

MJB&A Summary ■ December 14, 2018

## Summary of Proposed Revised Definition of “Waters of the U.S.”

On December 11, 2018, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the “Agencies”) proposed a *Revised Definition of “Waters of the United States”* (Proposed Rule), which proposes revisions to the scope of federal authority under the Clean Water Act (CWA). Specifically, it proposes to define Waters of the U.S. (WOTUS) as traditional navigable waters, including the territorial seas; tributaries of navigable waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetland adjacent to other jurisdictional waters. The Agencies explain that their intent is to provide regulatory clarity and predictability, to “strike a balance between Federal and State waters,” and to protect water resources “in a manner that preserves the traditional sovereignty of States over their own land and water resources.”

Overall, the proposed approach would narrow the scope of waters that could be subject to regulation under the Clean Water Act through the specific definitions summarized below. For example, the Proposed Rule defines terms such as “tributaries” and “adjacent wetlands” based on consideration of perennial and intermittent flows, hydrological surface connections, and conditions occurring within a “typical year.” Thus, ephemeral streams, ditches, non-adjacent wetlands, and certain ponds and lakes that lack such connections to navigable water are not proposed to be jurisdictional. The Proposed Rule also continues to include certain exemptions but proposes additional definitions of key terms associated with several exemptions, including the wastewater treatment exemption. Unlike the Clean Water Rule finalized in 2015, the Proposed Rule does not rely on a significant nexus test as it would eliminate the case-by-case application of that approach. Comments on the proposal will be accepted for 60 days following publication of the Proposed Rule in the Federal Register.

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### Background

On June 29, 2015, EPA and the Corps under the Obama Administration finalized the Clean Water Rule redefining the scope of waters protected under the CWA (2015 Rule).<sup>1</sup> The 2015 Rule retained traditional navigable waters, interstate waters, and the territorial seas as jurisdictional by rule, as well as impoundments of such jurisdictional waters. Tributaries and adjacent waters were also jurisdictional by rule, and waters with a significant nexus were to be determined on a case-specific basis. The Agencies also identified five specific types of waters in specific regions that should be subject to a significant nexus analysis and be considered similarly situated by rule.<sup>2</sup> The final rule also noted that: (1) waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and (2) waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments or covered tributary are subject to case-specific significant nexus determinations, unless such water were excluded in the rule.

<sup>1</sup> EPA and Corps, “Clean Water Rule: Definition of “Waters of the United States”, June 29, 2015, 80 FR 37053,

<https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>

<sup>2</sup> The five specific types included: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.

The 2015 Rule also included certain exclusions for: waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA; prior converted cropland; certain ditches; artificial, constructed ponds and lakes; artificially irrigated areas that would revert to dry land if the application of water to the area were to cease; certain wastewater recycling structures; certain stormwater control features; water-filled depressions created in dry land incidental to mining or construction activity; certain erosional features; groundwater; and puddles.

Following publication of the 2015 Rule, several states and environmental and industry groups filed both substantive and procedural challenges to the rule in multiple district and appellate courts. Currently, the 2015 Rule is subject to preliminary injunctions issued by three District Courts in 28 states.<sup>3</sup> In these states, the previously codified regulations, issued in 1986, are in effect. The 2015 Rule is currently in effect in the remaining 22 states and the District of Columbia.

On February 28, 2017, President Trump issued an Executive Order 13778 directing EPA and the Corps to review the 2015 Rule and rescind or revise the rule, as appropriate.<sup>4</sup> Subsequently, the Agencies announced that they would implement the Executive Order in a two-step process. On July 27, 2018, in “Step One,” the Agencies proposed to repeal the 2015 Rule and recodify the regulatory text that existed prior to the 2015 Rule. On July 12, 2018, the Agencies issued a supplemental notice of proposed rulemaking to seek additional comment on the Step One proposal,<sup>5</sup> but this action has not yet been finalized.

