)
A or A and B	0-3%; 3-8%	100
B or C	8-15%	100
C or D	15-25%	130
D or E	25-35%	170
F	35-60%	200

PERSON — Shall include any person, corporation, firm, partnership, association, trust, estate, individual, joint venture, and any unit of government, agency or subdivision thereof that is subject to this chapter.

POLLUTION — Shall include, in addition to its usual meaning, the presence in the environment of man-induced conditions or contaminants in quantities or with characteristics which are or may be injurious to human, plant, wildlife, animal forms or life or property.

WATERCOURSES — Shall include the following:

- A. Rivers, streams, brooks and waterways which are delineated on the current edition of the U.S. Department of Interior, Geological Survey, 7.5 Minute Series (topographic maps covering the Town of Southeast);
- B. Any other streams, brooks and waterways containing running water more than six months a year; and
- C. Lakes, ponds, marshes, swamps, bogs and all other bodies of water, natural or artificial, which are fed by or have surface discharge to another wetland or watercourse.

WETLANDS —

- A. Lands and waters consisting of any of the following:

- (1) Soil types which are poorly drained, very poorly drained, alluvial and floodplain soils as defined by the U.S. Department of Agriculture, Soil Conservation Service, which soil types in the Town of Southeast have the following map codes and names:

Map Code	Name
25	Sun silt loam
27	Sun (stony silt loam)
28	Fredon loam
35	Raynham silt loam
100	Fluvaquents
101	Carlisle muck
103	Freshwater marsh (aquents)
108	Udorthents wet substratum
251	Ridgebury loam
252	Ridgebury very stony loam
311	Fluvaquents
1011	Palms muck
1251	Leicester loam
1252	Leicester very stony loam

- (2) Lands and submerged lands, commonly called "marshes," "swamps," "sloughs," "bogs" and "flats," supporting aquatic or semiaquatic vegetation of the following vegetative types.
- (a) Wetland trees, which depend upon seasonal or permanent flooding or sufficiently waterlogged soils to give them a competitive advantage over other trees, including, among others, red maple (*Acer rubrum*), willows (*Salix* spp.), black spruce (*Picea mariana*); swamp white oak (*Quercus bicolor*), red ash (*Fraxinus pennsylvanica*), American elm (*Ulmus americana*) and larch (*Larix laricina*);
 - (b) Wetland shrubs, which depend upon seasonal or permanent flooding or sufficiently waterlogged soils to give them a competitive advantage over other shrubs, including, among others, alder (*Alnus* spp.), buttonbrush (*Cepha lanthus occidentalis*), bog rosemary (*Andromeda glaucophylla*), leatherleaf (*Chamaedaphne calyculata*), spice bush (*Lindera benzoin*), winter berry (*Llex montans*), red-osier dogwood (*Cornus stolonifera*) and highbush blueberry (*Vaccinium corymbosum*);
 - (c) Emergent vegetation, including, among other, cattails (*Typha* spp.), pickerelweed (*Pontederia cordata*), bulrushes (*Scirpus* spp.), arrow arum (*Peltandra virginica*), arrowheads (*Sagittaria* spp.), reed (*Pharagnites communis*), wild rice (*Zizania aquatica*), bur-reeds (*Spargantum* spp.), purple loosestrife (*Lythrum salicaria*), swamp loosestrife (*Decodor verticillatus*) and water plantain (*Alisma plantago-acquatica*);
 - (d) Rooted, floating-leaved vegetation, including, among others, water lily (*Nymphaea odorata*), water shield (*Brasenia schreberi*) and spatterdock (*Nuphar* spp.);
 - (e) Free-floating vegetation, including, among others, duck weed (*Lemna* spp.), big duckweed (*Spirodela Polyrhiz*) and watermeal (*Wolffia* spp.);
 - (f) Wet meadow vegetation, which depends upon seasonal or permanent flooding or sufficiently waterlogged soils to give it a competitive advantage over other open land vegetation, including, among others, sedges (*carex* spp.), rushes (*Juncus* spp.), cattails (*Typha* spp.), rice cut grass (*Leersia oryzoides*), reed canary grass (*Phalaris arundinaceae*), swamp loosestrife (*Decodon verticillatus*), spikerush (*Eleocharis* spp.), skunk cabbage (*Symplocarpus foetidus*) and false hellebore (*Veratrum viride*);
 - (g) Bog mat vegetation, including, among others, sphagnum mosses (*Sphagnum* spp.), bog rosemary (*Andromeda glaucophylla*), leatherleaf (*Chamaedaphne calyculata*), pitcher

plant (*Sarracenia purpurea*), and cranberries (*Vaccinium macrocarpon* and *V. oxycoccos*);

