



EPA's Proposed Rule On Waters Of The United States (WOTUS)

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Existing WOTUS rule:

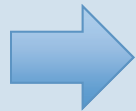


← (1) Waters used or susceptible for use in interstate commerce, including tidal waters (navigable)

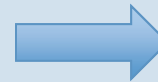
(2) Interstate waters or wetlands →



(3) Territorial seas →



+All impoundments of any of these waters →

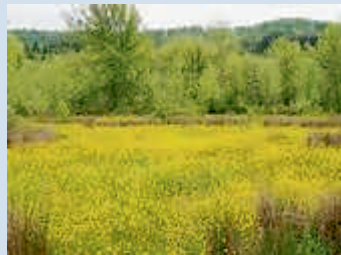
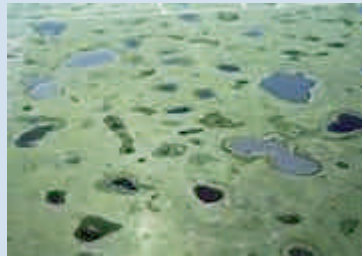


+ Wetlands adjacent to any of these waters



Existing rule “Catch-All”

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, prairie potholes, wet meadows, playa lakes, or natural ponds, ***use, degradation or destruction of which could affect interstate or foreign commerce...***



Proposed WOTUS Rule

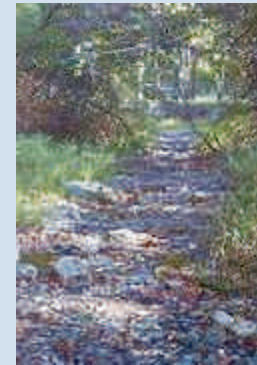
(a) Automatically regulated as *per se* jurisdictional:

- (1) Waters used or susceptible for use in interstate commerce or foreign commerce, including tidal waters (“traditional navigable waters”)
- (2) Interstate waters and wetlands
- (3) Territorial seas
- (4) All impoundments of any (1)-(3) or (5) water
- (5) All tributaries of any (1)-(4) waters
- (6) All wetlands and waters **adjacent** to any (1)-(5) waters
- (7) (and the catch-all...more on this later)

Tributaries as WOTUS

- **New definition of “tributary”:**
 - Any waterbody physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow, *either directly or through other waterbodies, to a (a)(1)-(4) water.*
 - *Even if there are breaks of any length, if bed, bank and OHWM can be found upstream of the break*
 - *Any amount of flow for any duration*
 - *Can be natural, man-altered, or man-made*
 - *Can include wetlands, lakes or ponds EVEN IF THEY LACK A BED AND BANK OR OHWM, provided they contribute flow to a (a)(1)-(3) water*
 - *Includes ALL ditches except those expressly excluded*
 - *Includes tribs TO or FROM a covered impoundment*

Tributaries as WOTUS



Adjacent **Waters** or Wetlands as WOTUS

- Definition of “adjacent”: bordering, contiguous or neighboring
 - **Includes new definition of “neighboring”**
 - “Neighboring”
 - Includes all w/w in **riparian areas** and **floodplains** of any (a)(1)-(5) water (including tributaries and impoundments)
 - **Includes w/w with shallow subsurface hydrologic connection or confined surface hydrologic connection**
 - Adds new definitions of **riparian areas** and **floodplains**

Adjacent Waters: Riparian Areas

- An area bordering a water where surface **or subsurface hydrology** directly influence the ecological processes and plant and animal community structure in that area....



Adjacent Waters: Floodplain

- An area **bordering** inland or coastal waters that was formed by sediment deposition from such water **under present climatic conditions** and is inundated during periods of **moderate to high water flows**.



Proposed WOTUS Rule: the new catch-all

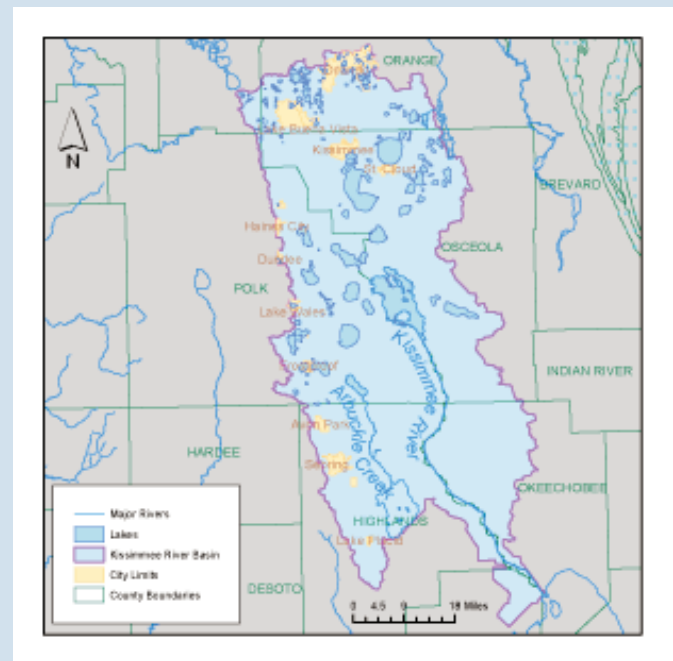
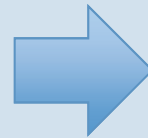
(7) On a case-specific basis, other waters that alone or in combination with other similarly situated waters in the same region have a “significant nexus” to any of those (1)-(3) waters:

- Waters used or susceptible for use in interstate commerce, including tidal waters (navigable)
- Interstate waters and wetlands
- Territorial seas

Definition of Significant Nexus (Case by Case Catch-All)

Wetlands or waters with:

- More than speculative or insubstantial effect on navigable/tidal, interstate, or territorial seas waters
- Alone or in combination with other “similarly situated” waters in the region
- Region = same watershed
- Similarly situated:
 - Similar functions +
 - Sufficiently close to each other or close to any WOTUS =
 - *Single landscape unit re effect*



Proposed WOTUS Rule: Exclusions

(b) The following are not WOTUS:

(1) Waste treatment systems designed to meet CWA requirements (existing exclusion, funky footnote deleted)

(2) Prior converted croplands; EPA has final authority on what that means (existing exclusion)

(3) Ditches excavated wholly in uplands, drain only uplands, and have less than perennial flow (**newly codified**)

(4) Ditches that do not contribute flow, directly or indirectly, to an (a)(1)-(4) water (**newly codified**)

(5) Various minor features typically excluded from jurisdiction (**newly codified**)

(b)(5) Exclusions Newly Codified

- Specified artificial waters in uplands



- Gullies, rills, upland swales



(b) (5) Exclusions Newly Codified

- Groundwater, including groundwater drained through subsurface drainage systems



(b)(3) & (b)(4) Exclusions Newly Codified: Ditches

(3) Ditches *wholly* in uplands, draining *uplands only, with less than perennial flow*



OR

(4) Ditches that do not contribute ANY flow to a TNW/tidal, interstate, or territorial seas, or impoundment of any covered water, *directly or indirectly*



Potential Impacts of Rule

- Increased ditches/man-made waters deemed jurisdictional as “tributaries”
- Uncertainty/Decrease in excluded ditches?
- Increased adjacent waters deemed jurisdictional: How is “adjacent” determined?
- Increased permitting, mitigation costs
- Riskier investments in development, infrastructure
- On-site voluntary EPA stream assessments
- Off-site effects of “significant nexus”

You decide: Jurisdictional??

