

# Take me to the River—How to Identify a WOTUS

Presented By:

Chazen Engineering, Land Surveying, and  
Landscape Architecture Co., DPC

Barbara B. Beall, PWS, LEED® AP

&

Whiteman, Osterman & Hanna, LLP

Terresa Bakner, ESQ

September 24, 2019

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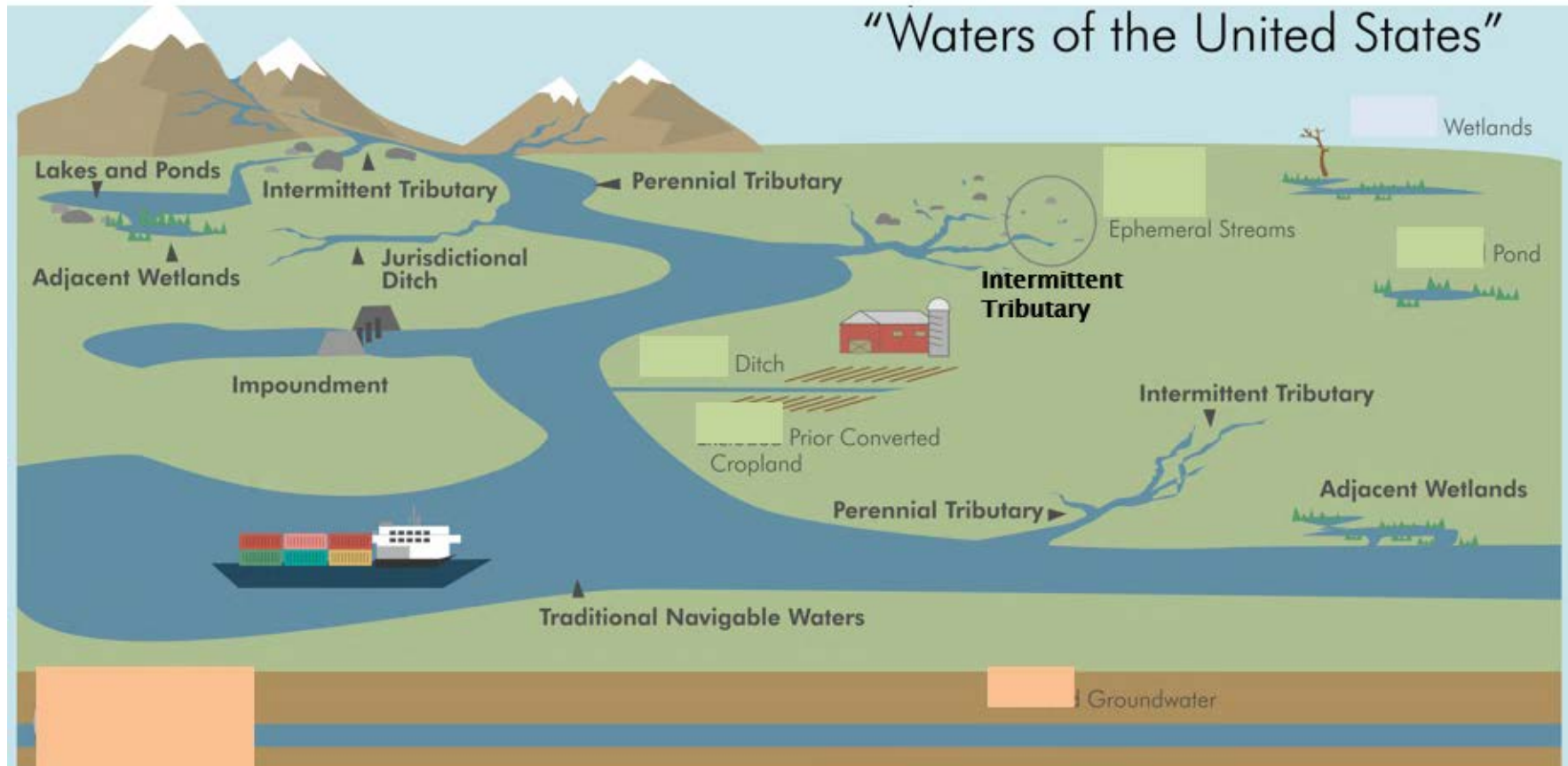
# Outline

- Setting the Stage – 1972 to 2007
- 2015 WOTUS regulations  
(Sept – Oct 2015; August 2018 to Present)
- 2018 Proposed WOTUS Regulations
- How to Prepare for Changes

# Setting the Stage..... 1972 to 2007

What are.....