- (h) Submergent vegetation, including, among others, pondweeds (*Potamogeton* spp.), mavadas (*Najas* spp.), bladderworts (*Utricularia* spp.), wild cherry (*Vallisneria spiralis*), coontails (*Ceratophyllum demersum*), water milfoils (*Myriophyllum* spp.), muskgrass (*Chara*), stonewort (*Nitella* spp.), water weeds (*Elodea* spp.), and water smartweed (*Polygonum amphibium*).
- (3) Lands and submerged lands containing remnants of any vegetation that is not aquatic or semiaquatic that has died because of wet conditions over a significantly long period, provided that such wet conditions do not exceed a maximum seasonal water depth of six feet, and provided further that such conditions can be expected to persist indefinitely, barring human intervention.
- (4) Lands enclosed by aquatic or semiaquatic vegetation as set forth in Subsection A(2) and dead vegetation as set forth in Subsection A(3), the regulation of which is necessary to protect and preserve the aquatic and semiaquatic vegetation.
- (5) Waters overlying the areas set forth in Subsection A(1) and A(3) and lands underlying areas set forth in Subsection A(4).
- (6) Lands and waters possessing the characteristics described in Subsection A(1), (2), (3), (4) and (5) that are less than one acre but are both hydrologically connected to and within 50 meters (165 feet) of other wetlands and together with these exceed one acre.
- B. Unvegetated open water is part of a wetland if it is more than 50% enclosed by wetland vegetation and is no larger than 2.5 hectares (6.2 acres). If the body of open water, substantially enclosed by wetland vegetation, is larger than 2.5 hectares, then only that portion within 50 meters (165 feet) of the wetland vegetation is part of the wetland.
- C. Unvegetated open water adjacent to wetlands but not substantially surrounded by wetland vegetation may be considered to be part of the wetland to a depth of two meters (6.6 feet) below low water or to the maximum extent of nonpersistent emergents, if these grow at depths greater than two meters.
- D. All areas within the one-hundred-year floodplain as shown on the latest map entitled "FIRM, Flood Insurance Rate Map; Town of Southeast, New York, Putnam County," prepared by the United States Department of Housing and Urban Development, Federal Insurance Administration, as amended from time to time.

WETLANDS INSPECTOR — The agent appointed by the Town Board to fulfill the designated enforcement and permit-processing responsibilities set forth in this chapter. A qualified Wetlands Inspector shall have a degree

from an accredited college or university in a related field, a minimum of two years of delineation experience, and scientific knowledge about the biogeophysical structure, function, or interrelationships of terrestrial and aquatic/semiaquatic plant and animal communities. **[Added 7-20-2006 by L.L. No. 7-2006]**

§ 78-3. Regulated activities; exclusions; permit application; application transmittal.

- A. Regulated activities and permits. Any person desiring to conduct a regulated activity as set forth in § 78-3B in any controlled area shall obtain a permit therefor as hereinafter provided.
- B. Activities regulated. Activities subject to regulation under this chapter shall include the following:
 - (1) Any form of dredging, draining, or excavation and any grading or removal of soil, mud, sand, gravel, silt or other earth material from any controlled area, either directly or indirectly; or
 - (2) Any form of dumping, filling or deposition of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind in any controlled area, either directly or indirectly; or
 - (3) Erecting any building or other structure, construction of any road, driveway or motor vehicle parking facility, drivings or pilings, installation of any pipe or other conduit or the placing of any other obstructions within a controlled area, whether or not the same affect the ebb and flow of water; or
 - (4) The use of any chemicals, dyes, fertilizers, herbicides or similar materials in any controlled area such that the same may cause pollution of waters; or
 - (5) Creating a diversion of water flow in any watercourses; or
 - (6) Creating an increase or decrease in the flow, velocity or volume of water in any watercourse; or
 - (7) Introducing any influents of high thermal content such that the same are capable of causing deleterious ecological effect; or
 - (8) Destroying or permitting the destruction of any trees or other plant life within the controlled area of a watercourse or wetland. These actions shall be reviewed by the administering authority so as to determine if such acts affect the prevailing surface water runoff conditions, directly or indirectly; or
 - (9) Any other activity which substantially impairs any of the several functions served by the wetlands and watercourses or the benefits derived therefrom as the same are set forth in § 78-1 of this chapter.

