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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
"Waters of the U.S." (WOTUS) Definition	40 CFR 230.3(s) The term "waters of the United States" means:	Define "waters of the United States" for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean:	For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term ''waters of the United States'' means:	**NOTE: <u>This rule will be finalized 60 days after publication in the Federal Register</u>**
Traditional Navigable Waters	All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, all waters which are subject to the ebb and flow of the tide;	(1) All waters which are currently used, 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;	(i) All waters which are currently used, 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;	**NO CHANGE** These waters are referred to as traditionally navigable waters of the U.S. For the purposes of CWA jurisdiction, waters are considered traditional navigable waters if: • They are subject to section 9 /10 of the 1899 Rivers and Harbors Appropriations Act • A federal court has determined the water body is navigable-in-fact under law • Waters currently used (or historically used) for commercial navigation, including commercial waterborne recreation (boat rentals, guided fishing trips, etc.)

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Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

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Interstate Waters	All interstate waters, including interstate "wetlands";	(2) All interstate waters, including interstate wetlands;	(i) All interstate waters[1], including interstate wetlands;	**NO CHANGE**
Territorial Seas	The territorial seas[2]; and	(6) The territorial seas;	(iii) The territorial seas;	**NO CHANGE**
Impoundments	All impoundments of waters otherwise defined as waters of the U.S. under this definition;	(4) All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;	(iv) All impoundments of waters otherwise identified as "waters of the U.S." under this section;	**NO SIGNIFICANT CHANGE** Impoundments such as berms, dikes**,** levees and dams may be considered jurisdictional because they are subject to "seepage"
Tributaries	Tributaries of waters for navigable and interstate, territorial seas and impoundments of waters	(5) All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;	(v) All tributaries of waters identified on pages 15-16 of this chart	**NEW LANGUAGE** The final rule defines, for the first time, the definition of a tributary: • *A tributary has a bed, bank and ordinary high water mark* • *A tributary contributes flow, directly or indirectly, to a WOTUS* The rule states that "a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and **ditches"** and **can flow perennially, intermittently or ephemerally** **Refer to tributary definition on pages 15-16 of the chart**

[1] Waters, such as lakes, ponds, streams, tributaries, etc.) are considered "interstate waters" if they flow across state boundaries, even if they are not considered "navigable" and do not connect to a WOTUS

[2] Territorial seas are defined as *"the belt of the seas measured from the line of the ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles"*

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

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Adjacent	Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.	7) All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;	(vi) **All waters adjacent to navigable and interstate waters, territorial seas and impoundments,** including wetlands, ponds, lakes, oxbows, impoundments and similar waters;	**NEW LANGUAGE** This is a significant change—current Corps regulations refer to *"wetlands adjacent to"* WOTUS. The final rule encompasses *"all waters adjacent"* to WOTUS The entire water is adjacent if any part of the water is bordering, continuous or neighboring. **These terms, including significant nexus, are further defined on pages 13-19 of this chart**. The term "adjacent" is relevant when assessing 100-year floodplain designations, high tide lines and ordinary high water mark---It may encompass those areas separated by roads, berms and other structures
Regional Consideration Criteria	All other waters such as interstate 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 would affect or could affect interstate or foreign commerce including any such waters:	3) And on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial sea	(vii) All waters, where they are determined, on a case-specific basis, to have a significant nexus to navigable waters, interstate waters and the territorial sea. These waters are <u>similarly situated and shall be combined, for purposes of a significant nexus analysis</u>, in the watershed that drains to the nearest navigable or interstate waters or territorial seas Waters identified in this paragraph shall not be combined adjacent waters	**NEW LANGUAGE** Regional water features that have a connection to a WOTUS may be jurisdictional These water features will be aggregated together—it is difficult to exempt one water feature if others are jurisdictional More waters in a broader area will be analyzed together

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Regional Consideration Criteria *(continued)*			when performing a significant nexus analysis If waters identified in this section are also an adjacent water, they are considered an adjacent water and no case-specific significant nexus analysis is required (A) Prairie potholes[3] (B) Carolina bays and Delmarva bays[4] (C) Pocosins[5] (D) Western vernal pools[6] (E) Texas coastal prairie wetlands[7]	**This definition is relevant for counties that own facilities and/or infrastructure near these regional water features** **It will be difficult to do any projects around these waters without getting a federal permit**
Commerce Clause Language	(i) Which are or could be used by interstate or foreign travelers for recreation or other purposes; (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce	(i) through (iii) eliminated	(i) through (iii) eliminated	**DELETED** The agencies considered this section duplicative language

