



Definition of “Waters of the United States” (WOTUS) Under the Clean Water Act

Summary of Proposed Rule Published by EPA and Corps

WOTUS REGULATORY TEXT				
	1986 EPA/Corps Regulations ¹	2015 WOTUS Rule	Proposed WOTUS Rule	Preliminary Analysis
“Waters of the U.S.” (WOTUS) Definition	40 CFR 230.3(s) The term “waters of the United States” means:	For purposes of the Clean Water Act, 33 U.S.C. 1251 <i>et. seq.</i> and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:	For purposes of the Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i> and its implementing regulations, subject to exclusions in paragraph (1)(2) of this section, the term “waters of the U.S.” means:	NOTE: This rule is open for public comment until April 15, 2019.
Traditional Navigable Waters (TNW)	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;	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;	Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including <u>the territorial seas</u> and waters which are subject to the ebb and flow of the tide;	REVISED—Adds the term “territorial seas.” The agencies included “territorial seas” in with TNW because they “can think of no instance in which a territorial sea would not also be considered traditionally navigable...”
Tributaries	Tributaries of waters for navigable, interstate, territorial seas and impoundments	All tributaries of waters...(includes 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 and contribute to the flow, either directly or indirectly) to a WOTUS.	Tributaries of TNW (<i>Refer to definition of tributaries for more information</i>).	REVISED: Limits jurisdiction to tributaries that flow to a TNW.

¹ Currently, the 1986 regulation is used in 28 states and the 2015 WOTUS rule is valid in 22 states. See: https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/.



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Ditches	No section on ditches in 1980’s regulation, however, ditches were sometimes deemed jurisdictional under the tributary definition.	Ditches are regulated as tributaries, except for ditches that are excluded by category (refer to exemptions section).	Ditches are considered WOTUS if they satisfy any of the following conditions: 1) Ditches that satisfy the traditional navigable waters definition; 2) Ditches that are constructed in a tributary or that relocates or alters a tributary (as defined under WOTUS) or 3) Ditches constructed in an adjacent wetland as long as these ditches meet the tributary definition.	NEW CATEGORY: The agencies are creating a new jurisdictional category for ditches to differentiate them from tributaries. However, in some cases, ditches can be classified as tributaries which will continue to lead to confusion.
Certain Lakes and Ponds	No section specifically on lakes and ponds in 1986/1988 regulation, however, certain lakes and ponds were regulated under the “Other Waters” section.	No specific section on lakes and ponds, however, lakes and ponds may be regulated under sections on “adjacent” or “other” waters.	Lakes and ponds that satisfy any of the conditions of a TNW, that contribute perennial or intermittent flow to a TNW in a typical year either directly or indirectly through a WOTUS designated tributaries, ditches, lakes and ponds, impoundments and adjacent wetlands, so long as those water features convey perennial or intermittent flow downstream.	NEW CATEGORY: The agencies are proposing a separate category of WOTUS to include certain lakes and ponds since these features have different characteristics from TNW. i.e. still waters v. flowing waters. Lakes and ponds that contribute perennial or intermittent flow to a TNW in a “typical year” either directly or indirectly through a WOTUS would be considered jurisdictional. But, lakes and ponds that contribute to a TNW through ephemeral (rainfall) flow would be excluded.



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Impoundments	All impoundments of waters otherwise defined as waters of the U.S. under this definition;	All impoundments of waters otherwise identified as “waters of the U.S.” under this section;	Impoundments of traditional navigable waters and jurisdictional tributaries, ditches, lakes and ponds and adjacent wetlands.	NO CHANGE: The agencies do not propose to make any changes to the impoundment (e.g. dam that impounds water on a river)) category of WOTUS as it exists in the 1986 regulations.
Adjacent Wetlands	Wetlands adjacent to waters (other than waters that are themselves wetlands) for TNW, interstate, other waters, impoundments, tributaries and the territorial sea; 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.	All waters adjacent to a traditional navigable water, interstate waters and wetlands, territorial seas, impoundments and tributaries.	Adjacent wetlands to traditional navigable waters, including territorial seas, tributaries to those waters, jurisdictional ditches, lakes and ponds and impoundments of otherwise jurisdictional waters.	<p>REVISED: The proposed rule states that adjacent wetlands must meet several criteria to be jurisdictional under the proposed rule. They must satisfy all three wetland delineation factors (i.e. hydrology, hydrophytic vegetation and hydric soils) and touch a jurisdictional water at either a point or side.</p> <p>Wetlands that have a direct hydrologic surface connection to a WOTUS via inundation (perennial or intermittent) by a jurisdictional water during a typical year would be considered adjacent wetlands under the proposed rule.</p> <p>Features that were once wetlands but have been naturally transformed or lawfully converted to upland (e.g. in compliance with a Section 404 permit) would be considered upland.</p>



