



## Proposed Revised Definition of "Waters of the United States" Key Proposed Changes

- On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) proposed a revised definition of "waters of the United States," which would delineate the scope of federal regulatory authority under the Clean Water Act in a clear and understandable way.
- The agencies are concerned that the previous administration's 2015 Rule defining "waters of the United States" may have greatly expanded Washington's control over local land use decisions.
- The agencies' proposal respects the constitutional and statutory limits of federal government to regulate navigable water under the Clean Water Act and gives states and tribes more flexibility to determine how best to manage waters within their borders.
- States already have their own authorities to regulate waters within their borders, regardless of whether they are federally regulated as "waters of the United States."
- 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 with interests in this proposed regulation.
- The agencies' proposal would eliminate the time-consuming and uncertain process of determining whether a "significant nexus" exists between a water and a downstream traditional navigable water as directed under the agencies' 2008 *Rapanos* Guidance or whether a water has a significant nexus to a traditional navigable water, interstate water or territorial sea as codified in the agencies' 2015 Rule defining "waters of the United States."
- Specifically, the agencies are proposing the following changes (among others) compared to the 2015 Rule and pre-2015 practice:
  - Traditional navigable waters
    - No change, except that the territorial seas are identified in the proposal as a type of traditional navigable water.
  - Interstate waters
    - No longer an independent category of jurisdictional waters under the proposal; jurisdictional if they satisfy the conditions of another category of jurisdictional waters.
    - Independent category of jurisdiction under 2015 Rule and pre-2015 practice.
  - Tributaries
    - Rivers and streams that contribute perennial or intermittent flow to downstream traditional navigable waters in typical year are jurisdictional under the proposal; no ephemeral features are considered jurisdictional under the proposal.
    - Both the 2015 Rule and pre-2015 practice found some ephemeral streams jurisdictional.
  - Ditches

- Fewer ditches will be considered jurisdictional under the proposal, mostly because no ditches constructed in upland and no ditches with ephemeral flow would be considered jurisdictional.
  - Both the 2015 Rule and pre-2015 practice found ditches jurisdictional where they were a tributary, including ditches constructed in upland with perennial or intermittent flow.
- Lakes and Ponds
  - Lakes and ponds were not a separate category in the 2015 Rule or pre-2015 practice.
  - This proposal more closely adheres to the pre-2015 practice of regulating lakes and ponds as traditional navigable waters or as part of the tributary network of traditional navigable waters, with added clarity to make implementation more straightforward and for consistency.
  - Under this proposed definition, fewer lakes and ponds may be jurisdictional than under the 2015 Rule because non-navigable, isolated lakes and ponds were considered adjacent waters together with isolated wetlands under the expanded definition of “neighboring” in the 2015 Rule.
- Impoundments
  - Impoundments of jurisdictional waters would remain jurisdictional under the proposal, as they were under the 2015 Rule or pre-2015 practice.
- Adjacent Wetlands
  - Under the agencies’ proposal there are more limited circumstances where wetlands would be considered adjacent relative to both the 2015 Rule and pre-2015 practice.
  - Under the 2015 Rule and pre-2015 practice wetlands behind a berm or dike were considered adjacent. Under the agencies’ new proposal wetlands must either abut jurisdictional waters or have a direct hydrological surface connection to jurisdictional waters in a typical year to be jurisdictional themselves; wetlands physically separated from jurisdictional waters by a berm, dike, or other barrier are not adjacent if they lack a direct hydrologic surface connection to a jurisdictional water in a typical year.

## 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-2018-0149 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>.

# 2019 POLICY BRIEF

## COUNTIES ARE ENCOURAGED TO WEIGH IN ON PROPOSED “WATERS OF THE U.S.” RULE

### QUICK FACTS

- Even non-federal waters are protected by state and local regulations – sometimes even more strictly than federal rules. As co-regulator under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion.
- While the proposed rule exempts ditches that are not only wet during rainfalls, other ditches that flow seasonally or year-round may be jurisdictional.
- The proposed rule newly defines the term tributary as a “naturally occurring surface water channel that contributes perennial or intermittent flow to a WOTUS” and ditches as “artificial, manmade conveyances.”

