

Revised Definition of “Waters of the United States”



PUBLISHED FEBRUARY 14, 2019
COMMENTS DUE APRIL 15, 2019

2019 WOTUS Revisions



- **Joint proposed rulemaking of the Army Corps of Engineers and the Environmental Protection Agency**
 - Amends (replaces and deletes) provisions impacted by the 2015 Clean Water Rule
 - Proposes to amend eleven (11) sections of the Code of Federal Regulations to ensure consistent definitions between all provisions where “WOTUS” are regulated
 - “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...”

Final Rule Amends....



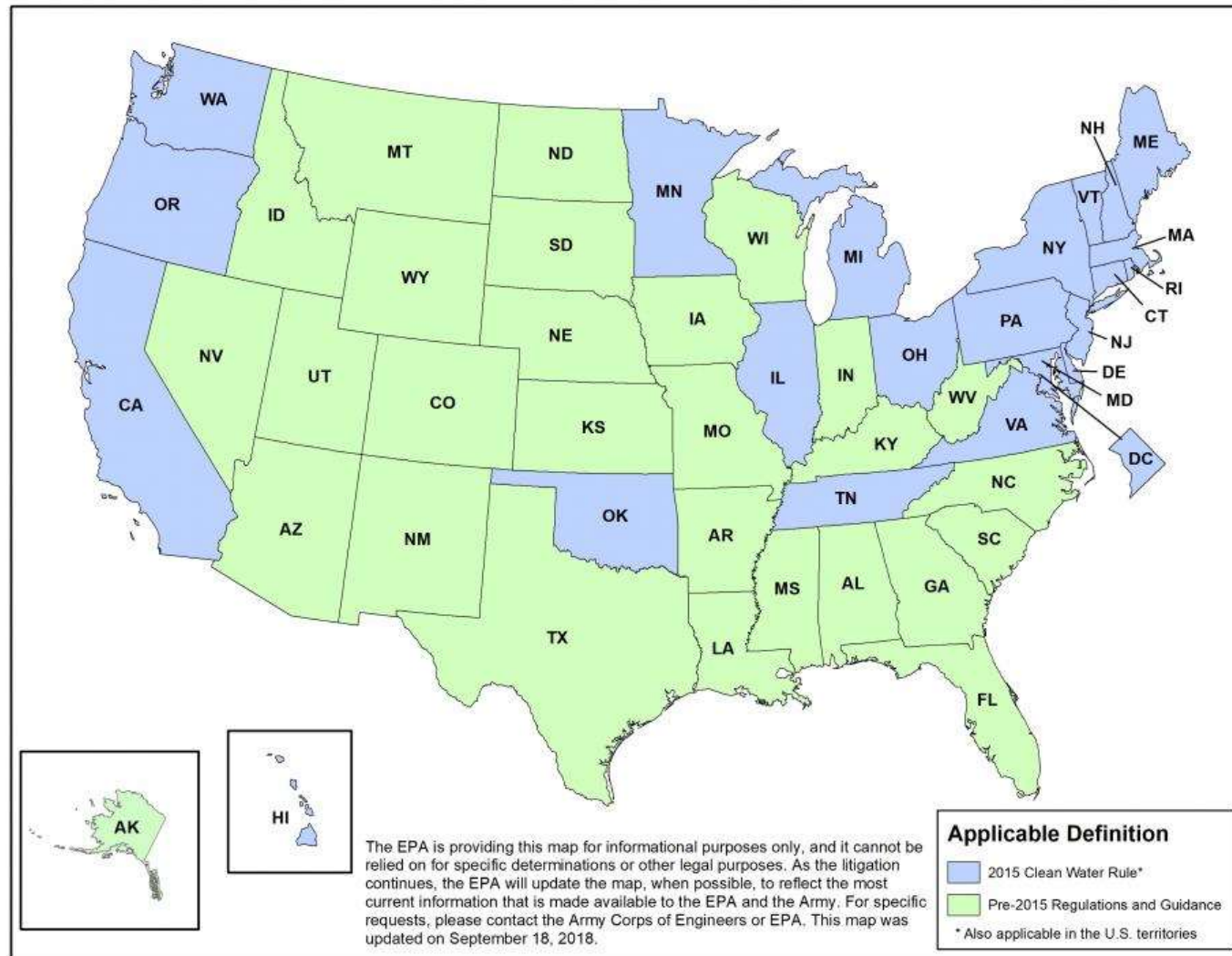
- 33 CFR Part 328: Definition of Waters of the United States
- 40 CFR Part 110: Discharge of Oil
- 40 CFR Part 112: Oil Pollution Prevention
- 40 CFR Part 116: Designation of Hazardous Substance
- 40 CFR Part 117: Determination of RQs for Hazardous Substances
- 40 CFR Part 122: EPA Administered Permit Programs: NPDES