### Proposed Revised Definition

The Agencies propose to define WOTUS as: traditional navigable waters (including territorial seas), tributaries that contribute perennial or intermittent flow to such waters, certain ditches, certain lakes and ponds, impoundments of otherwise jurisdictional waters, and wetlands adjacent to other jurisdictional waters. The Proposed Rule eliminates the significant nexus test and includes the following exemptions:

- Groundwater, including groundwater drained through subsurface drainage systems
- Certain ditches
- Prior converted cropland
- Artificially irrigated areas that would revert to upland if artificial irrigation ceases
- Certain artificial lakes and ponds constructed in upland
- Water-filled depressions created in upland incidental to mining or construction activity
- Stormwater control features in upland to convey, treat, infiltrate, or store stormwater runoff
- Wastewater recycling structures constructed in upland
- Waste treatment systems

Table 1 summarizes the proposed definitions for jurisdictional waters as well as key exclusions compared to the 2015 Rule.

<sup>3</sup> Preliminary injunctions were issued by the U.S. District Court for the District of North Dakota, the U.S. District Court for the Southern District of Georgia, and the U.S. District Court for the Southern District of Texas. As a result, the 2015 Rule is subject to a preliminary injunction in: AL, AK, AZ, AR, CO, FL, GA, ID, IN, IA, KS, KY, LA, MS, MO, MT, NE, NV, NC, ND, SC, SD, TX, UT, WV, WI, WY, and NM.

<sup>4</sup> Executive Order 13778, Vol. 82, No. 41 (March 3, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-03-03/pdf/2017-04353.pdf>.

<sup>5</sup> On February 6, 2018, the Agencies proposed to establish an applicability date for the 2015 Rule of February 6, 2020. However, on August 16, 2018, the U.S. District Court for the District of South Carolina enjoined the applicability date nationwide. On November 26, 2018, the U.S. District Court for the Western District of Washington issued a similar order.

**Table 1: Proposed Jurisdictional Waters Under Definition of WOTUS**

Term	Proposed Definition	Notes	Comparison to 2015 Rule
<i>Traditional Navigable Waters</i>	“waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide” <sup>6</sup>	The following continue to be jurisdictional if they are navigable: <ul style="list-style-type: none"> <li>• Large rivers and lakes</li> <li>• Territorial seas</li> <li>• Tidal waters</li> <li>• Interstate waters, including interstate wetlands</li> </ul>	Both the 2015 Rule and Proposed Rule treat navigable waters as jurisdictional
<i>Territorial Seas and Interstate Waters</i>	Included if territorial seas or interstate waters are “traditionally navigable waters” but excludes territorial seas and interstate waters that are not traditionally navigable		The Proposed Rule excludes interstate waters and territorial seas unless they are navigable while 2015 Rule maintains the historic treatment
<i>Adjacent Wetlands</i>	“wetlands that abut <sup>7</sup> or have a direct hydrological surface connection <sup>8</sup> to a water [under federal jurisdiction] in a typical year”	Includes wetlands as jurisdictional if they: <ul style="list-style-type: none"> <li>• Physically touch other jurisdictional waters</li> <li>• Have a surface water connection in a typical year that results from:               <ul style="list-style-type: none"> <li>○ inundation from a water under federal jurisdiction to the wetland</li> <li>○ perennial or intermittent flow between the wetland and a water under federal control</li> </ul> </li> </ul> Excludes wetlands that are physically separated from other waters under federal jurisdiction by upland or by dikes, barriers, or similar structures and also lack a direct hydrologic surface connection	The Proposed Rule considers the hydrological surface connection to jurisdictional waters while the 2015 Rule treats all waters adjacent to another water under federal jurisdiction (including adjacent wetlands) as jurisdictional

<sup>6</sup> The Proposed Rule defines “waters subject to the ebb and flow of tides” and “tidal waters” to 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.”

