

## Overview of WOTUS Step-2 Proposal

The following are the six categories of WOTUS provided in the proposal:

Category	Includes	Notes
(a)(1) <b>Traditional Navigable Waters (TNWs)</b>	Waters currently used, or were used in the past, or may be susceptible to <b>use in interstate or foreign commerce</b> , including territorial seas and tidal waters	<ul style="list-style-type: none"> <li>• This is the same TNW definition as before except that it now adds territorial seas.</li> <li>• The Agencies are taking comment on whether Appendix D has caused problems with TNW determinations</li> <li>• Rule removes interstate waters category</li> </ul>
(a)(2) <b>Tributaries</b>	<ul style="list-style-type: none"> <li>• River, stream, or similarly <b>naturally occurring surface water channel</b> that <b>contributes perennial</b> (flowing continuously year-round) or <b>intermittent</b> (flowing continuously during certain times of a typical year, more than in response to precipitation) flow to a TNW <b>in a typical year</b> (within normal range of precipitation)</li> <li>• Contribution of flow to TNW can be directly or indirectly through jurisdictional WOTUS so long as those features convey perennial or intermittent flow downstream</li> <li>• Tributary maintains status even if it flows through <b>natural or artificial break</b> so long break conveys <b>perennial or intermittent flow</b> to a tributary or other jurisdictional WOTUS</li> </ul>	<ul style="list-style-type: none"> <li>• Different terminology than has been used before for the tributary definition; eliminates bed and bank and ordinary high water mark concepts from the definition</li> <li>• Use of intermittent and perennial flow in a typical year is intended to address regional and geographic variations, with the concept of “typical year” being a new defined term</li> <li>• Agencies seek comment on other flow ranges and values (e.g., continuous flow for 90 days) that could allow for more national consistency</li> </ul>
(a)(3) <b>Ditches</b>	Ditches ( <b>artificial channels</b> used to convey water) that are: <ul style="list-style-type: none"> <li>• TNWs</li> </ul>	<ul style="list-style-type: none"> <li>• Ephemeral (flowing in direct response to precipitation) ditches are not jurisdictional</li> </ul>

Category	Includes	Notes
	<ul style="list-style-type: none"> <li>Constructed in/relocate a <b>tributary</b> <u>and</u> meet <b>tributary</b> definition</li> <li>Constructed in <b>adjacent wetlands</b> <u>and</u> meet <b>tributary</b> definition</li> </ul>	<ul style="list-style-type: none"> <li>Non-tidal ditches excavated in uplands are not jurisdictional</li> <li>If Agencies are not sure whether ditch was constructed in a tributary, could need to look at historical data, but burden of proof is on Agencies</li> </ul>
<b>(a)(4) Lakes and ponds</b>	<p>Lakes and ponds that:</p> <ul style="list-style-type: none"> <li>are TNWs</li> <li><b>contribute perennial or intermittent</b> flow to a TNW in a <b>typical year</b> directly or indirectly through either a WOTUS or excluded feature that conveys perennial or intermittent flow downstream</li> <li>Are <b>flooded by</b> a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a <b>typical year</b></li> </ul>	<ul style="list-style-type: none"> <li>New category of jurisdictional waters</li> <li>Focus is on lake/pond's contribution of flow and connection to TNWs.</li> <li>Does not include lakes/ponds that contribute flow to TNWs through ephemeral flow</li> </ul>
<b>(a)(5) Impoundments</b>	<b>Impoundments</b> of WOTUS	<ul style="list-style-type: none"> <li>No changes proposed</li> <li>Agencies request comment on whether impoundments needed as separate category</li> </ul>
<b>(a)(6) Adjacent wetlands</b>	<p>Wetlands adjacent to jurisdictional TNWs, tributaries, ditches, lakes/ponds, and impoundments</p> <ul style="list-style-type: none"> <li>To be adjacent, wetlands must <b>abut</b> (touch at least one point or side) or have <b>direct hydrological surface connection</b> (as a result of inundation from a jurisdictional WOTUS or via perennial or intermittent flow between wetland and a WOTUS)</li> <li>Wetlands that are physically separated from jurisdictional TNWs, tributaries, ditches,</li> </ul>	<ul style="list-style-type: none"> <li>Limited to wetlands and maintains current wetland definition requiring all 3 wetland criteria (hydrology, hydrophytic vegetation, and hydric soils)</li> <li>Removes bordering, contiguous, and neighboring concepts</li> <li>Ephemeral flow or subsurface connections do not constitute direct hydrologic connection</li> <li>Wetlands separated from other WOTUS by upland (area that does not meet wetland criteria) or by dikes,</li> </ul>

Category	Includes	Notes
	lakes/ponds, and impoundments by upland, dikes, barriers, or similar structure AND lack a direct hydrologic surface connection are NOT adjacent wetlands	<p>barriers, or other similar structures would have to have direct hydrologic surface connection to WOTUS in a typical year to be a jurisdictional adjacent wetland</p> <ul style="list-style-type: none"> <li>Agencies seek comment on other ways to define adjacency (e.g., distance limits)</li> </ul>