[3] Prairie potholes are primarily freshwater marshes found in the Upper Midwest (especially North Dakota, South Dakota, Wisconsin and Minnesota)
[4] The Carolina bays (also called Delmarva bays) are ponded, depressions and wetlands found along the Atlantic seaboard
[5] Pocosins are bog areas, with a shallow water table, that contain evergreen shrubs and trees. They can be found from Virginia to northern Florida
[6] Western vernal pools are seasonal depression wetlands found on the West Coast and in the northeastern and Midwestern states
[7] Texas coastal prairie wetlands are freshwater wetlands located along the Texas Gulf Coast

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

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Floodplain/ High Tide Line/ Ordinary High Water *(continued)*		The proposed rule used the term "floodplain" to identify waters that would be near (adjacent) to a WOTUS to claim federal jurisdiction Floodplain, under the proposed rule, meant an area bordering inland or coastal waters that was formed by sediment preposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows The proposed rule definition relies heavily on "moderate to high water flows" rather than the Federal Emergency Management Agency's (FEMA) flood plain definitional terms such as 100 year or 500 year floodplains	(viii) **All waters located within a 100-year floodplain** of navigable and interstate waters and territorial seas and **all waters located within 4,000 feet of the high tide line or ordinary high water mark (OHWM)** of navigable waters, interstate waters, territorial seas and impoundments where they are determined on a case-specific basis to have a significant nexus to navigable waters, interstate waters and/or territorial seas For waters determined to have a significant nexus, the entire water is a "water of the U.S." if a portion is located within the 100-year floodplain of navigable or interstate waters or territorial seas or within 4,000 feet of the high tide line or ordinary high water mark Waters in this section shall not be combined with adjacent waters when performing a significant nexus analysis If waters identified in this paragraph are also an adjacent water, no case-specific significant nexus analysis is required	**NEW LANGUAGE** This language is broad and may have significant impact on county facilities and infrastructure in a 100-year floodplain or near a river, ocean, dam or interstate waters It is problematic using the term "100-year floodplain" for jurisdictional purposes: • Not all areas of the country have 100-year floodplain maps • In some parts of the country, the 100-year floodplain maps have not been updated—nor are they available • The 100-year flood maps are constantly changing, and the process to revise can be challenging This definition may impact jurisdictional stormwater and wastewater recycling features built in wet areas, such as constructed wetlands and grassy and vegetated swales

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
WOTUS Exemptions	8) Waters of the United States do not include:	Waters excluded from the definition of "waters of the U.S." include:	(2) The following are not "waters of the United States" even where they otherwise meet the definition of "waters of the U.S."	N/A
Waste Treatment Exemption	Prior converted cropland or waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling points as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the U.S.	(1) Waste treatment systems, including treatment points or lagoons, **designed to meet CWA requirements**	(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act	**REVISED LANGUAGE** The final rule codifies 1986 and 1988 guidance preamble language Even though the preamble gives some guidance, the waste treatment exemption remains unclear Under the final rule, only those waste treatment systems designed to meet CWA requirements would be exempt but for waste treatment systems that were built to address non-CWA compliance issues, it is uncertain whether these systems would also be exempt
Prior Converted Cropland Exemption	*(Refer above)*	(2) Prior converted cropland	(ii) 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 CWA, the final authority regarding CWA jurisdiction remains with EPA	EPA is the final decision-maker on what constitutes a prior converted cropland

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Ditch Exemptions		• Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow • Ditches that do not contribute to flow, either directly or indirectly to a "water of the U.S."	(iii) The following ditches *(are exempt):* (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands (C) Ditches that do not flow, either directly or through another water, into a navigable and interstate waters and territorial seas	**NEW LANGUAGE** The final rule proposes to exempt certain types of ditches. **However, the language is likely to cause implementation issues** The final rule specifically states that ditches are tributaries if they have: ○ A bed, banks and ordinary high water mark ○ And connects, directly or indirectly, to a "waters of the U.S." The final rule and preamble states that tributaries can be natural, man-altered or man-made and includes rivers, streams, canals and **ditches** that flow perennially, intermittently and ephemerally **The responsibility will be on the local government to prove the ditch is exempt** Under the final rule, these types of ditches are clearly jurisdictional: ○ Roadside and other ditches that have flow year-round ○ Roadside and other ditches with irregular flow (intermittent) that are a relocated tributary, or are excavated in a tributary, or drain wetlands