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NOT INCLUDED IN THE RULE				
	1986 WOTUS Regulations	2015 WOTUS Rule	Proposed WOTUS Rule	Preliminary analysis
Interstate Waters	All interstate waters, including interstate wetlands;	All interstate waters, including interstate wetlands;	Proposed rule would remove section on interstate waters and wetlands.	CATEGORY DELETED: The agencies propose to remove the category on interstate waters. While this proposal marks a shift away from prior agency positions, the agencies expect that many of the waters previously regulated as an “interstate water” would also be jurisdictional under one of the other proposed WOTUS categories.
Other Waters	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: a) Which are or could be used by interstate or foreign travelers for recreational or other purposes; b) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or c) Which are used or could be used for industrial purposes by industries in interstate commerce.	All waters—prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands—were they are determined, on a case-specific basis to have a significant next to a TNW, interstates waters and wetlands and the territorial seas.	“Other waters” designation removed from proposed rule.	CATEGORY DELETED.



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Territorial Seas	The territorial seas ² ;	The territorial seas;	Section on territorial seas was moved under section on traditional navigable waters.	SECTION DELETED: incorporated into section on traditionally navigable waters
100-year Floodplain	Not part of the 1986 rule.	All waters located within the 100-year floodplain of traditional navigable waters, interstate waters (including interstate wetlands) and the territorial seas and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate waters and wetlands, territorial seas and impoundments where they are determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate waters and wetlands and the territorial sea. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain...or within 4,000 feet of the high tide line or ordinary high-water mark. Waters identified in this paragraph shall not be combined with adjacent waters when performing a significant nexus analysis.	Not included in proposed rule	SECTION DELETED: This provision was part of the 2015 WOTUS rule, it is not included in the 1985 regulations nor the proposed WOTUS rule.

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”



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Regional Consideration Criteria	No provision in 1986 regulations	<p>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</p> <p>Waters identified in this paragraph shall not be combined adjacent waters when performing a significant nexus analysis</p> <p><u>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.</u></p>	<p>Not applicable.</p> <p>However, the rule does include a intermittent flow jurisdiction designation based on “geographic area.”</p>	SECTION DELETED: This provision was part of the 2015 WOTUS rule, it is not included in the 1985 regulations nor the proposed WOTUS rule.
Commerce Clause Language	Which are or could be used by interstate or foreign travelers for recreation or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce.	Section deleted.	Not applicable to proposed rule	SECTION DELETED.



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Summary of Proposed Rule Published by EPA and Corps

EXEMPTIONS				
Key Terms	1986 EPA/Corps Regulations	2015 WOTUS Rule	Proposed WOTUS Rule	Preliminary Analysis
	Waters of the United States do not include:	The following are not “waters of the United States” even where they otherwise meet the definition of “waters of the U.S.:	The following 11 exemptions are not “waters of the United States”:	N/A
Other Waters	The 1986 rule did not have an exemption on “other waters.”	The 2015 rule did not have an “other waters” exemption.	Excluded waters or water features that are not identified in traditional navigable waters, tributaries, ditches, lakes and ponds, impoundments or adjacent wetlands.	NEW. The proposed rule Includes an exemption on “other waters,” called “excluded waters.”
Groundwater Exemption	While the 1986 rule did not have a specific exemption on groundwater, it was generally understood that groundwater was a state responsibility.	Groundwater, including groundwater drained through subsurface drainage systems	Groundwater, including groundwater drained through subsurface drainage systems.	NO CHANGE — 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. However, the agencies added the subsurface drainage clarification to specify that even when groundwater is channelized in subsurface systems, like tile drains used in agriculture, it is still exempt from jurisdiction. However, the exemption would not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in intermittent or perennial streams.