<sup>7</sup> The Proposed Rule defines “abut” to mean “when a wetland touches an otherwise jurisdictional water at either a point or side.”

<sup>8</sup> The Proposed Rule states that a direct hydrologic surface connection 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.”

Term	Proposed Definition	Notes	Comparison to 2015 Rule
<i>Tributaries</i>	<p>“a river, stream, or similar naturally occurring surface water channel that contributes perennial<sup>9</sup> or intermittent<sup>10</sup> flow [to a “traditional navigable water”] in a typical year<sup>11</sup> either directly or indirectly [through another federally jurisdictional water or through water features excluded from jurisdiction] so long as those water features convey perennial or intermittent flow downstream”</p>	<p>Includes waterways that:</p> <ul style="list-style-type: none"> <li>• Function as traditional navigable waters</li> <li>• Contribute perennial (continuous) or intermittent flow to a traditional navigable water</li> <li>• Flow through an artificial or natural break so long as the break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break</li> </ul> <p>Excludes surface features that flow only in direct response to precipitation, such as ephemeral<sup>12</sup> flows, dry washes, arroyos, or other similar features</p>	<p>The Proposed Rule focuses on tributaries that contribute perennial or intermittent flow to traditional navigable waters while the 2015 Rule used the physical presence of a bed, bank, and an ordinary high water-mark, which would capture perennial and most intermittent waterways. The 2015 Rule’s definition of tributary also expressly includes “natural, man-altered, or man-made water” and “rivers, streams, canals and ditches” not explicitly excluded in definition of WOTUS.</p>
<i>Certain Lakes and Ponds</i>	<p>“Lakes and ponds that satisfy any of the conditions [of a traditional navigable water], lakes and ponds that contribute perennial or intermittent flow to a [traditional navigable water] in a typical year either directly or indirectly through [another water or water feature] so long as those water creatures convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water [under federal jurisdiction] in a typical year”</p>	<p>The Proposed Rule includes as jurisdictional certain lakes and ponds that:</p> <ul style="list-style-type: none"> <li>• Function as traditional navigable waters</li> <li>• Contribute perennial or intermittent flow to a traditional navigable water either directly or indirectly in a typical year</li> <li>• Are flooded by a water under federal jurisdiction as defined in this rule in a typical year</li> </ul>	<p>The Proposed Rule treats lakes and ponds jurisdictional based on relationship to navigable water while the 2015 Rule defines lakes and ponds as jurisdictional if adjacent<sup>13</sup> to another water under federal jurisdiction</p>

<sup>9</sup> The Proposed Rule defines “perennial” to mean surface water flowing continuously year-round during a typical year.

<sup>10</sup> The Proposed Rule defines “intermittent” as “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).”

<sup>11</sup> The Proposed Rule defines a “typical year” to mean “within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

<sup>12</sup> The Proposed Rule defines “ephemeral” as “surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall).”

<sup>13</sup> The 2015 Rule defined “adjacent” as “bordering, contiguous, or neighboring a water under federal jurisdiction, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.