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

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Ditch Exemptions *(continued)*				○ Ditches, regardless of flow, that are excavated in or relocate a tributary **QUESTION: What ditches are not excavated?** **QUESTION: If a ditch is defined as a tributary and a tributary is defined as a ditch, if a ditch (aka tributary) is excavated, will the ditch still be exempt?** **QUESTION: Does the definition of tributaries trump the ditch exemption or does the ditch exempt trump the tributaries definition?** **QUESTION: Even if a ditch is exempt under this exclusion, how does this interpretation impact CWA's recapture clause[8]?**
Other Exemptions		Additionally, the following features are exempted (from the "waters of the U.S." definition): (1) Would exclude artificial areas that revert to uplands if application of irrigation water ceases; (2) Artificial lakes and ponds used solely for stock	(iv) The following features (are not "waters of the U.S."): (A) Artificially irrigated areas that would revert to dry land should application of water to that area cease; (B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds,	**MODIFIED LANGUAGE** Adds the term "dry land" which is undefined in the final regulation—the final rule is even narrower than the proposal

[8] The "recapture clause" brings a normally exempt ditch back under federal jurisdiction if it constitutes a new use of the wetland and if the activity in the ditch would result in a "reduction in reach/impairment of flow or circulation" of "waters of the U.S."

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Other Exemptions (continued)		watering, irrigation, settling basins, rice growing; (3) Artificial reflecting pools or swimming pools created by excavating and/or diking in dry land (4) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (5) Water-filled depressions created incidental to construction activity;	settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; (C) Artificial reflecting pools or swimming pools created in dry land; (D) Small ornamental waters created in dry land; (E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;	The agencies note that artificially created ponds can be used for multiple purposes, including farming, animal habitat, water retention, fire control ponds and recreation; many of these ponds are relevant to county governments. The agencies have stated that these types of ponds should generally be exempt However, even if these ponds are excluded as a WOTUS, the discharges from the pond to a WOTUS may be regulated under the CWA's current National Pollution Discharge Elimination System (NPDES) Section 402 permit program It is important to note that while certain ditches and waters may seem to be exempt, they can also serve as a hydrological connection that the agencies may consider jurisdictional under a significant nexus analysis. In addition, these features may be regulated as a point source and regulated under other CWA programs, such as Section 402

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

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Other Exemptions *(continued)*		(F) Groundwater, including groundwater drained through subsurface drainage systems; and, (G) Gullies and rills and non-wetland swales	*(groundwater section moved to section (v))* (H) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and (I) Puddles	The agencies tried to make it clear that ALL erosional features that are not considered a "tributary" would be excluded from federal permitting authority
Groundwater Exemption		*(refer above to (F) Groundwater section)*	(v) Groundwater, including groundwater drained through subsurface drainage systems	**No change from current rules**—Agencies have never interpreted WOTUS to include groundwater However, the exclusion does not apply to surface expressions of groundwater—i.e. where groundwater emerges and becomes a base flow in streams or spring fed ponds
Stormwater and Wastewater Exemptions	N/A	N/A	(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. (vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling	**NEW LANGUAGE** Stormwater features and wastewater structures built on dry land are exempt from WOTUS but some features, such as channelized or piped streams, would be jurisdictional **But, the term "dry land" is undefined in the final regulation. This is relevant because counties**

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Stormwater and Wastewater Exemptions *(continued)*				**may own stormwater features or wastewater structures that are located on "wet" land** A key element of the stormwater exclusion is whether the feature conveys, treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems "but have never been considered 'waters of the U.S.'" While the final language carves out an exemption for stormwater and wastewater, the definition is potentially limiting because it is strictly limited to infrastructure on dry land This exemption may not apply to infrastructure in coastal or low-lying areas Additionally, older facilities may have segments of their structures and infrastructure build in wet areas, which would not qualify for the exemption The responsibility is on local governments to prove that these features structures were built on dry land, and thus, are exempt

