

Definition of "Waters of the United States" Under the Clean Water Act

Background: The [2015 Clean Water Rule](#) is now in effect in 22 states, the District of Columbia, and the U.S. territories (including Michigan). The definition of "waters of the United States" currently in effect in 28 states is the definition promulgated in 1986/1988, implemented consistent with subsequent Supreme Court decisions and guidance documents.

On February 28, 2017, the President of the United States issued an Executive Order directing EPA and Department of the Army to review and rescind or revise the 2015 Rule.

1986/1988 Regulatory Definition of "Waters of the United States"

40 CFR 230.3(s) The term waters of the United States means:

1. All waters which are currently used, or 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. All interstate waters including interstate wetlands;
3. All other waters such as 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 including any such waters:
 1. Which are or could be used by interstate or foreign travelers for recreational or other purposes;
or
 2. (From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
or
 3. Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
6. The territorial sea;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include 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.

2015 Waters of the United States Definition

The **Clean Water Rule** is a 2015 regulation published by the [U.S. Environmental Protection Agency \(EPA\)](#) and the [United States Army Corps of Engineers \(USACE\)](#) to clarify [water resource management](#) in the [United States](#)

under a provision of the [Clean Water Act of 1972](#).^[1] The regulation defined the scope of federal water protection in a more consistent manner, particularly over [streams](#) and [wetlands](#) which have a significant hydrological and ecological connection to traditional navigable waters, interstate waters, and territorial seas. It is also referred to as the **Waters of the United States** rule, which defines all bodies of water that fall under U.S. federal jurisdiction.

The agencies define “waters of the United States” in paragraph (a) of the rule for all sections of the CWA to include the traditional navigable waters (a)(1), interstate waters (a)(2), the territorial seas (a)(3), impoundments of jurisdictional waters (a)(4), covered tributaries (a)(5), and covered adjacent waters (a)(6). Waters in these categories are jurisdictional “waters of the United States” by rule—no additional analysis is required. This eliminates the need to make a case-specific significant nexus determination for covered tributaries or covered adjacent waters because the agencies determined that these waters have a significant nexus to waters identified in (a)(1) through (a)(3) of the rule and thus are “waters of the United States.” The agencies emphasize that the finding of jurisdiction for these covered tributaries and covered adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with other of these covered tributaries or covered adjacent waters in the watershed, is significant.

The agencies exclude specified waters from the definition of “waters of the United States” in paragraph (b) of the rule. The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA and makes no change to the existing exclusion for prior converted cropland. The rule excludes for the first time certain waters and features over which the agencies have generally not asserted CWA jurisdiction, as well as groundwater, which the agencies have never interpreted to be a “water of the United States” under the CWA. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical.

This final rule provides clear exclusions for certain types of ditches. The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Waters and features that are excluded under paragraph (b) of the rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a).

In addition to waters that are categorically “waters of the United States” or categorically excluded under paragraphs (a) and (b), the rule identifies certain waters that can be “waters of the United States” only where a case-specific determination has found a significant nexus between the water and traditional navigable waters, interstate waters, or the territorial seas. First, paragraph (a)(7) of the rule specifies five types of waters (Prairie potholes, Delmarva and Carolina bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that the agencies have determined to be “similarly situated,” and thus are to be considered in combination in a significant nexus analysis. Second, paragraph (a)(8) specifies that waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters located within 4,000 feet from the high tide line or the ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments, or covered tributaries may be found to have a significant nexus on a case-specific basis, but the agencies have not made a determination that the waters are “similarly situated.” As a result, a significant nexus analysis for these waters will include a case-specific assessment of whether there are any similarly situated waters, as well as whether the water, alone or in combination with any waters determined to be similarly situated, has a significant nexus to a traditional navigable water, interstate water, or territorial sea. The rule outlines at (c)(5)(i)-(ix) functions relevant to these case-specific significant nexus analyses.

Proposed Changes

The new proposed definition would create six categories of regulated waters and includes 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, features that are only wet during rainfall events, groundwater, stormwater control features, wastewater recycling infrastructure built in uplands, converted cropland and waste treatment systems.

- 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, DC.
 - 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 U.S.” 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 U.S.,” 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 U.S.” 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 U.S.” to the wetland or 2) perennial or intermittent flow between the wetland and a “water of the U.S.” 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 outlines what is not “waters of the U.S.,” including:
 - Waters that would not be included in the proposed categories of “waters of the U.S.” listed above
 - 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
 - Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater runoff
 - 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