



ASSOCIATION OF CLEAN WATER ADMINISTRATORS

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To: ACWA Board & Membership
From: ACWA National Office
Date: June 2, 2015
Re: Preliminary Summary of Waters of the U.S. Final Rule

The following memorandum provides an overview¹ of the key elements within the final “Waters of the U.S. (WOUS)” Rule (a.k.a. The Clean Water Rule) (hereinafter “Final Rule”).² The summary is meant to assist ACWA’s Membership in their review of the nearly 300-page pre-publication version of the Final Rule made available by EPA on May 27, 2015.³ The below information is intended to summarize key changes included in the rule proposal (hereinafter “Proposed Rule”)⁴ that were retained in the Final Rule, and also highlights those areas where the Final Rule differs from the language in the Proposed Rule. This memo also incorporates references to the EPA/Corps Fact Sheet on the Clean Water Rule (hereinafter “Clean Water Rule Fact Sheet”)⁵ where applicable.

Background

The SWANCC (2001) and *Rapanos* (2006) U.S. Supreme Court decisions⁶ have resulted in considerable confusion over what waters are jurisdictional under the Clean Water Act (CWA), and therefore increased allocation of federal and state resources to determining this on a case-by-case basis. The Final Rule is intended to provide clarity to regulators and the regulated community regarding what waterbodies are jurisdictional and what discharges are subject to permitting requirements.

¹ Please note that this summary does not address every modification and language edit that appears in the Final Rule as compared to the Proposed Rule. ACWA’s review of the Final Rule is ongoing, and future updates or edits may be made to this summary as appropriate. Likewise, once the Final Rule is published in the Federal Register, ACWA may update any citations referenced below to conform to the Federal Register page numbers.

² Clean Water Rule: Definition of “Waters of the United States” available in Pre-publication version here: <http://www2.epa.gov/cleanwaterrule/prepublication-version-final-clean-water-rule>

³ *Id.*

⁴ 79 Fed. Reg. 22188, 22274 (April 14, 2014); Docket No. EPA-HQ-OW- 2011-0880 FRL-9901-47-OW available at <https://federalregister.gov/a/2014-07142>.

⁵ EPA/Corps Clean Water Rule Fact Sheet available at http://www2.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf

⁶ In SWANCC, the Court decided that the use of waters by migratory birds is not a sufficient basis for federal jurisdiction under the CWA. In *Rapanos*, a splintered decision provided 1) ‘relative permanance’ with a connection to traditional navigable waters, and 2) ‘significant nexus’ to navigable waters as bases for determining whether a water is protected under the CWA. These two decisions have resulted in considerable confusion over what waters are jurisdictional, and therefore increased allocation of federal and state resources to determining this on a case-by-case basis.

Unchanged Categories of Jurisdictional Waters⁷

Waters in the following categories are already considered jurisdictional by existing regulations⁸ and would continue to be jurisdictional WOUS under both the Proposed and the Final Rules (i.e., language in Final Rule is unchanged from existing regulatory WOUS definition):

- 1) **Traditional navigable waters.**
- 2) **Interstate waters**, including interstate wetlands.
- 3) **The territorial seas.**
- 4) **Impoundments** of traditional navigable waters, interstate waters (including interstate wetlands), and tributaries, as defined, of such waters.
- 5) **Tributaries** of a traditional navigable water, interstate water, the territorial seas or impoundment.

Altered Categories of Jurisdictional Waters

6) **Adjacent waters/wetlands**

- **Proposed Rule:**⁹ - *all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary.*
- **Final Rule:**¹⁰ *all waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section [i.e., a traditional navigable water, interstate water, the territorial seas, impoundment or tributary], including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;*
- This category replaces and expands upon the previous category of “adjacent wetlands,” and largely accounts for the projected 3% increase in jurisdiction put forth in the EPA/Corps March, 2014 report, *Economic Analysis of Proposed Revised Definition of Waters of the United States.*
- **Per Clean Water Rule Fact Sheet:**

Old Rule	Proposed Rule	Final Rule
Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries [i.e., jurisdictional waters]	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.

- 7) **Isolated or “Other Waters”**—waterbodies not covered by the first six categories waters and that may or may not share a “significant nexus” to navigable waters.
 - **Proposed Rule:**¹¹ - **Deemed “other waters,”** these waters, including wetlands, would only be regulated *on a case-specific basis . . . provided that those waters alone, or in combination*

⁷ Pre-publication version at p. 199; see also Clean Water Rule Fact Sheet

⁸ 33 CFR § 328.3; 40 CFR § 122.2.

⁹ See 79 Fed. Reg. 22264; and Pre-publication version at p. 199.

¹⁰ Id.

¹¹ See 79 Fed. Reg. 22265.

- with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a downstream traditional navigable water, interstate water or territorial sea [i.e., waters identified in paragraphs (1)(i) through (iii) of this definition] (see new definition of significant nexus).*
- **Final Rule:**¹² - **Drops the term “other waters” and instead lists specific waters (i.e., (i) through (v)) for case-by-case significant nexus analysis as follows: All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a traditional navigable water, interstate water or territorial sea [i.e., waters identified in paragraphs (a)(1) through (3)]. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water traditional navigable water, interstate water or territorial sea. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) [i.e., see Adjacent Waters/Wetlands above] of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.**
 - (i) Prairie potholes.** *Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.*
 - (ii) Carolina bays and Delmarva bays.** *Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.*
 - (iii) Pocosins.** *Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.*
 - (iv) Western vernal pools.** *Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.*
 - (v) Texas coastal prairie wetlands.** *Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.*
 - (8) All waters located within the 100-year floodplain of a traditional navigable water, interstate water or territorial sea [i.e., waters identified in paragraphs (a)(1) through (3)], 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 traditional navigable water, interstate water or territorial sea. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a traditional navigable water, interstate water or territorial sea, or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section [i.e., see Adjacent Waters/Wetlands above] when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under**

¹² Pre-publication version at p. 199-200.

paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

• **Per Clean Water Rule Fact Sheet:**

Old Rule	Proposed Rule	Final Rule
Included all other waters [i.e., “intrastate lakes, rivers, 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.	Included “ other waters ” where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.