- C. Exclusions. Activities excluded from regulation under this chapter shall include the following:
- (1) (Reserved)
 - (2) (Reserved)
 - (3) Public health activities under orders and regulations of the Putnam County Department of Health, provided that copies of such orders and regulations have been filed with the Town Clerk of the Town of Southeast and that the Water Control Board may request modification of such orders if it deems it necessary to implement the policy of this chapter;
 - (4) Mosquito control projects approved in writing by the New York State Department of Environmental Conservation;
 - (5) The operation, maintenance and repair of dams, retaining walls, docks and water control structures that were in existence on the effective date of this chapter;
 - (6) Emergency work which is necessary to protect health and safety or prevent damage to property, provided that the Town Clerk is given written notice within 48 hours after commencement of such work and within 48 hours after completion of the work, and provided that such work is limited to alleviation of the emergency condition; and
 - (7) Trimming, pruning and bracing of trees; decorative landscaping; including the addition of trees and plants.
- D. Application for permit. Any person proposing to conduct a regulated activity as specified in § 78-3B shall file an application for a permit with the Wetlands Inspector in a form and with such information as the Wetlands Inspector may prescribe. The application shall be accompanied by a fee as set from time to time by the Town Board and four copies of at least the following information. If the same shall show sufficient detailed information the administering authority may waive the map requirement below and accept as a substitute therefor any subdivision plat map, grading plans and construction plans as the same may have been prepared for submission pursuant to the Town of Southeast Land Subdivision Regulations.¹ **[Amended 7-20-2006 by L.L. No. 7-2006]**
- (1) The names of the owners of record of the land on which the activity is to be conducted and all adjacent owners;
 - (2) A detailed description of the proposed activity;
 - (3) A map showing the controlled area affected and any wetlands or watercourses therein, and the location, extent and nature of proposed activity. Said map shall be prepared and certified by a

1. Editor's Note: See Ch. 123, Subdivision of Land.

licensed surveyor, professional engineer or professional architect and show contours at two-foot intervals, stone walls, fence lines, tree lines and other major features of the land; and

- (4) The names of all known claimants of water rights in, or adjacent to, the wetlands or watercourses.
- E. Transmittal of application. Upon receipt, the Wetlands Inspector shall transmit a copy of each application, as follows: **[Amended 7-20-2006 by L.L. No. 7-2006]**
- (1) To the Planning Board. **[Amended 8-30-2012 by L.L. No. 7-2012]**
 - (2) In the event that the wetland or watercourse crosses Town lines, to the Clerk of such adjoining township.
 - (3) In the event that the wetland or watercourse crosses Putnam County lines, to the Clerk of the adjoining county.

§ 78-4. Application procedure. [Amended 7-20-2006 by L.L. No. 7-2006]

A. Action on application by Wetlands Inspector.

- (1) Upon receipt of the application, the Wetlands Inspector may request the submission of such additional information as he may deem necessary to determine compliance with this chapter, including but not limited to the following:
 - (a) An environmental inventory and an assessment of the location and the effects of the proposed activity;
 - (b) A chemical and biological evaluation of the waters involved and the effects thereupon by the proposed activity;
 - (c) Hydraulic and hydrological studies of the wetlands and watercourses;
 - (d) A geologic evaluation of the wetland setting; and
 - (e) A program consisting of a schedule, sequence and type of equipment to be used in the conduct of the proposed activity.
- (2) The Wetlands Inspector shall also, upon receipt of the application, determine whether the proposed activity involves a project development plan application, as the same may be required pursuant to the Town of Southeast Zoning Ordinance,² or a subdivision application. In the event either, or both, of these are determined to be required, the Wetlands Inspector shall forthwith

2. Editor's Note: See Ch. 138, Zoning.

advise the Planning Board and request a recommendation from said Board.

