

Summary and Key Points from the Proposed Rule “Revised Definition of Waters of the United States”

2/14/2019

This memorandum provides a brief overview of key parts of the proposed rule “[Revised Definition of Waters of the United States](#)” (“proposed rule”), published by US EPA and the US Army Corps of Engineers on February 14, 2019.

For ease of reference, the 2015 final rule “[Definition of “Waters of the United States”](#)” will be referred to as the “2015 rule.”

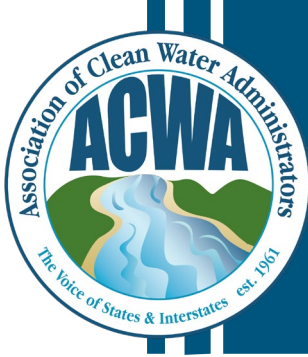
Overview of the “Revised Definition of Waters of the United States”

Section II: Background

In the “Supplementary Information” part of the proposed rule, the agencies provide background, context, and justification for their rulemaking and executive orders. This begins in “Section II: Background”.

Section II(A) provides an executive summary. Section II(B) includes information about the historical context of the definition of Waters of the United States. Section II(C) briefly discusses the Trump administration’s Executive Order 13778 directing the agencies to consider redefining Waters of the United States and discusses the “applicability rule” which aimed to provide regulatory certainty by delaying implementation of the 2015 rule. Section II(D) provides information on EPA’s stakeholder outreach. II(E) details the legal underpinnings used by the agencies to justify the proposed rule’s changes and decisions.

Section II(B), “The CWA and Regulatory Definition of “Waters of the United States””, is noteworthy because it provides an overview of the Clean Water Act (“CWA”), beginning with an overview of the first implementing regulations for the Act in 1973 and continuing forward through court cases and regulatory amendments which altered the definition and interpretation of “Waters of the United States.” The section concludes with information about how the 2015 rule expanded the jurisdiction of the CWA, and information summarizing the lawsuits which followed publication of the 2015 rule.



Section II(C), “Overview of Legal Construct for the Proposed Rule”, is also noteworthy and provides insight into arguments that will likely be deployed in court to defend the proposed rule should the rule eventually become finalized. The section examines cases during which the Supreme Court has discussed terms such as adjacent wetlands, navigable waters, tributaries, significant nexus, seasonal and intermittent streams, and more. The section spends a great deal of time reviewing and analyzing Justice Scalia’s opinion in the landmark 2006 case *Rapanos v. United States*.

At the end of the section the agencies pull together a few guiding principles for this proposed rule:

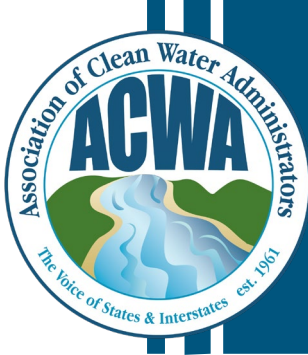
- Any regulation of waters beyond traditionally navigable waters should be grounded in the language and structure of the Act,
- Wetlands adjacent to traditionally navigable waters and tributaries to those waters can be regulated if they are not “nonnavigable, isolated, intrastate waters”,
- Certain categorical waters can also be regulated to improve regulatory predictability, and that preservation of state authority over land-use and water-use decisions is an important goal of the CWA
- Any definitions created by the proposed rule are not judgments on which water is worth protecting, but only judgments on which water is subjected to federal requirements as opposed to state and tribal ones.

Section III(A-H): Proposed Definition of Waters of the United States

Section III(A-H) of the proposed rule includes discussions of the relevant definitions narrowing federal jurisdiction under the CWA. Below are notable terms and descriptions taken mostly from section III(A-H), but also from the actual proposed rule text. For each term or description, the subpart of section III where it is discussed is listed, and all definitions can be found in the rule text on pages 185-190.