Take Home Message: No case-specific significant nexus analysis is ever needed if a water is identified as an “adjacent water” under paragraph (a)(6) of the definition.

Unchanged Definitions

- 1) **Traditional navigable waters**¹³ - 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.
- 2) **Wetlands**¹⁴ - those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas

Definition Unchanged in Proposal, but Expanded Language in Final Rule

1) **Adjacent**

- **Old Rule/Proposed Rule vs. Final Rule:**¹⁵ *bordering, contiguous or neighboring a water identified in paragraphs (a)(1) through (5) of this section, ~~Waters, including waters, separated from other waters of the United States by man-made constructed dikes or barriers, natural river berms, beach dunes and the like are~~ “adjacent waters.”* (However, see below for new definition of neighboring.) *For purposes of adjacency, an open water*

¹³ See 79 Fed. Reg. 22264; and Pre-publication version at p. 199.

¹⁴ See 79 Fed. Reg. 22265; and Pre-publication version at p. 205.

¹⁵ Pre-publication version at p. 202 -203.

such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

New Definitions in Proposed Rule Compared with Final Rule

1) Tributary

- **Proposed Rule:**¹⁶ *a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section [1 through 4 in the Unchanged Categories section above]. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section. (See Waters Automatically Excluded below.)*
- **Final Rule:**¹⁷ *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. **These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.** A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. **A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.***

¹⁶ See 79 Fed. Reg. 22265.

¹⁷ Pre-publication version at p. 203-204.

- **Per Clean Water Rule Fact Sheet:**

Old Rule	Proposed Rule	Final Rule
Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal <u>except</u> wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.

2) **Neighboring**

- **Proposed Rule:**¹⁸ *for the purposes of the term “adjacent” . . . includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.*
- **Final Rule:**¹⁹ **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; (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; (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.**

3) **Riparian area**

- **Final vs. Proposed:** [**Eliminated Definition in Final**]: ~~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.~~
- In response to comments, “[t]he agencies concluded that the use of the riparian area was **unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain . . .**”²⁰

4) **Floodplain**

- **Final vs. Proposed** [**Eliminated Definition in Final**]:²¹ ~~an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.~~

¹⁸ See 79 Fed. Reg. 22265.

¹⁹ Pre-publication version at p. 203.

²⁰ Pre-publication version at p. 113 (for quote); see also discussion on pp. 112 -117.

²¹ See 79 Fed. Reg. 22265; see also discussion in Pre-publication version at pp. 112-113.

5) Significant Nexus

- **Final vs. Proposed:**²² this term indicates that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. **The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section.** For an effect to be significant, it must be more than speculative or insubstantial. ~~Other waters, including wetlands,~~ **Waters** are similarly situated when they ~~perform similar functions~~ **function alike** and are ~~located~~ sufficiently close **to function** together **in affecting downstream waters.** ~~or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.~~ **For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (i) through (ix) of this paragraph. 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 significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:**

- (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) through (3) of this section.

6) Ordinary High Water Mark [Defined and Added to Final Rule Definitions Section]²³

The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) High tide line [Defined and Added to Final Rule Definitions Section]²⁴

²² See 79 Fed. Reg. 22265; and Pre-publication version at pp. 204-205.

²³ Pre-publication version at p. 206.

²⁴ Id.

The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Waters Automatically Excluded from the Definition of "WOUS" in Proposed vs. Final Rule:²⁵

- 1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- 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.
- 3) ~~Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.~~

3) The following ditches:

- (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.**
- (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.**
- (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through ~~(4)~~(3) of this section.

4) The following features:

- (i) Artificially irrigated areas that would revert to ~~upland~~ **dry land** should application of irrigation water to that area cease;
- (ii) artificial **constructed** lakes or ponds created ~~by excavating and/or diking~~ **in** dry land such as farm and ~~used exclusively for such purposes as~~ stock watering **ponds**, irrigation **ponds**, settling basins, ~~or~~ **fields flooded for rice growing, log cleaning ponds, or cooling ponds**;
- (iii) artificial reflecting pools or swimming pools created ~~by excavating and/or diking~~ **in** dry land;
- (iv) small ornamental waters created ~~by excavating and/or diking~~ **in** dry land for primarily aesthetic reasons;
- (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**;
- ~~(vi) groundwater, including groundwater drained through subsurface drainage systems; and~~
- (vi) **Erosional features, including** gullies and rills and **other ephemeral features that do not meet the definition of tributary**, non-wetland swales, **and lawfully constructed grassed waterways; and**
- (vii) **Puddles.**

5) Groundwater [separated from list of features under 4) above] *including groundwater drained through subsurface drainage systems*

²⁵ See 79 Fed. Reg. 22265; and Pre-publication version at pp. 201-202.

6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

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.

• **Per Clean Water Rule Fact Sheet:**

Old Rule	Proposed Rule	Final Rule
Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.