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Ephemeral features	The 1986 rule did not have a specific exemption on ephemeral features.	The 2015 rule had an exemption on certain ephemeral features (erosion features such as gullies, rills and other ephemeral features that do not meet the definition of tributary, non-wetland swales and lawfully constructed grassed waters and puddles.	Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland.	<p>REVISED: This exclusion would include ephemeral flows, swales, and erosional features, including gullies and rills, as non-jurisdictional features, as long as they ephemeral in natural (only flow during rain events).</p> <p>If the flow lasts for longer than a rain event, the feature may be classified as a tributary, and thus jurisdictional under the rule. Regardless of the name of the feature, if it meets the definition of a tributary, it would not be an excluded ephemeral feature.</p>
Certain ditches	The 1986 did not have an exemption on ditches.	<p>The following ditches (<i>are exempt</i>): Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands and ditches that do not flow, either directly or through another water, into a navigable and interstate waters and territorial seas</p> <p>Jurisdictional ditches include: Roadside and other ditches that have flow year-round and irregular flow (intermittent) that are a relocated tributary, or are excavated in a tributary, or drain wetlands.</p>	Ditches that are not a TNW or constructed in, relocate or alter a tributary or not adjacent to a wetlands.	<p>REVISED: The agencies intend for most manmade ditches to be exempt if they only flow during rain events. However, ditches are jurisdictional if they are a TNW, subject to the ebb and flow of the tide, are constructed in or alter a natural stream or are built in adjacent wetlands.</p>



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Prior Converted Cropland Exemption	Prior converted cropland	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.	Prior converted cropland	NO CHANGE: The agencies include a new definition of “prior converted cropland” and an explanation of when a prior converted cropland designation would no longer be applicable when the cropland is abandoned, <i>and</i> the land has reverted to wetlands. Under this proposed rule, prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.
Artificially Irrigated Areas	The 1986 regulation did not include an exemption on artificially irrigated areas.	Artificially irrigated areas that would revert to dry land should application of water to that area cease; Note: The term “dry land” is undefined in the final regulation.	Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease.	CLARIFICATION: The agencies specifically clarify the types of activities that would be excluded under this exemption.
Artificial Lakes and Ponds	The 1986 definition did not include an exemption on artificial lakes and ponds.	Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds.	Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not jurisdictional lakes and ponds and impoundments.	CLARIFICATION: This exclusion would also apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters and features. Conveyances created in upland that are physically connected to and are part of the proposed excluded feature would also be excluded. While the agencies propose to exempt ponds, they note that ponds, in some cases, can be point sources for pollutants and subject to CWA Section 301 regulation.



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Artificial reflecting pools or swimming pools	The 1986 definition did not include an exemption on artificial reflecting pools or swimming pools.	Artificial reflecting pools or swimming pools created in dry land;	Proposed regulation does not address artificial pools.	EXEMPTION DELETED: Agencies feel that it is unnecessary and duplicative of other sections.
Water-filled depressions	The 1986 definition did not include an exemption on water-filled depressions.	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.	Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel.	NO CHANGE: This is consistent with the 2015 WOTUS rule.
Stormwater features	The 1986 definition did not include an exemption on stormwater features.	Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.	Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off.	REVISION: The exemption would clarify the agencies longstanding practice of not classifying stormwater features as WOTUS. However, the agencies note that some waters, such as channelized streams with intermittent or perennial flows within a stormwater management system, may be jurisdictional. A key element of the exclusion is whether the feature or control system was built in upland and whether it conveys, treats, or stores stormwater.
Wastewater Recycling	The 1986 definition did not include an exemption on wastewater recycling.	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.	Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins.	REVISION: clarifies that wastewater recycling structures—i.e. detention and retention basins as well as groundwater recharge basins and infiltration ponds built for wastewater recycling—are exempt. The proposed exclusion would also cover water distributary structures that are built in upland for water recycling.