Final Rule Amends...



- 40 CFR Part 230: Section 404(b)(1) Dredge or Fill Materials
- 40 CFR Part 232: Section 404 Exemptions
- 40 CFR Part 300, Appendix E: Oil Spill Response
- 40 CFR Part 302: Designation, RQ, and Notifications
- 40 CFR Part 401: General Provisions

The 2015 *Clean Water Rule* is Still in Effect in 22 States





“...This proposed definition revision is also intended to clearly implement the overall objective of the CWA [Clean Water Act] to restore and maintain the quality of the nation’s waters while respecting State and tribal authority over their own land and water resources.”



“This 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.”



“Given the significant civil and criminal penalties associated with the CWA, the agencies seek to promote regulatory certainty while providing fair and predictable notice of the limit of federal jurisdiction.”

Proposed Revision to WOTUS



- Establishes six (6) categories of jurisdictional waters considered WOTUS:
 - 33 CFR Part 328.3(a)(1) Navigable waters
 - ✦ “...Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...”
 - 33 CFR Part 328.3(a)(2) Tributaries to navigable waters
 - 33 CFR Part 328.3(a)(3) Ditches that are traditionally navigable or that relocate a tributary, and ditches in adjacent wetland
 - 33 CFR Part 328.3(a)(4) Lakes and ponds that contribute flow to a navigable water
 - 33 CFR Part 328.3(a)(5) Impoundments of jurisdictional waters
 - 33 CFR Part 328.3(a)(6) Wetlands adjacent to jurisdictional waters

Proposed Exclusions to WOTUS



- **Eleven (11) categories are not WOTUS at 33 CFR 328.3(b):**
 - Waters or water features not identified in (a)(1)
 - Groundwater, including groundwater drained through subsurface drainage systems
 - Ephemeral features and diffuse stormwater run-off
 - Ditches that are not identified in (a)(1)
 - Prior converted cropland
 - Artificially irrigated areas, included fields flooded for growing
 - Artificial lakes and ponds
 - Water-filled depressions incidental to mining or construction
 - Stormwater control features to convey, treat, infiltrate or store
 - Wastewater recycling structures
 - Waste treatment systems

Definitions in 2019 Proposed Rule to Lend Clarity and Certainty



- **Adjacent Wetlands**
- **Ditch**
- **Ephemeral**
- High tide line
- Intermittent
- Ordinary high water mark
- Perennial
- Prior converted cropland
- **Snowpack**
- Tidal waters
- **Tributary**
- **Typical year**
- Upland
- Waste treatment system
- Wetlands

Tributary Defined



- River, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in (a)(1)(i) of this section *in a typical year (emphasis added)*

Typical Year Defined



- The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic region
- Definition added to included extended period of predictable, continuous, seasonal surface flow occurring year after year...

Ephemeral Defined



- The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).
- Snow fall is not snow pack; melting of snow pack does not meet the definition of ephemeral
- Ephemeral waters are excluded from the definition of WOTUS.... “limiting jurisdiction to perennial and intermittent streams most appropriate balances the Federal government’s interest in regulation (*sic*) the nation’s navigable waters while respecting State land use authority over features that are only episodically wet following precipitation events...”

Ditch Defined



- The term *ditch* means an artificial channel used to convey water.
- To be jurisdictional, a ditch must...
 - Be an “artificial” channel
 - Convey water
- If it meets any of the (a)(1) waters, the ditch is jurisdictional
- Ditches that satisfy the definition of tributary
- Ditches constructed in an adjacent wetland

Adjacent Wetlands Defined



- Wetlands that *abut* or *have a direct hydrologic surface connection* to a water identified in (a)(1)(i) through (v) in a typical year
- Wetlands physically separated from a (proposed WOTUS) by upland or dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are *not* adjacent

A Wetland....