- B. Notice and hearing. The following notice and hearing requirements shall be applicable in the case of any application transmitted to the Planning Board and proposing a regulated activity that has other than minor significance as specified in § 78-4H. **[Amended 8-30-2012 by L.L. No. 7-2012]**
- (1) The applicant shall post a sign on the property consistent with the requirements of § 138-44A.
 - (2) No sooner than five days and not later than 30 days after such publication of notice, the Planning Board shall hold a public hearing on the application, except that, if no notice of objection to the application is necessary, the Planning Board may dispense with such hearing. If no public hearing is to be held the Planning Board shall publish notice of its decision, setting forth the reasons therefor, and a copy of such notice shall be filed with the Town Clerk and transmitted to the officials and agencies specified in § 78-3E.
 - (3) Not less than 10 days prior to a hearing, if any, the applicant shall send notice of such hearing by U.S. Postal Service certified or registered mail, return receipt requested, to the owners of all lots in the Town abutting the property where the activity is proposed, or at the Planning Board's discretion to all property owners within 500 feet of the lot where the activity is proposed.
 - (4) Notice of any public hearing shall be published by the Planning Board in one newspaper having a general circulation in the Town not less than five days before such hearing. A copy of the notice shall be transmitted to the officials and agencies specified in § 78-3E.
 - (5) All such applications and the accompanying maps and documents, shall be open for public inspection in the office of the Town Clerk from and after publication of first notice under § 78-4B(1).
- C. Report. Within 65 days after the application is received, or after notice has been published by the applicant under § 78-4B(1), whichever is later, the Planning Board, having received a report from the Wetland Inspector, shall make a determination as to whether or not the proposed regulated activity, with or without modification set by the Planning Board, conforms to the criteria set forth in § 78-4G. **[Amended 8-30-2012 by L.L. No. 7-2012]**
- D. Extension of time. The applicant and the Planning Board may by mutual consent extend the time for a determination on the application.
- E. Conditions. The Planning Board may specify requirements for modification of the proposed regulated activity and conditions or

limitations for conduct of the activity, including but not limited to the time for conduct and completion of the activity and a requirement to post a bond to guarantee completion of the work in accordance with plans.

- F. Determination. The Planning Board shall make a written determination, including the reasons therefor and any modifications, conditions and limitations, at a Planning Board meeting to approve or deny the application and whether or not a permit is to be issued under this chapter. **[Amended 8-30-2012 by L.L. No. 7-2012]**
- G. Criteria for approval. The following are criteria applicable to the approval of permits for proposed regulated activities in controlled areas, including wetlands and watercourses:
- (1) The activity will not have a substantial adverse effect upon the natural function and benefits of a wetland or watercourse as set forth in § 78-1B(6); and
 - (2) The activity will not substantially change the natural channel of a watercourse or substantially inhibit the natural dynamics of a watercourse system; and
 - (3) The activity will not result in the degrading or pollution of waters; and
 - (4) The activity will not increase the potential for flooding; and
 - (5) Sufficient provision has been made for control of erosion, siltation and sedimentation during and after conduct of the activity; or
 - (6) The activity will alleviate or remove a hazard to the public health or safety.
- H. Activities of minor significance. Any or all parts of § 78-3D can be waived at the discretion of the Planning Board with regard to activities of minor significance. Proposed regulated activities of minor significance which may be approved by the Planning Board include the following: **[Amended 8-30-2012 by L.L. No. 7-2012]**
- (1) Activities for which a site plan, subdivision plat maps, construction plans and grading plans and plat plans for grading and removal of earth are not required.
 - (2) Where no building or other structure or sewage disposal system or well is proposed in a controlled area.
 - (3) Installation of a driveway to a one-family dwelling.
 - (4) Excavation, grading or depositing of less than 20 cubic yards of earth materials in a controlled area of a wetland or watercourse per application.
 - (5) Modification to less than 25 feet of a watercourse on a lot or parcel.