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Summary of Proposed Rule Published by EPA and Corps

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Waste Treatment Exemption	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.	Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.	Waste treatment systems.	NO CHANGE: The agencies propose to keep the waste treatment exclusion. However, the proposed rule defines for the first time a “waste treatment system.”
Erosional Features	The 1986 definition did not include an exemption on erosional features.	Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterway	Not included in proposed rule	DELETED. The agencies believe this exemption is unnecessary since many of the afore-mentioned features may be excluded under the ephemeral ditch exemption.
Ornamental Waters	The 1986 definition did not include an exemption on ornamental waters.	Small ornamental waters created in dry land	Not included in proposed rule	DELETED.
Puddles	The 1986 definition did not include an exemption on puddles.	Puddles.	Not included in proposed rule	DELETED.



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GLOSSARY OF KEY TERMS IN WOTUS				
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Abut	No definition for “abut” in the 1986 regulations.	No definition for “abut” in the 2015 regulations.	“Abut” is proposed to mean when a wetland touches an otherwise jurisdictional water at either a point or side.	NEW.
Adjacent Wetlands	Under the 1986 regulation, adjacent means bordering, contiguous, or neighboring.	The term <i>adjacent</i> 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. 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.	The term adjacent wetlands means wetlands that abut or have a direct hydrologic surface connection to a TNW, jurisdictional-in-fact tributaries, ditches, lakes and ponds and impoundments in a typical year. Abut means to touch at least at one point or side of a TNW, jurisdictional-in-fact tributaries, ditches, lakes and ponds and impoundments via perennial or intermittent flow.	REVISED. The proposed rule more narrowly defines “adjacent wetlands” to wetlands that have a “direct hydrological surface connection” to a WOTUS. Since isolated wetlands do not have a direct surface connection to WOTUS, they would not be jurisdictional under the rule. Key criteria to determine if a feature near wetlands is jurisdictional: does the feature (aka ditch) touch the wetland at any point and do the wetlands have a direct hydrologic surface connection to a WOTUS either perennially or intermittently? If both answers are yes, then the feature may require CWA Section 404 permits for construction, modification, and in some cases, maintenance activities.



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	1986 EPA/Corps Regulations	2015 WOTUS Rule	Proposed WOTUS rule	Preliminary Analysis
“Certain Times of a Typical Year”	This term is not used in the 1986 regulations.	The term is not used in the 2015 regulations.	The phrase “certain times of a typical year” is intended to include extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year.	NEW: The agencies are not proposing a specific duration (<i>e.g.</i> , the number days, weeks, or months) of surface flow that constitutes intermittent flow as the agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions. The agencies indicate these decisions would be made at the regional level.
Direct Hydrologic Surface Connection			A “direct hydrologic surface connection” as proposed occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water.	
Ditches	While the 1986 regulation definition does not reference ditches, the preamble (explanation of the purpose of the rule) references an exclusion for certain types of ditches that are excavated wholly in and drain only in uplands and do not carry a relatively permanent flow of water.	In the 2015 regulation, the terms tributaries and ditches are often used interchangeably. Under the final 2015 rule, a ditch may be a “water of the United States” if it meets the definition of “tributary.”. The final rule codifies and clarifies longstanding practice and guidance (including 1986 and 1988 preamble language), which has been to exclude these waters from jurisdiction.	The term “ditch” means an artificial and manmade channel used to convey water.	REVISION: Proposed rule defines ditch for the first time as an artificial, manmade conveyance used to convey water. Ditches, such as the Erie Canal, are automatically jurisdictional because commerce occurred on the canal. Ditches that function as tributaries in adjacent wetlands would also be jurisdictional.



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Summary of Proposed Rule Published by EPA and Corps

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Ephemeral	Previously, discharges to ephemeral streams located in uplands only required a permit if case-by-case analysis determined the receiving channel as a WOTUS.	Not defined.	The term ephemeral means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).	REVISED: Ephemeral is defined to mean that a feature is only wet during rain events and is otherwise dry.
High Tide Line	The term high tide line means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide.	The 2015 rule uses the same high tide definition as the 1986 rule and clarifies that the high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.	The proposed rule uses the same high tide language as both the 1986 and 2015 rule.	NO CHANGE.