- Agencies are maintaining the longstanding regulatory definition of “wetlands”
- An area must satisfy all three of the definition’s criteria under normal circumstances :
 - Hydrology
 - Hydrophytic vegetation
 - Hydric soils

Direct Hydrologic Surface Connection



- Occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water



Quoted in the Preamble from *Riverside Bayview*...

“[i]n determining the limits of its power to regulate discharges under the Act, the corps must necessarily choose some point at which water ends and land begins...Where on this continuum to find the limit of ‘waters’ is far from obvious...”



“Wetlands separated from otherwise jurisdictional waters by upland or by dikes, barriers, or other similar structures are not adjacent simply because a surface water connection between the two is possible or if, for example, wetlands “are connected to the navigable water by flooding, on average, every 100 years” or by directional sheet flow during an individual storm event.”



“This proposed definition (of adjacent wetland) would end the current practice of conducting case-specific significant nexus evaluations for non-abutting wetlands to relative permanent and non-relatively permanent waters.”

“In light of the “more specific [tributary] regulations” proposed today, the agencies propose to eliminate the case-specific significant nexus analysis through categorical treatment adjacent wetlands, as defined by this proposal, as Waters of the United States.”

Significant Nexus....



- The 2015 Clean Water Rule brought forward the notion of a Significant Nexus that would make a water “WOTUS”
 - Waters are WOTUS if they significantly alter the chemical, physical or biological integrity of jurisdictional waters
 - Made on a water individually, but determination can be made **in combination with other waters where waters function together** (i.e., alone or in combination)
 - Waters in a **region** may be considered
- This proposed rule eliminates “..this case-specific *significant nexus*” analysis by providing a clear definition of *tributary* that is easier to implement...”
- “...Justice Kennedy’ “significant nexus” test for wetlands adjacent to nonnavigable tributaries was only needed “absent more specific regulations””