Term	Proposed Definition	Notes	Comparison to 2015 Rule
<i>Ditches</i>	“an artificial channel used to convey water”	<p>The Proposed Rule includes as jurisdictional ditches that:</p> <ul style="list-style-type: none"> <li>• Function as traditional navigable waters</li> <li>• Are constructed in a tributary or that relocate or alter a tributary if they also satisfy the “tributary” definition</li> <li>• Are constructed in an adjacent wetland and satisfy the “tributary” definition</li> </ul> <p>Ditches not meeting any of the above descriptions would be exempted from jurisdiction. However, exempted ditches could still be regulated by states and tribes and would still be subject to CWA permitting if they meet the definition of “point source” in CWA section 502(14)</p>	<p>Both the 2015 Rule and Proposed Rule include certain ditches as jurisdictional and exempt others</p> <p>The 2015 Rule’s definition of tributary expressly included as jurisdictional any ditches that are relocated tributaries, are excavated in a tributary, or do not drain wetlands and also have perennial flow, as well as any ditches that flow into another jurisdictional water</p>
<i>Impoundments of Otherwise Jurisdictional Waters</i>	“Impoundments of waters [under federal jurisdiction]”	Impoundments of jurisdictional waters remain jurisdictional and consistent with the 2015 Rule	
<i>Waste Treatment System Exemption</i>	“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)”	Waste treatment systems are exempted, but the Proposed Rule includes new definitions to clarify the exemption	Both the 2015 Rule and the Proposed Rule exempt waste treatment systems from jurisdiction
<i>Stormwater Control Features Exemption</i>	“stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off”	Stormwater control features remain exempted	Both the Proposed Rule and the 2015 Rule exempt stormwater control features but with different language. The 2015 Rule based the exemption on those constructed in dry land and the Proposed Rule exempt features constructed in upland

Term	Proposed Approach	Comparison to 2015 Rule
<p><i>Additional Exemptions</i></p>	<p>The Proposed Rule also exempts from jurisdiction:</p> <ul style="list-style-type: none"> <li>• Groundwater, including groundwater drained through subsurface drainage systems</li> <li>• Prior converted crop land<sup>14</sup></li> <li>• Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland if artificial irrigation ceases</li> <li>• Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) that do not qualify as jurisdictional lakes, ponds, or impoundments</li> <li>• 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.</li> <li>• Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins</li> <li>• Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland</li> </ul>	<p>For comparison, the 2015 Rule excludes:</p> <ul style="list-style-type: none"> <li>• Groundwater, including groundwater drained through subsurface drainage systems</li> <li>• Prior converted crop land<sup>15</sup></li> <li>• Artificially irrigated areas that would revert to dry land should application of water to that area cease</li> <li>• 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, logs cleaning ponds, or cooling ponds, as well as artificial reflecting pools or swimming pools created in dry land</li> <li>• Water-filled depressions created in upland incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water</li> <li>• Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds build for wastewater recycling; and water distributary structures built for wastewater recycling</li> <li>• Puddles and erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, lawfully constructed grassed waterways, and small, ornamental waters created in dry land</li> </ul>
<p><i>Significant Nexus Analysis</i></p>	<p>The Proposed Rule eliminates the case-by-case application of the significant nexus test in favor of categories of jurisdictional waters</p>	<p>The Proposed Rule eliminates the significant nexus analysis from the 2015 Rule. The 2015 Rule applies a case-by-case application of the significant nexus test for Prairie potholes, Carolina and Delmarva bays, Pocosins, Western vernal pools in California, and Texas coastal prairie wetlands</p> <p>The 2015 Rule also used the significant nexus test for:</p> <ul style="list-style-type: none"> <li>• Waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and</li> <li>• Waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments or covered tributary.</li> </ul>

<sup>14</sup> The Proposed Rule defines “prior converted crop land” as “any area, that, prior to December 23, 2018, was drained or otherwise manipulated for the purpose, or having the effect, of having the effect of making production of an agricultural product possible

<sup>15</sup> The 2015 Rule does not define “prior converted crop land.”

## Additional Details on Key Provisions and Requests for Comment

### *Waste Treatment Systems*

The Proposed Rule proposes to retain the 2015 Rule’s exclusion of waste treatment systems from jurisdictional waters, which the preamble explains has existed since 1979. However, the Agencies note that the proposal includes a definition of “waste treatment system” for the first time in order to “improve regulatory predictability and clarity.” The proposed definition “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).” A waste treatment system would still require a CWA section 402 permit if it discharges into waters of the U.S. Additionally, if a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, it would not qualify for the exclusion.

With respect to cooling ponds, the preamble explains that those created under section 404 in jurisdictional waters and that have section 402 permits “are and would continue to be subject to the waste treatment system exclusion.” Additionally, ponds created to serve as part of a cooling water system with a “valid state permit constructed in waters of the United States prior to enactment of the 1972 amendments of the CWA and currently excluded from jurisdiction would also remain excluded.”