**Exclusions - The following are categories of waters that are *not* WOTUS:**

Exclusion	Notes
<b>(b)(1) Features that are not identified WOTUS in (a)</b>	<ul style="list-style-type: none"> <li>Agencies include to avoid suggestion features listed in (b) would be jurisdictional but for an applicable exclusion</li> </ul>
<b>(b)(2) Groundwater</b> , including groundwater drained through subsurface drainage systems	<ul style="list-style-type: none"> <li>Continues agency practice not to regulate groundwater as WOTUS</li> </ul>
<b>(b)(3) Ephemeral features and diffuse stormwater run-off</b> (including sheet flow)	<ul style="list-style-type: none"> <li>These features would not meet categories outlined in (a), but are explicitly excluded here to avoid confusion</li> </ul>
<b>(b)(4) Ditches</b> that are not: TNWs, constructed in/relocate a tributary <u>and</u> meet tributary definition, or constructed in adjacent wetlands <u>and</u> meet tributary definition	<ul style="list-style-type: none"> <li>Excludes all ditches that are not identified in paragraph (a)(3)</li> </ul>
<p><b>(b)(5) Prior converted cropland</b></p> <ul style="list-style-type: none"> <li>Any area that, prior to Dec. 23, 1985, was drained or otherwise manipulated for purpose or having effect of making production of an agricultural product possible.</li> </ul>	<ul style="list-style-type: none"> <li>Retains exclusion and provides further clarity on when PCC exclusion applies</li> <li>Five-year timeframe for maintaining agricultural purposes is consistent with 1993 preamble</li> <li>Eliminates “change in use” limitation</li> </ul>

Exclusion	Notes
<ul style="list-style-type: none"> <li>Area is no longer PCC when it is abandoned and has reverted to wetland. Abandonment occurs when PCC is not used for, or in support of, agricultural purposes at least once in the immediately preceding 5 years.</li> </ul>	
<p><b>(b)(6) Artificially irrigated areas that would revert to upland</b> should irrigation cease</p>	<ul style="list-style-type: none"> <li>Tied to concept of “upland” (area that does not meet wetland criteria)</li> </ul>
<p><b>(b)(7) Artificial lakes and ponds</b> (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) <b>constructed in upland</b> that do not fall into jurisdictional lakes/pond or impoundment categories</p>	<ul style="list-style-type: none"> <li>Tied to concept of “upland” (area that does not meet wetland criteria)</li> <li>Does not exclude areas that otherwise fall into lakes/pond or impoundment categories</li> <li>Eliminates language requiring particular uses for lakes and ponds, recognizing that lakes/ponds can have variety of uses</li> </ul>
<p><b>(b)(8) Water-filled depressions created in upland incidental to mining or construction and sand, gravel, and fill pits excavated in uplands</b></p>	<ul style="list-style-type: none"> <li>Tied to concept of “upland” (area that does not meet wetland criteria)</li> <li>Consistent with 2015 Rule</li> </ul>
<p><b>(b)(9) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off</b></p>	<ul style="list-style-type: none"> <li>Tied to concept of “upland” (area that does not meet wetland criteria)</li> <li>Stormwater control features that are not built in WOTUS are viewed as non-jurisdictional</li> <li>Includes stormwater features (e.g., green infrastructure) that develop/exhibit wetland characteristics</li> </ul>
<p><b>(b)(10) Wastewater recycling structures constructed in uplands</b></p>	<ul style="list-style-type: none"> <li>Tied to concept of “upland” (area that does not meet wetland criteria)</li> </ul>

Exclusion	Notes
<p><b>(b)(11) Waste treatment systems</b>, which include: <b>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</b>, from wastewater prior to discharge (or eliminating any such discharge).</p>	<ul style="list-style-type: none"> <li>• Provides definition of “waste treatment system” for the first time</li> <li>• Clarifies that exclusion applies to all components of WTS system and that treatment can be passive or active</li> <li>• Notes that agencies affirmatively relinquish jurisdiction where WOTUS is impounded (under permit) to construct WTS</li> <li>• Preamble notes WTS exclusion applies to systems constructed either in accordance with requirements of the CWA, or prior to 1972 CWA enactment</li> <li>• Makes ministerial changes (deletion of cooling pond parenthetical and suspended language regarding impoundment of WOTUS)</li> </ul>

**Other Points of Note:**

- Proposed Rule is intended to establish bright lines. Eliminates case-by-case application of significant nexus test
- Proposed Rule aims to be consistent with all of the Supreme Court case law, rather than adopting the test of a particular *Rapanos* opinion
- Proposed Rule uses Connectivity Report to “inform” and points out that the Report lends support to determinations that ephemeral waters and non-abutting wetlands are not jurisdictional. Proposal notes that drawing lines between federal/state waters is legal determination.
- 60-day comment period, which will run from publication in *Federal Register* (likely will be published in a few weeks)
- Includes Economic Analysis, which takes qualitative approach (in recognition of fact that there has never been sufficient information available to accurately determine the scope of WOTUS under various definitions)