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Summary of Proposed Rule Published by EPA and Corps

	1986 EPA/Corps Regulations	2015 WOTUS Rule	Proposed WOTUS rule	Preliminary Analysis
Intermittent	Intermittent is generally understood to be seasonal (i.e. monsoon season)	No specific definition on intermittent.	The term intermittent means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).	<p>REVISION: Defined the term intermittent to mean surface water that flows continuously during certain times of the year. (I.e. when the groundwater table is elevated or there is seasonal snowmelt).</p> <p>Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained.</p>
Neighboring Definition	“Neighboring” is not defined in the 1986 regulation.	<i>Neighboring</i> means: All waters located within 100 feet of the OHWM of a WOTUS are jurisdiction. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark; all waters located within the 100-year floodplain and not more than 1,500 feet from the OHWM of such water. The entire water is neighboring if a portion is located within 1,500 feet of the OHWM and within the 100-year floodplain; and 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 OHWM of the Great Lakes.	The term “neighboring” is not used in the proposed rule.	DELETED: The term “neighboring” is not used in the proposed rule.



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Ordinary High-Water Mark (OHWM) 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.	The 2015 WOTUS regulations echo pre-existing definitions on OHWM.	The proposed rule does not change the existing definition of OHWM.	NO CHANGE. <u>Note: Under current regulation, the term ordinary high-water mark is ambiguous and applied inconsistently in the field</u> Many of the ordinary high-water mark physical indicators can occur whenever land may have water flowing across it, regardless of flow or duration.
Perennial	The term “perennial” is generally understood to mean year-round.	The 2015 regulation does not define perennial.	The term perennial means surface water flowing continuously year-round during a “typical” year.	REVISION: Defines perennial as a feature that flows year-round in a typical year.
Prior Converted Cropland	The term was defined at that time by the USDA National Food Security Act Manual. The Manual states that prior converted cropland (PC) is converted wetland where the conversion occurred before December 23, 1985; an agricultural commodity had been produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity).	2015 rule uses the same language as 1986 regulations.	The term prior converted cropland means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. An area is no longer considered prior converted cropland for purposes of the CWA when the area is abandoned and has reverted to wetlands. Abandonment occurs when prior converted cropland is not used least once in the immediately preceding five years.	REVISION: While the proposed rule does not change the current prior converted cropland exemption, it does include a revised definition for prior converted cropland.



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Summary of Proposed Rule Published by EPA and Corps

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Significant Nexus		All waters—prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands, where they are determined, on a case-specific basis, to have a significant nexus to a traditional navigable water, interstate waters (including interstate wetlands) and the territorial seas) are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest navigable traditional waters, interstate waters/wetlands and the territorial seas. Waters identified in this paragraph shall not be combined with all adjacent waters when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water, they are an adjacent water and no case-specific significant nexus analysis is required.	The term “significant nexus” is not included in the 2019 proposed WOTUS rule.	<p>DELETED: Not part of the 1986 regulations but included in the 2015 rule, the term “significant nexus” was developed as a result of the U.S. Supreme Court 4-4-1 split decision in <i>Rapanos vs. United States</i> where there was no clear majority on what types of features should be considered a WOTUS. In <i>Rapanos</i>, there were two points of view:</p> <ul style="list-style-type: none"> Justice Scalia argued that WOTUS should include only relatively permanent, standing or continuously flowing bodies of water. <i>The proposed rule is based on this opinion.</i> Justice Kennedy argued that CWA defines navigable waters as a water or wetland that possesses a “significant nexus” to waters that are navigable-in-fact. <i>This is the basis of the 2015 WOTUS rule.</i>
Similarly Situated Waters	Interpreted to mean all wetlands (not waters) adjacent to the same tributary.	Waters are “similarly situated” when they function alike and are sufficiently close to function together in affecting downstream primary waters.	The proposed rule does not speak to similarly situated waters.	<p>DELETED. The term “similarly situated waters” was based on Supreme Court Justice Kennedy’s opinion in <i>Rapanos v. United States</i>. Justice Scalia, who wrote the opposing opinion, disagreed with Justice Kennedy’s approach. The 2019 rule is based on Justice Scalia’s opinion.</p>