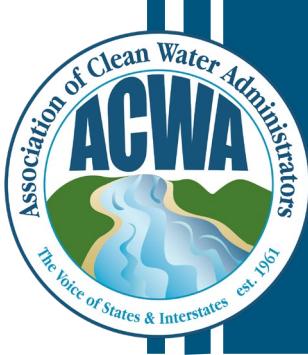
Any bold, underlined, or italicized text is stylized for emphasis, not stylized in the actual proposed rule.

- **Traditionally Navigable Waters** (“TNWs”) remain explicitly covered by the Act. Territorial Seas are now explicitly included as a point of clarification. TNWs are discussed in section III(A).
- **Interstate waters and interstate wetlands as categories are removed.** Interstate waters and interstate wetlands can still be jurisdictional under the proposed rule if they fall under other definitions. Interstate waters are discussed in section III(B).
- **Impoundments** remain jurisdictional, except “where discharge of dredged or fill material into a Water of the United States transforms a water body into upland through a section 404 permitting action, the water would no longer be jurisdictional, consistent with longstanding

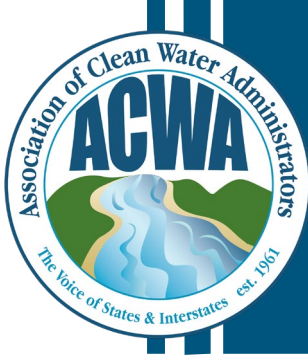


agency practice.” Impoundments are discussed in section III(C).

- **Perennial:** Surface water flowing continuously year-round during a typical year. Perennial is defined in the proposed rule text (§328.3(c)(7)), and the term is discussed in the tributaries section of the supplementary information, III(D).
- **Intermittent:** Surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts. Intermittent is defined in the proposed rule text (§328.3(c)(7)), and the term is discussed in the tributaries section of the supplementary information, III(D).
- **Typical Year:** Within the normal range of precipitation over a rolling thirty-year period for a particular geographic area, not including times of drought or extreme flooding. A “typical year” is defined in the proposed rule text (§328.3(c)(12)), and the term is discussed in the tributaries section of the supplementary information, III(D).
 - For “certain times of a typical year”, section III(D) states that it “is intended to include extended periods of predictable, continuous, season surface flow occurring in the same geographic feature year after year”. The agencies do not propose a specific duration for surface flow to constitute intermittent due to variability of geography and hydrology around the country.
- **Ephemeral:** Surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall, distinguished from flow resulting from melting snowpack. Ephemeral is defined in the proposed rule text (§328.3(c)(3)), and the term is discussed in the tributaries section of the supplementary information, III(D).
- **Snowpack:** Layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes. Snowpack is defined in the proposed rule text (§328.3(c)(9)), and the term is discussed in the tributaries section of the supplementary information, III(D).
- **Upland:** any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e. hydrology, hydrophytic vegetation, hydric soils) identified in the rule’s wetland definition and does not below the ordinary high-water mark/ high tide line of a WOTUS. Upland is defined in the proposed rule text (§328.3(c)(13)).