- (6) The activity is not to be conducted in a floodplain.
 - (7) Removal of water-deposited silt or debris in order to restore the controlled area, including the wetland or watercourse, to the condition existing before the deposit.
 - (8) Incidental removal of trees and shrubs within the controlled area of wetlands or watercourses.
 - (9) Provided that all of the above activities are conducted in a manner to conform to the criteria set forth in § 78-4G(1) through (6) of this chapter.
- I. Permit issuance or denial. Upon receipt of the determination of the Planning Board as provided in § 78-4F of this chapter, the Wetland Inspector shall issue or deny issuance of a permit, subject to any resolution adopted by the Planning Board, in accordance with § 78-4F. Such permit shall contain and be made subject to any and all conditions imposed by the Planning Board determination. **[Amended 8-30-2012 by L.L. No. 7-2012]**

§ 78-5. Administration and enforcement. [Amended 7-20-2006 by L.L. No. 7-2006]

- A. Administration. This chapter shall be administered and enforced by a Wetland Inspector appointed by the Town Board. The Planning Board shall consult the Wetland Inspector prior to making a determination on a permit application. The Wetland Inspector shall keep records of all applications and permits, of all identifiable complaints of any violation of this chapter and of all notices of violation served by him and the action taken consequent thereon, which records shall be public records. He shall be in charge of all such records and public access thereto pursuant to the provisions of the Freedom of Information Law³ and applicable rules. He shall file with the Southeast Town Clerk and the Planning Board Secretary a copy of each order or decision rendered by him. **[Amended 8-30-2012 by L.L. No. 7-2012]**
- B. Procedures. The Town Board may by resolution adopt rules and procedures for the administration of this chapter, including the submission of applications.
- C. Inspections. The Wetlands Inspector, or his authorized agents, may enter upon land or waters for the purpose of inspection to determine compliance with this chapter and for the purpose of undertaking any investigations, examinations, surveys or other activity necessary for the purpose of this chapter.
- D. Suspension and revocation. The Wetlands Inspector is authorized to suspend or revoke a permit if he finds that the applicant has not complied with any of the conditions or limitations set forth in the permit

3. Editor's Note: See Public Officers Law § 84 et seq.

or has exceeded the scope of the activity as set forth in the application. The Wetlands Inspector may suspend the permit if the applicant fails to comply with the terms and conditions set forth in the application.

- E. Remedies. The Wetlands Inspector is authorized to order, in writing, the cessation of any regulated activity being conducted in violation of this chapter; he shall withdraw such order when he determines there is compliance herewith. The Wetlands Inspector is authorized to order, in writing, the remedying of any condition which is found to be in violation of this chapter. Any person who willfully violates this chapter shall be guilty of a misdemeanor, punishable by a fine of not less than \$250 nor more than \$1,000. The Town Board may impose, by order after a hearing, a civil penalty not to exceed \$250 for each violation of this chapter. Each day of continued violation shall constitute a separate and additional violation. An order imposing a civil penalty shall be deemed a final determination for purposes of judicial review and the Town of Southeast may bring an action to recover such civil penalty in any court of competent jurisdiction. Such action shall be brought on behalf of the Town, and any amount recovered shall be paid into the general revenue funds of the Town. Such right of action or recovery may be released, compromised or adjusted by the Town Board. The proper authorities of the Town of Southeast may institute any appropriate action or proceeding to prevent, restrain, correct or abate any violation of this chapter and to achieve restoration of the affected wetland or watercourse to its condition prior to the violation.
- F. Other laws. Approval of an application and issuance of a permit under this chapter shall not be construed to constitute compliance with any other regulation, ordinance or law nor to relieve the applicant from responsibility to obtain a permit thereunder. The Wetlands Inspector may at his discretion withhold issuance of a permit hereunder until any other required permit has been obtained by the applicant. This chapter is in addition to, and does not abrogate or lessen the effect of, any other regulation, ordinance or law pertaining to activities regulated hereunder and controlled areas to which this chapter is applicable.
- G. Appeals. Any person aggrieved by any order or decision under this chapter may seek judicial review pursuant to Article 78 of the Civil Practice Law and Rules in the Supreme Court for the County of Putnam within 30 days after the date of the filing of such order or decision with the Southeast Town Clerk. In the alternative, any person aggrieved by any order or decision under this chapter may seek review by the Freshwater Wetlands Appeals Board of the New York State Department of Environmental Conservation within 30 days after the date of the filing of such order or decision with the Town Clerk.
- H. Severability. The provisions of this chapter shall be severable, and if any clause, sentence, paragraph, subdivision or part thereof shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence,

paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.