The Proposed Rule requests comment on the proposed exclusion of waste treatment systems and the definition and asks whether the rule text should specify that the exclusion only applies to “lawfully constructed waste treatment systems” to improve clarity and to make the Agencies’ intent clear.

### *Wetlands*

The Proposed Rule includes adjacent wetlands as jurisdictional. The preamble notes that the Agencies propose to retain the definition of wetland to mean “those 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.” The presence or boundaries of wetlands would be determined based upon an area satisfying all three of the definition’s criteria (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances. In defining adjacent wetlands, the Proposed Rule considers the hydrological surface connection to jurisdictional waters. The Proposed rule defines “adjacent wetlands” as “wetlands that abut<sup>16</sup> or have a direct hydrological surface connection<sup>17</sup> to a water [under federal jurisdiction] in a typical year.<sup>18</sup>” The Proposed Rule also states that features that were once wetlands but have been “naturally transformed or lawfully converted to upland”<sup>19</sup> would be considered upland, and therefore, not jurisdictional.

The Proposed Rule requests comment on the treatment of wetlands and the Agencies’ interpretation of applicable Supreme Court case law. Additionally, the Agencies request comment on the following:

<sup>16</sup> The Proposed Rule defines “abut” to mean “when a wetland touches an otherwise jurisdictional water at either a point or side.”

<sup>17</sup> The Proposed Rule states that a direct hydrologic surface connection 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.”

<sup>18</sup> A typical year in the proposed rule means “within the normal range of precipitation over a rolling 30-year period for a particular geographic area.”

<sup>19</sup> In the Proposed Rule, “upland” refers to any land area above the ordinary highwater mark or high tide line that does not satisfy all three wetland delineation features under normal conditions.

- Whether the Agencies should include regulatory text to make clear that wetlands must satisfy all three delineation criteria (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances;
- Whether there are terms or phrases within the existing wetlands definition that require clarification (e.g., “under normal circumstances”), and if so, the appropriate definitions and form to provide such clarifications (e.g., regulatory text or future agency guidance);
- Whether there are other potential interpretations of adjacency (e.g., a distance limit to establish the boundaries between federal and state water or establishing a jurisdictional cut-off in a contiguous wetland for administrative purposes rather than extending jurisdiction to the outer limits of the wetland where all three wetland characteristics are no longer satisfied);
- Whether the definition of “adjacent wetlands” should not include reference to dikes, barriers, and other similar structures and instead those terms should be included in the definition of “upland”;
- An alternate approach, whereby wetlands that are separated from another jurisdictional water by upland or a dike, barrier, or other similar structure would not be jurisdictional even if they have a direct hydrologic surface connection in a typical year to an otherwise jurisdictional water. Under this alternative, wetlands would be jurisdictional if the direct hydrologic surface connection is through an upland structure (e.g., a culvert);
- Which indicators can be used to determine whether a wetland abuts a jurisdictional water, and whether surface hydrology indicators or remote tools exist that may be helpful;
- Whether it is appropriate to describe a “direct hydrologic surface connection” as occurring due to inundation from a jurisdictional water or via perennial or intermittent flow between a wetland and a jurisdictional water in a typical year;
- Whether other types of hydrologic surface connections between wetlands and jurisdictional waters could constitute a “direct hydrologic surface connection” or if, and under what circumstances, subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency; and
- Whether there are other tools that may be helpful in the implementation of the proposed adjacent wetlands category.