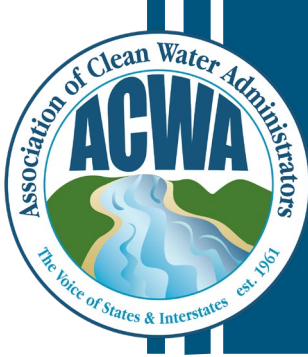
- **Tributaries** are defined as a river, stream, or similar naturally occurring surface water channel that **contributes perennial or intermittent flow** to a traditional navigable water or territorial sea in a **typical year** either directly or indirectly through jurisdictional waters, such as other tributaries, impoundments, and adjacent wetlands or through water features identified in exclusions so long as those water features convey perennial or intermittent flow downstream. Tributaries are discussed in section III(D) and defined in the proposed rule text (§328.3(c)(11)).
 - **Ephemeral waters are notably excluded under this definition.** The proposed rule specifically states that “tributaries as defined in today’s proposal do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features.” Ephemeral is defined as “surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)” in §328.3(c)(3) of the proposed rule text.
 - The agencies emphasize that under the new definitions, a tributary can have certain natural or manmade breaks and remain a tributary, so long as the break conveys perennial or intermittent flow to a tributary or other jurisdictional water downstream of the break.
- **Ditches** are a new category added to the definition of “waters of the United States” and are defined as artificial channels used to convey water. Ditches are discussed in section III(E), and the definition is located in §328.3(c)(2), although their jurisdictionality is defined in in §328.3(a)(3) and in §328.3(b)(4).
 - The agencies propose to “delineate the categories of ditches that would be waters of the United States” and “are proposing to exclude all other ditches from that definition.” Included ditches would be those constructed in a tributary and those constructed in an adjacent wetland that also fulfill the definition of tributary. Most ditches would be excluded, including ditches connected to ephemeral waterways and uplands.
- **Lakes and Ponds** are a proposed separate category, with specific types of lakes and ponds listed as being covered. The agencies would include lakes and ponds that are traditionally navigable waters, lakes and ponds that contribute intermittent or perennial flow to downstream TNWs in a typical year, and lakes and ponds typically flooded by other waters of the United States in a typical year. Lakes and Ponds are discussed in section III(F) and, and jurisdictional lakes and ponds are defined in the proposed rule text (§328.3(a)(4)).



- **Wetlands:** Defined as 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. Wetlands are discussed in section III(G) and defined in the proposed rule text (§328.3(c)(15)).
- **Adjacent Wetlands:** The agencies propose to define adjacent wetland to mean wetlands that abut or have a direct hydrological surface connection (intermittent or perennial flow included) to other “waters of the United States” in a typical year. Wetlands, including adjacent wetlands, are discussed in section III(G) and defined in the proposed rule text (§328.3(c)(1)).

A wetland physically separated from jurisdictional water by structures like dikes or barriers also lacking a direct hydrological surface connection would not be adjacent. Wetlands lacking any surface connection would not be jurisdictional, as they would be non-adjacent.

- The agencies would include as jurisdictional all adjacent wetlands to 1) traditionally navigable waters, 2) jurisdictional ditches, 3) jurisdictional lakes and ponds, 4) impounds of otherwise jurisdictional waters. The agencies also would keep their longstanding regulatory definition for wetlands.
- **The Connectivity Report:** In the section defining tributaries, the proposed rule also discusses [EPA Science Advisory Board \(SAB\) review of the draft connectivity report](#). The proposed rule emphasizes that in the SAB review of the draft report, the SAB explained that the report provides information on connectivity and isolation of streams and wetlands to larger water bodies, but “does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream rivers”. The proposed rule also states that the agencies are using the report to inform the revised definitions, recognizing that “science cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA”. The connectivity report is discussed in section III(G).
- **Exclusions:** the proposed rule contains eleven exclusions, listed in the proposed rule text (§328.3(b)(1-11)) and discussed in section III(H).
 - Any water not enumerated as jurisdictional
 - Groundwater



- Ephemeral surface features and diffuse stormwater runoff
- All ditches except those identified as explicitly jurisdictional (see above)
- Prior converted cropland
- Artificially irrigates areas that would revert to upland should application of irrigation water to that area cease
- Artificial lakes and ponds constructed in upland (such as water storage reservoirs, farm and stock watering ponds, settling basins)
- 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
- Stormwater control features in upland
- Wastewater recycling structures in upland
- Waste treatment systems

Section III(i): Summary of Proposed Rule as Compared to the 1986 and 2015 Regulations

In this section, the agencies echo statements from earlier in the proposed rule as to why the rule as whole, and individual definitions, are superior to prior jurisdictional rules, and more likely to adhere to the statutory text, legislative history, and legal precedent. It also discusses why the agencies view new revised definitions as more easily implemented and practical.