### ACTION NEEDED:

NACo urges counties to provide input and feedback on the administration’s revised definition for “Waters of the U.S.” under the Clean Water Act. Counties are encouraged to provide examples on how the proposed rule will impact county-owned infrastructure such as roads and roadside ditches, drainage and irrigation conveyances, flood control channels, bridge construction and rehabilitation projects and stormwater and wastewater facilities and provide suggestions on how the rule can be modified.

### BACKGROUND:

On February 14, the U.S. Environmental and Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) [officially released](#) the Trump Administration’s proposed new “Waters of United States” (WOTUS) rule defining which bodies of water across the United States are subject to federal regulations under the Clean Water Act (CWA). This action represents the second step in the process taken by the EPA and Army Corps to review and replace the Obama Administration’s 2015 WOTUS rule. The proposed rule is open for public comment until April 15, 2019.

The new proposed definition would create six categories of regulated waters and 11 exemptions. The six categories of WOTUS include: traditional navigable waters; tributaries; certain ditches; certain lakes and ponds; impoundments; and adjacent wetlands. The proposed rule specifies that if water does not meet one of the six listed categories, it will not be considered a WOTUS and clarifies that certain other waters will also no longer be considered a WOTUS, such as ditches that are only wet during rainfall events, groundwater, stormwater control features, wastewater recycling infrastructure built in uplands, converted cropland and waste treatment systems.

While the proposed rule tries to draw a bright line between tributaries and ditches, there remains uncertainty about when a ditch may be jurisdictional. For example, even though tributaries are defined as “naturally occurring surface channels” and ditches are defined as an “artificial channel used to convey water,” there are some cases when ditches may be considered jurisdictional under the tributary definition. Case in point, many roadside and drainage ditches were built decades ago in natural stream systems would be jurisdictional if the ditch has year-round or seasonal flow. But, ditches that are only wet during rainfall events, are not jurisdictional under the proposed rule.



**Under the proposed rule, the following types of county-owned infrastructure may be jurisdictional:**

- Roadside ditches that have flow year-round (perennial flow)
- Roadside and other ditches with intermittent flow (i.e. seasonal) that are a relocated tributary, or are excavated in a tributary, or touch jurisdictional wetlands
- Roadside and other ditches that have a seasonal flow due to snowmelts and monsoons
- Stormwater systems and wastewater recycling infrastructure in low-lying areas

Furthermore, the proposed rule ponders how jurisdictional "intermittent" waters should be defined. But, the proposed rule stops short at proposing a specific duration (e.g. the number of days, weeks or even months) the feature would need to flow to be considered "intermittent." Currently, intermittent means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or melted snowpack). This lack of a definition could be problematic in some parts of the country due to different climates, topography, and other features.

Finally, the proposed rule contains several exemptions for stormwater features and wastewater recycling structures constructed in uplands and for waste treatment systems. While the waste treatment exemption is a continuation of a previous exemption, the proposed rule defines for the first time the parameters of a waste treatment system. The stormwater exemption is similar to provisions in the 2015 WOTUS rule and raise similar questions about when stormwater systems and/or green infrastructure are considered jurisdictional. These systems are regulated under the CWA Section 402 stormwater permit program which allows water to be treated before it is released to a WOTUS. However,

under law, we cannot treat water in a WOTUS, which will automatically cause conflict with the CWA Section 402 program. This, in turn, opens local governments up to citizen suits. Instead, the stormwater system as a whole should be exempt from WOTUS if it is permitted under Section 402. NACo looks forward to working with the agencies to address these challenges.

"Waters of the U.S." (WOTUS) is a term used in the Clean Water Act to determine what waters and their conveyances fall under federal and state permitting authority. In 2014, EPA and the Army Corps undertook an effort to rewrite and expand the current WOTUS definition. In 2015, the Obama Administration finalized a new definition of WOTUS, which was immediately challenged in the courts. NACo has expressed multiple concerns on the 2015 WOTUS rule's impact on county-owned and maintained roadside ditches, bridges, flood control channels, drainage conveyances and wastewater and stormwater systems and has [called for the final rule to be withdrawn](#) until further analysis and more in-depth consultation with state and local officials be completed.

Currently, the 2015 WOTUS rule is currently in effect in 22 states (California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Washington), while regulations from the 1980s are in effect in the other 28 states. As a result, in February 2017, President Trump released Executive Order (EO) 13778: [Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the U.S." Rule](#), which instructed the EPA and the Corps to review and rewrite the 2015 WOTUS rule.

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