### *Tributaries*

The Proposed Rule includes tributaries as jurisdictional and defines the term to include any rivers, streams, or similar naturally occurring surface water channels that contribute perennial<sup>20</sup> or intermittent<sup>21</sup> flow to a traditional navigable water or territorial sea in a typical year. Thus, the proposed approach excludes ephemeral<sup>22</sup> features as they are incapable of providing perennial or intermittent flow. Additionally, the proposed definitions would establish that a “mere hydrological connection cannot provide the basis for CWA jurisdiction.” Rather, the bodies of water must be “geographic features” that are “relatively permanent...and that contribute perennial or intermittent flow to a traditional navigable water.” In addition, tributaries can have artificial or natural breaks provided that the break conveys perennial or intermittent flow to any jurisdictional water downstream of the bank.

The preamble notes that to implement the proposed approach, the Agencies “would consider the upstream extent of a tributary to be the point at which the feature ceases to contribute to perennial or intermittent flow to a traditional navigable water or territorial sea.”

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<sup>20</sup> Perennial is defined as “surface water flowing continuously year-round during a typical year.”

<sup>21</sup> Intermittent is defined as “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).”

<sup>22</sup> Ephemeral includes “surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).”



Thus, the Proposed Rule eliminates the case-specific “significant nexus” analysis and notes that Justice Kennedy included such a test “absent more specific regulations.” The Agencies request comment on this conclusion and on whether the Agencies have “previously overread Justice Kennedy’s opinion to mandate the significant nexus test outside the actual holding of Justice Kennedy’s opinion, which was limited to the wetlands at issue in that case.”

The Proposed Rule requests comment on the proposed interpretation of the Rapanos opinion and whether the significant nexus test must be a mandatory component of any future definition of WOTUS. Additionally, the Agencies ask for comment on several aspects of proposed definitions associated with tributaries, including, for example:

- Whether it is necessary to define “typical year” given the agencies’ understanding that it is a commonly understood term in field adaptation, whether they should provide additional detail in the regulatory text, and whether there are alternative ways to make clear that times of drought or extreme floods would not be considered a factor to determine tributaries;
- Whether the definition of “tributary” should:
  - be limited to perennial waters only;
  - include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year;
  - not be focused in intermittent flow but rather seasonal flow;
  - reflect water flowing continuously during certain times of a typical year as a result of melting snowpack or when the channel bed intersects the groundwater table while nothing the latter may be a difficult characteristic to identify in the field;
  - include specific flow characteristics (e.g., timing, duration, frequency, or magnitude), and if so, what flow values or ranges of values (including supporting rationale) would satisfy the tributary definition and what methods, tools, or data could be used to determine such values; and
  - include the concepts of bed and banks and ordinary high water mark.

### *Ditches*

The Proposed Rule exempts ditches, “an artificial channel used to convey water,” from jurisdictional waters except for ditches that: 1) function as traditional navigable waters, 2) are constructed in a tributary or that relocate or alter a tributary as long as they also satisfy the conditions of the proposed “tributary” definition, or 3) are constructed in an adjacent wetland and also satisfy the conditions of the proposed “tributary” definition. The preamble notes that under this definition, most farm and roadside ditches would be excluded from federal jurisdiction. However, states and tribes could continue to regulate ditches not federally regulated, and they would still be subject to CWA permitting if they meet the definition of “point source” in CWA section 502(14).

In addition to seeking comment on the proposed definition of “ditch” and the value of proposing a separate category of jurisdictional ditches, the Agencies also request comment on the following issues:

- As an alternative to the proposed approach, retaining the historical treatment of jurisdictional ditches within the definition of tributary
- Whether the Agencies should add a temporal component to distinguish jurisdictional ditches when evaluating ditches that may have been constructed in tributaries or adjacent wetlands (e.g., the Agencies could consider a ditch that appears to be constructed in upland to be non-jurisdictional unless there is evidence that the ditch was constructed in a natural waterway prior to the 1972 CWA)