2015 Clean Water Rule “Significant Nexus” in a Picture

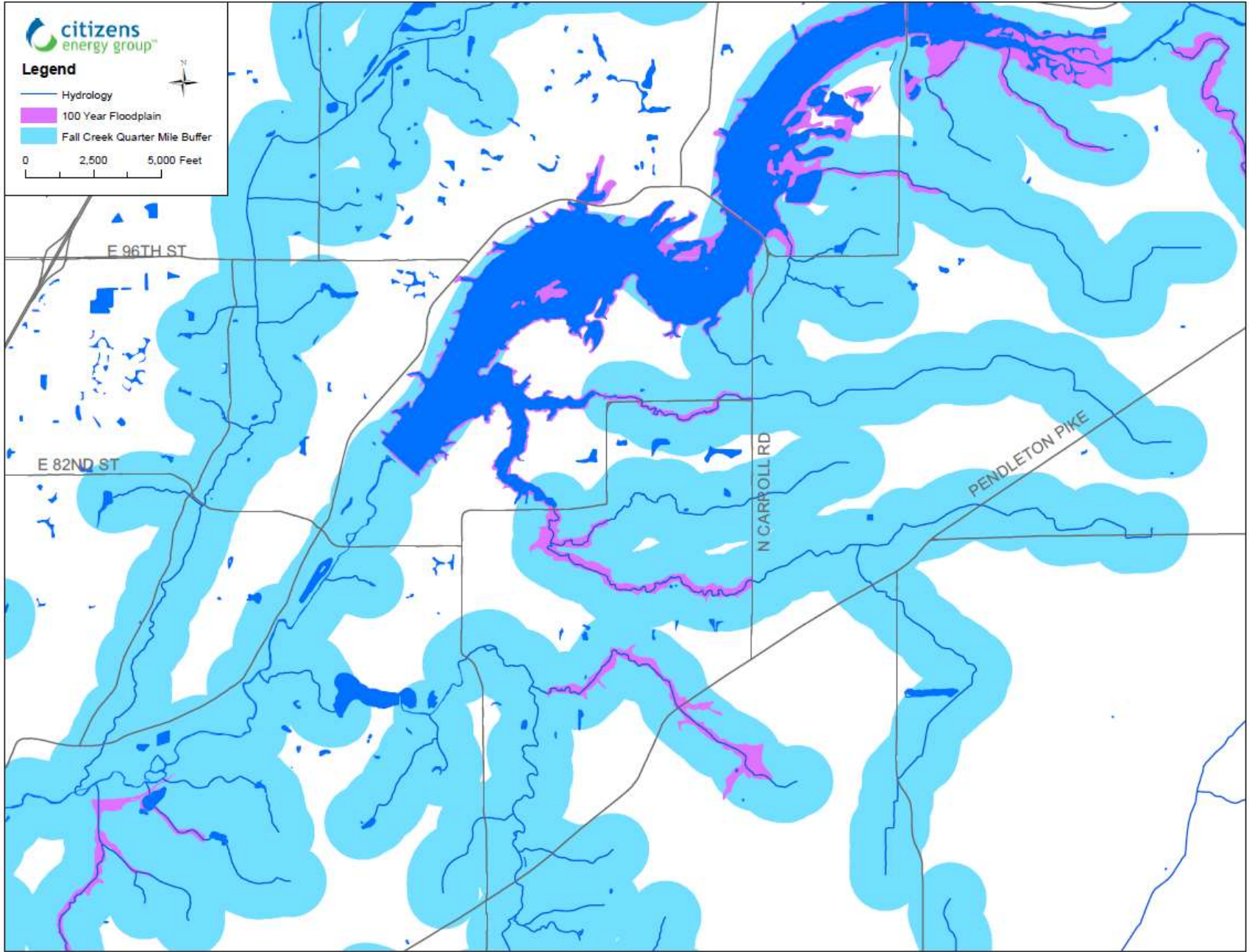




Legend

- Hydrology
- 100 Year Floodplain
- Fall Creek Quarter Mile Buffer

0 2,500 5,000 Feet



“Neighboring” versus “Abut”



- 2015 Clean Water Rule used the term “neighboring” in describing *adjacent* for purposes of jurisdiction
- 2019 proposed rule abandons the term “neighboring” in favor of the word *abut*, which captures the common understanding – touching, consistent with the common definition of the word *adjacent*
- The term “abut” in the proposed definition...would provide members of the regulated community with fair notice as to whether wetlands are subject to CWA jurisdiction.

Lakes and Ponds



- Lakes and ponds that satisfy any of the conditions in (a)(1) – “traditional navigable”
- Lakes and ponds that contribute perennial or intermittent flow to an (a)(1) water in a typical year through an (a)(2) through (a)(6) water
- Lakes and ponds flooded by an (a)(1) through (a)(5) water in a typical year



“The agencies’ authority to regulate “the waters of the United States” is grounded in Congress’ commerce power over navigation.”

“The agencies can choose to regulate beyond waters more traditionally understood as navigable given the broad purposes of the CWA, but must provide a reasonable basis for doing so.”

“...lakes and ponds....described above, fall within Congress’ commerce power and are consistent with the ordinary meaning of “waters of the United States,” and that regulating them effectuates the goals and policies of the CWA.”



“A lake or pond that may be connected to a “water of the United States” by flooding, on average, once every 100 years would not be jurisdictional under this proposal.”

“The proposed lakes and ponds category would replace existing procedures that may depend on case-specific “significant nexus” analyses of the relationship between a particular lake or pond with downstream water.”

Tools for Determining Whether a Lake or Pond is Jurisdictional



- Where an enclosed body of water is displayed on a USGS topo map or in NHD data, it may indicate a lake or pond.
- The presence of a “blue line” stream on a USGS topo or NHD data may be indicative of an (a)(2) –(a)(6) water
- There is no current definition to distinguish between a *pond* and a *lake* – should there be?

Waters that are *Not* WOTUS



- The proposed rule would exclude groundwater, including groundwater drained through subsurface drainage
 - “The agencies have never interpreted “waters of the United States” to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater.”
- Artificial lakes and ponds constructed in upland areas, including farm and stock watering ponds
- Owing to growing interest in water reclamation projects, detention and retention basins, including infiltration basins and groundwater recharge basins are excluded