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Stormwater and Wastewater Exemptions *(continued)*				The final rule states that if water is removed from one part of a tributary network and moved to another, such as in a aqueduct or canal, it would be regulated But, even if stormwater and wastewater infrastructure is granted an exemption, they may be regulated as a point source under CWA Section 402 permit program **QUESTION: Are grassy and vegetative swales, which are used to improve water quality, jurisdictional?** **QUESTION: What if a facility uses an artificial swamp to improve water quality — i.e. treatment swamps — are these considered jurisdictional?** **QUESTION: Under the final rule, if stormwater features or wastewater structures are on wet land, they are jurisdictional. However, if only part of the feature is in a 100-year floodplain, will the whole system then fall under federal regulation?**

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(As of June 2, 2015)

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			In this section, the following definitions apply to terms used in the final rule:	
Adjacent Definition	Under existing regulation for "adjacent wetlands," only wetlands adjacent to a "water of the U.S." are considered jurisdictional Adjacent means bordering, ordering, contiguous or neighboring	Adjacent waters are defined as wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to "waters of the U.S." Waters, including wetlands, separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, etc. are "adjacent waters" are jurisdictional	(i) The term *adjacent* means bordering, contiguous, or neighboring waters next to navigable and interstate waters, territorial seas and impoundments, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark Adjacency is not limited to waters located laterally in navigable and interstate waters, territorial seas, impoundments and tributaries Adjacent waters also include all waters that connect segments of navigable and interstate waters, territorial seas, impoundments and tributaries or are located at the head of a water identified as navigable and interstate waters, territorial seas, impoundments and tributaries of this section and are bordering, contiguous, or neighboring such water Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent	**NEW DEFINITION** The new definition of adjacency is incredibly broad—this may lead to confusion and inconsistency in the field Adjacent waters include waters separated from other "waters pf the U.S." by constructed dikes or barriers **Adjacency is not just limited to traditionally navigable and interstate waters, territorial seas, impoundments and tributaries** **Adjacency uses the terms bordering, contiguous or neighboring to determine jurisdiction** The term "adjacent waters" is broad in scope. Ponds, wetlands, ditches, lakes and other types of nature or man-made aquatic systems may be jurisdictional if they are near to a WOTUS. This may have implications for counties that own infrastructure near these waters

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Neighboring Definition		Neighboring is defined as: • Including waters located within the riparian area or floodplain of a "water of the U.S." or waters with a confined surface or shallow subsurface hydrological connection[12] to a jurisdictional water; • Water must be geographically proximate to the adjacent water; Waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate	(ii) The term *neighboring* means: (A) All waters located within 100 feet of the ordinary high water mark of a water identified as navigable and interstate waters, territorial seas, impoundments and tributaries are jurisdiction. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark; (B) All waters located within the 100-year floodplain of a navigable and interstate waters, territorial seas, impoundments and tributaries and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain; (C) All waters located within 1,500 feet of the high tide line of navigable waters, interstate waters and territorial seas, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes	**NEW DEFINITON** **Under the final rule, neighboring is defined for the first time** Final rule eliminated the proposed rule's language on shallow subsurface hydrological connection, which is helpful However, the final rule lays out specific parameters for jurisdiction within the 100-year floodplain and ordinary high water mark—and the implications to counties are broad **First, if a county owns a non-exempt ditch that runs for miles and only a small portion of the ditch is in the 100-year floodplain, the whole length of the ditch—inside and outside the floodplain—is now jurisdictional** Second, the neighboring definition is broad and may have a significant impact on county facilities and infrastructure in a 100-year floodplain or near rivers, oceans, dams or other tributaries This definition may also impact jurisdictional stormwater and wastewater recycling features built in wet areas, such as constructed wetlands and grassy and vegetated swales