- What tools the Agencies could utilize to help identify whether a ditch is constructed in upland or in a tributary or adjacent wetland, etc.
- Whether there are other approaches for addressing the evidentiary concerns that may arise for historic ditches
- The exclusion of all ditches constructed in upland, regardless of flow regime, and whether that is consistent with the *Rapanos* opinions given that ditches constructed in upland that flow perennially would be presumed to be non-jurisdictional even if they also satisfy the proposed definition of tributary
- Whether a ditch can be both a point source and WOTUS, or whether those two categories are mutually exclusive

### *Stormwater Control Features*

The Proposed Rule explicitly exempts stormwater control features that are “excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.” The preamble explains that nothing in the Proposed Rule is intended to alter the current practice, but rather the exclusion is designed to “clarify the appropriate limits of jurisdiction relating to these systems.” Thus, the Proposed Rule requests comment on whether the proposed exclusion for stormwater control features should be expanded or clarified to include permitted municipal separate storm sewer systems (MS4s) and, if so, whether the exclusion would apply to all MS4s or limited portions and how such an exclusion might be implemented.

### **Legal Basis**

The Proposed Rule describes the past case law and regulatory developments leading to this proposal. Overall, the preamble states that the objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Summarizing *United States v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. United States (SWANCC)*, and *Rapanos v. United States (Rapanos)*, the Proposed Rule notes:

- A wetland that abuts a navigable water traditionally understood as navigable is subject to CWA permitting under *Riverside Bayview*, and in *SWANCC*, the majority opinion held that a statutory interpretation of the CWA would preclude nonnavigable, isolated, intrastate ponds that lack a sufficient connection to sufficient navigable waters.
- In *Rapanos*, Justice Scalia wrote an opinion in a four-Justice plurality interpreting WOTUS to “include[] only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes’ and ‘wetlands with a continuous surface connection’ to relatively permanent water. By contrast, Justice Kennedy’s concurring opinion found that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”

The Proposed Rule notes that since *Rapanos*, the Federal government adopted a “broad interpretation of Justice Kennedy’s concurring opinion, arguing that his ‘significant nexus’ test provides an independent basis for establishing jurisdiction over certain waters of the United States.” However, the Agencies are now seeking comment on Justice Kennedy’s opinion and whether it should only apply to the specific facts and wetlands at issue in that case.

Additionally, the preamble notes that the plurality and Justice Kennedy opinion in *Rapanos* have “substantial similarities.” Specifically, both agree that a jurisdictional determination must use a two-step process: “(1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters.” Both also agree that the connection “must be close” with the plurality referring to a “continuous surface connection” or “continuous physical connection” and Kennedy’s opinion recognizing that “the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a ‘navigable water’ under the Act.”

With respect to tributaries, the Proposed Rule also summarizes the commonalities of the plurality and Justice Kennedy’s opinion as both focus on tributaries’ contribution to and connection with traditional navigable waters. However, the Agencies note that neither “defined with precision where to draw the line” between relatively permanent, intermittent streams, and non-jurisdictional tributaries.

Based on the discussion of the Supreme Court precedent, the Proposed Rule includes certain Principles and Considerations, including, for example:

- The Agencies’ authority under the CWA is “grounded in Congress’ commerce power over navigation and the Agencies can “choose to regulate beyond waters more traditionally understood as navigable...but must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction.
- The Agencies can choose to regulate adjacent wetlands and some tributaries if the “wetlands are closely connected to the tributaries.”
- *SWANCC* “calls into question the agencies’ authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters.”
- The Agencies can “regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burdens while still effectuating the purposes of the Act.”

The preamble also discusses in detail the responsibilities and rights of states and tribes to regulate their water resources. The Agencies explain that the Proposed Rule does not conclusively determine which of the nation’s waters warrant environmental protection; rather “the agencies interpret the definition as drawing the boundary between those waters subject to federal requirements under the CWA and those waters States and Tribes are free to manage under their independent authorities.”

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## About Us

MJB&A provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information we encourage you to visit our website, [www.mjbradley.com](http://www.mjbradley.com).