



## Short Summary of WOTUS Rule

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have released a proposed rule to revise the definition of “waters of the United States” (WOTUS) for all Clean Water Act (CWA) programs. Despite the agencies’ claims to the contrary, the definitional changes contained in the proposed WOTUS rule would significantly expand federal control of land and water resources across the Nation, triggering substantial additional permitting and regulatory requirements.

### Key Provisions of the Proposed Rule

The following outlines briefly the key provisions of the regulatory text.

#### ➤ **WOTUS Under the Proposed Rule**

1. All waters currently used, used in the past, or may be susceptible to use in interstate or foreign commerce, including tidal waters (frequently referred to as traditional navigable waters (TNWs));
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in (1)-(3) above;
5. All tributaries of waters identified in (1)-(4) above;
6. All waters, including wetlands, adjacent to a water identified in (1)-(5) above; and
7. On a case-specific basis, other waters, including wetlands, that alone or in combination with other similarly situated waters in the region have a significant nexus to a water identified in (1)-(3) above.

#### ➤ **Tributary Definition**

- Water with a bed and banks and ordinary high water mark which contributes flow directly or through other water bodies to waters in (1)-(4) above.
- **Wetlands, lakes, and ponds** can be tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow.
- Water does not lose its tributary status if there are man-made breaks (such as bridges, culverts, pipes, dams) so long as bed and bank and ordinary high water mark can be identified upstream of the break.
- A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).
- The proposed rule, for the first time ever, specifically defines **ditches** as jurisdictional tributaries (unless excluded, as discussed below) under all CWA programs. The inclusion of roadside, irrigation, and stormwater ditches will have huge practical consequences that have yet to be evaluated by the agencies.

#### ➤ **Adjacent Waters Definition**

- **Adjacent** waters, including wetlands, are jurisdictional. Bordering, contiguous, or neighboring waters separated from other WOTUS by dikes, or barriers are adjacent waters.
- **Neighboring** means waters located within a riparian area or floodplain or waters with a shallow subsurface connection or confined surface hydrologic connection.
- **Riparian areas** are transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community of the area

- **Floodplain** is an area bordering inland or coastal areas that is inundated during periods of moderate to high water flows. Proposed rule does not define flood interval, but leaves up to agencies’ “best professional judgment.”
- **Significant Nexus Definition**
  - Means water, including wetlands, either alone or in combination with other similarly situated waters on the region significantly affects water identified in (1)-(3) above.
  - Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together so that they can be evaluated as a single landscape unit. Proposed rule does not define “single landscape unit.”
  - For an effect to be significant, it must be more than speculative or insubstantial.
- **Exclusions in Proposed Rule**
  - Waste treatment systems designed to meet the requirements of the CWA;
  - Prior converted cropland;
  - Ditches excavated wholly in uplands that drain only uplands and have less than perennial flow;
  - Ditches that do not contribute flow, either directly, or through another water, to a water identified in paragraphs (1)-(4) above;
  - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - Water-filled depressions from construction;
  - Groundwater, including groundwater drained through subsurface draining systems; and
  - Gullies, rills, and non-wetland swales.
  - Although these features (certain ditches, groundwater, gullies, rills, and non-wetlands, etc.) are not WOTUS under the proposed rule, they can serve to establish a connection under the proposed rule (*e.g.* connection that demonstrates adjacency to jurisdictional or demonstrates that an “other water” has a significant nexus to a (a)(1) – (3) waters).

**Interpretative Rule (IR) Governing Exemptions for Farming, Ranching, and Forestry Provides Insufficient Protections**

The proposed rule imposes a new regime even as it continues existing statutory and regulatory exemptions from Section 404 permitting requirements for normal farming, silviculture and ranching practices where these activities are part of an ongoing farming, ranching or forestry operation. In tandem with the proposed rule, the agencies have issued an “interpretive rule” that was made immediately effective, without advance notice and comment.

- The IR purportedly expands the list of existing agricultural exemptions to include an additional 53 activities that are exempt from permitting requirements so long as they are conducted consistent with Natural Resources Conservation Service (NRCS) conservation practice standards – a requirement that is nowhere found in the law.
- EPA and the Corps will enter into a Memorandum of Agreement with the NRCS to develop and implement a process for identifying, reviewing, and updating NRCS agricultural conservation practices and activities that would qualify for the exemption.

### **Concerns with the Interpretative Rule:**

- The agencies' discussion of the agricultural exemptions is misleading and intended to minimize opposition to the rule. But the IR has no effect on CWA jurisdiction, *i.e.*, the exemption is not an exclusion from federal CWA jurisdiction. In addition, the IR is nothing more than agency guidance and does not have the force of law.
- The "expanded" list of excluded activities in the IR already fall within the "normal" farming and ranching exclusion and therefore were already exempt from permitting requirements if undertaken as part of an ongoing operation. Instead, the IR – in effect – limits farmer's ability to use the agricultural exemptions by introducing compliance with NRCS standards as a qualification for their use. Also, through the regulation and guidance, the agencies are narrowing what is "normal" farming and ranching activities by limiting them to those that have been on-going since the 1970s. They do not apply if there is a change of land use (*i.e.* easement for a wind turbine), an interruption in activities, or a change in crops.
- The exemptions affirmed in the IR only apply to the Section 404 "dredge and fill" permit program, not the Section 402 NPDES permit requirements for discharges of pollutants. This will affect every day weed control, fertilizer applications and other common farm activities.
- Additional problems with the agency's approach include: (1) who will inspect and enforce compliance with NRCS guidelines; (2) will third parties have the ability to challenge exempt status; (3) EPA's role in NRCS programs that will be defined through a Memorandum of Agreement that has yet to be developed; and (4) whether this is an interpretative or a legislative rule under the Administrative Procedure Act.