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Tributary Definition	Tributaries are considered a "water of the U.S." under existing regulation. Agencies have stated they *generally* would not assert jurisdiction over ditches (including roadside ditches) excavated wholly in and draining only in uplands and do not carry a relatively permanent flow of water.	Tributaries include, natural and manmade waters, including wetlands, rivers, streams, lakes, ponds, impoundments, canals and ditches if they: • Have a bed, bank, and ordinary high water mark (OHWM)[6] Contribute to flow, either directly or indirectly, to a "water of the U.S." Would excludes ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow[8]	The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment) identified as navigable waters, interstate waters and/or territorial seas, that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, **and ditches** not excluded under paragraph (2) of this section A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles,	**NEW DEFINITION** The final rule includes *for the first time* a regulatory definition of a tributary, which specifically defines ditches as jurisdictional tributaries unless specifically exempt Physical characteristics of a tributary include a bed, banks and ordinary high water mark[9]. Additionally, a tributary contributes flow, directly or indirectly, to "waters of the U.S." A tributary can be perennial, intermittent or ephemeral A water, that is considered a jurisdictional tributary, does not lose its status if there are manmade breaks – bridges, culverts, pipes, or dams – or natural breaks – wetlands, debris piles, boulder fields, streams underground – as long as there is a bed, bank, and OHWM identified upstream of the break. **This is problematic for arid and semi-arid areas where banks of the tributary may disappear at times**

[9] NOTE: The term ordinary high water mark is problematic and inconsistently applied in the field. For more information, refer to page 16-17 of this chart

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Tributary Definition *(continued)*			boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break **A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the U.S. that does not meet the definition of tributary or through a non-jurisdictional water to a WOTUS**	**There is no limit on the length of the break as long as there is upstream bed, banks and an ordinary high water mark** Many county-owned ditches have a bed, bank and ordinary high water mark and flow, directly or indirectly to a WOTUS and may be classified as a tributary which may negate the ditch exemption
Ordinary High Water Mark Definition	Existing Corps regulations define ordinary high water mark as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e)		(vi) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas	**Note: Under current regulation, the term ordinary high water mark is ambiguous and applied inconsistently in the field** Many of the ordinary high water mark physical indicators can occur whenever land may have water flowing across it, regardless of flow or duration The standard for ordinary high water mark is currently in flux at the Corps. The Corps is issuing technical manuals that diverge from the current regulatory definition. Rather than clarifying how an ordinary high water mark is determined, codifying this definition is likely to lead to more confusion in the field

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

Summary of Final Regulation Published by EPA and Corps

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Significant Nexus Definition		The term "significant nexus" means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e. the watershed that drains to the nearest "water of the U.S.") and significant affect the chemical, physical or biological integrity of the water to which they drain For an effect to be significant, must be more than speculative or insubstantial Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the U.S." so they can be evaluated as a single landscape unit regarding their chemical, physical, or biological impact on a "water of the U.S."	(v) The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified as navigable waters, interstate waters or territorial seas The term "in the region" means the watershed that drains to the nearest navigable waters, interstate waters or territorial sea For an effect to be significant, it must be more than speculative or insubstantial Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream navigable waters, interstate waters and territorial seas shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph **A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly**	**NEW DEFINITION** The final rule's significant nexus definition is based on Supreme Court Justice Kennedy's "similarly situated waters" test The significant nexus standard is used to determine connection to "waters of the U.S." The significant nexus definition used in the final rule diverges from Justice Kennedy's decision. Justice Kennedy's opinion included "chemical, physical and biological" to determine jurisdiction However, the final rule uses the "chemical, physical or biological" to determine jurisdiction **This will allow the agencies to claim jurisdiction based on just one factor, rather than all three factors—chemical, physical and biological—and will broaden the types of waters that fall under federal jurisdiction** **QUESTION: Are all of these factors equally important or are some factors more important than others?**

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
Significant Nexus Definition *(continued)*			**situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest navigable water, interstate water or territorial seas** Functions relevant to the significant nexus evaluation are the following: (A) Sediment trapping, (B) Nutrient recycling, (C) Pollutant trapping, transformation, filtering, and transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section	

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

Summary of Final Regulation Published by EPA and Corps

(As of June 2, 2015)

Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
"Dry Land" Definition			**The term is used but undefined in the final rule**	Several exclusions and exemptions use the phrase "dry land." The agencies state that "dry land" refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like However, the final rule notes that a WOTUS is not considered "dry land" just because it lacks water at a given time. Similarly, an areas remains "dry land" even if the land is wet after a rainfall The agencies note there is no agreed upon definition, given geographic and regional differences **The agencies concluded that further clarity on this issue can be provided during implementation**