Definition of “Waters of the United States” (WOTUS) Under the Clean Water Act
Summary of Proposed Rule Published by EPA and Corps

	1986 EPA/Corps Regulations	2015 WOTUS Rule	Proposed WOTUS rule	Preliminary Analysis
Snowpack	Snowpack is not defined in the 1986 regulation.	Snowpack is not defined in the 2015 rule.	The term snowpack means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions). The agencies note that melting snowpack can be the sole or primary source of perennial or intermittent flow in tributaries and mountain streams.	NEW: The agencies define the term “snowpack” for the first time. This definition is relevant to the intermittent and tributary definitions to note whether a water feature is (or is not) jurisdictional.
Traditional Navigable Waters (TNW)	Under the 2017 <i>Rapanos</i> guidance, the Army Corps states that a water qualifies as a traditional navigable water if it meets any of the following tests: a) the waterbody is subject to the ebb and flow of the tide and/or b) the waterbody is presently used or had been used in the past, or may be susceptible for use to transport interstate or foreign commerce, and c) if federal courts have determined the waterbody is navigable-in-fact under federal law.	The 2015 rule did not redefine TNW.	The 2019 proposed rule adds “territorial seas” to the TNW definition.	REVISED.
Territorial Seas	Generally, means the belt of the seas measured for the line of ordinary low water along that portion of the county 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.”	The 2015 rule uses the same definition as the 1986 regulations.	The 2019 proposed rule uses the same definition as the 1986 and 2015 rules.	NO CHANGE.



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	1986 EPA/Corps Regulations	2015 WOTUS Rule	Proposed WOTUS rule	Preliminary Analysis
Tidal Waters	While “tidal waters” was not defined previously in the 1986 rule, there was a general field understanding of its meaning.	Tidal waters are not defined in the 2015 WOTUS rule.	Tidal waters and waters subject to the ebb and flow of the tide. The terms tidal waters and waters subject to the ebb and flow of the tide mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.	NEW.
Tributary Definition	Tributaries are considered a “water of the U.S.” under pre-existing regulation.	<p>The terms <i>tributary</i> and <i>tributaries</i> 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</p> <p>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</p>	<p>Under the proposed rule, a “tributary” is defined as a “river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a WOTUS in a typical year either directly or indirectly.</p> <p>A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water.</p>	<p>REVISED: The new language differs from the 2015 rule because it narrows the definition of tributary to only include rivers, streams and other natural features that flow either intermittently or year-round.</p> <p>Hypothetically, this would exempt most artificial, manmade ditches, unless these ditches are constructed in or reroute an existing tributary.</p> <p>The term tributaries include rivers, streams, creeks, bayous, branches, brooks, runs, etc. regardless of size.</p>



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Tributary Definition (cont'd)		<p>A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, <u>and ditches</u> not excluded.</p> <p>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, 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.</p>	<p>downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.</p> <p>The agencies state that the proposed rule DOES NOT consider ephemeral flows, dry washes, arroyos and similar features jurisdictional because they lack the required perennial or intermittent flow regimes to satisfy the tributary definition.</p>	
Typical Year	Not applicable to 1986 rule.	Not applicable to 1986 rule.	Typical year. The term typical year means within the normal range of precipitation over a rolling thirty-year period for a yet-to-be defined regional geographic area.	NEW.
Uplands	Not defined in 1986 rule but has a common understanding in the field.	Not defined in final rule.	The term upland means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) and does not lie below the OHWM or the high tide line of a WOTUS.	<p>REVISED: Defines the term “uplands.”</p> <p>Note: the 2015 rule used the term “dry land” rather than uplands.</p>



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Waste Treatment System	Waste treatment systems have been excluded from WOTUS since 1979 but have never been clearly defined.	2015 rule exempted waste treatment systems but did not define what they were.	The term waste treatment system includes 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, from wastewater prior to discharge (or eliminating any such discharge).	NEW: Proposed rule defines waste treatment systems for the first time. Applies only to waste treatment systems constructed in accordance with the requirements of CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments.
Wetlands	Wetlands are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	The term <i>wetlands</i> means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	The term wetlands means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.	NO CHANGE.