“Waters of the United States”



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# Setting the Stage..... 1972 to 2007

- 1789 – US Constitution – Federal v. States’ Rights
- 1899 – Section 10 Rivers and Harbors Act  
[Traditionally] Navigable Waters (regulates work, structures)
- 1972 – Clean Water Act Section 404  
“Regulates discharge of dredged or fill material into navigable waters of the United States”
- Various lawsuits expand Section 404 jurisdiction  
1985 – US v. Riverside Bayview
- Before 1986, no limit headwater fills, 1986 – NWP 26
- 1995 – Lopez Decision – Commerce Clause Bubble

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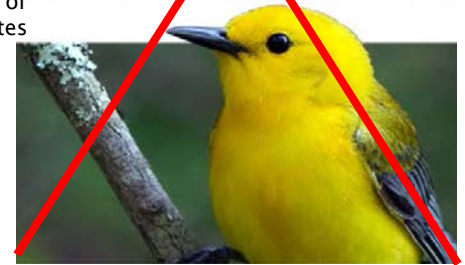
# Setting the Stage..... 1972 to 2007

## ➤ 1997 – WILSON HOMES

United States v. Wilson, 133 F. 3d 251 (4<sup>th</sup> Cir. 1997)

Isolated wetlands not regulated if commerce connection is migratory birds. People watching birds does not necessarily equate to significant nexus under Commerce Clause. Limited to 4<sup>th</sup> circuit.

[www.doi.gov](http://www.doi.gov). Economic impact of waterfowl hunting in United States



## ➤ 2001 – SWANCC v. US Army Corps of Engineers

531 U.S. 159 (2001). US Supreme Court Nationally, isolated wetlands not regulated if commerce connection is migratory bird rule.

Opened door to questions regarding significant nexus to commerce clause



<https://www.nps.gov/common/uploads/photogallery/mwr/park/cuva/5B597EE-155D-4519-3E567FD9C8D29567/5B597EEE-155D-4519-3E567FD9C8D29567-large.JPG>

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# Setting the Stage..... 1972 to 2007

## 2006 – Rapanos (and Carabell) v. United States

547 U.S. 715 (2006)

- Rapanos – Four Michigan wetlands near ditches or man-made drains eventually running to TNWs. Carabell is denied permit to fill wetlands adjacent to a ditch.
- Plurality decision.
- Waters of the United States “...includes 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 their immediately adjacent wetlands.]
- **“Absent more specific regulations...”** Corps must establish significant nexus on a case by case bases when seeking to regulate wetlands based on adjacency to non-navigable tributaries in order to avoid unreasonable application of the Act.
- Significant nexus determination requires demonstration of more than insubstantial or insignificant physical, chemical, biological inputs to TNWs from low volume waters adjacent wetlands.



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# Setting the Stage..... 1972 to 2007

## ➤ Rapanos and Carabell Guidance – 5/30/2007

- Approved JD versus Preliminary JD
- When significant nexus needed.
- How to complete JD forms.
- Photos:
  - TNW, Wetland adj to TNW.
  - RPWs, non-RPWs
  - Wetlands directly abutting RPWS
  - Wetlands adjacent but not abutting
  - Impoundments
  - Isolated waters
  - Ditches, swales, erosional features
- [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/jd\\_guidebook\\_051207final.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf)

### U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the *Approved Jurisdictional Determination Form* ("JD form"). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.<sup>1</sup>

Caribbean Sea, St. Thomas, U.S. Virgin Islands.



This document was prepared jointly by the U.S. Army Corps of Engineers and the Environmental Protection Agency.

The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

# 2007 Definition WOTUS

## Section 404 – 33 CFR 238.3(a)

### Traditionally Navigable Waters (TNW)

1. All waters that are currently used, or were used in the past, or which may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

- ▶ Similar to “Navigable Waters” 33 CFR 329.4 Section 10 Rivers & Harbors Act



<https://www.epa.gov/wetlands/coastal-wetlands>

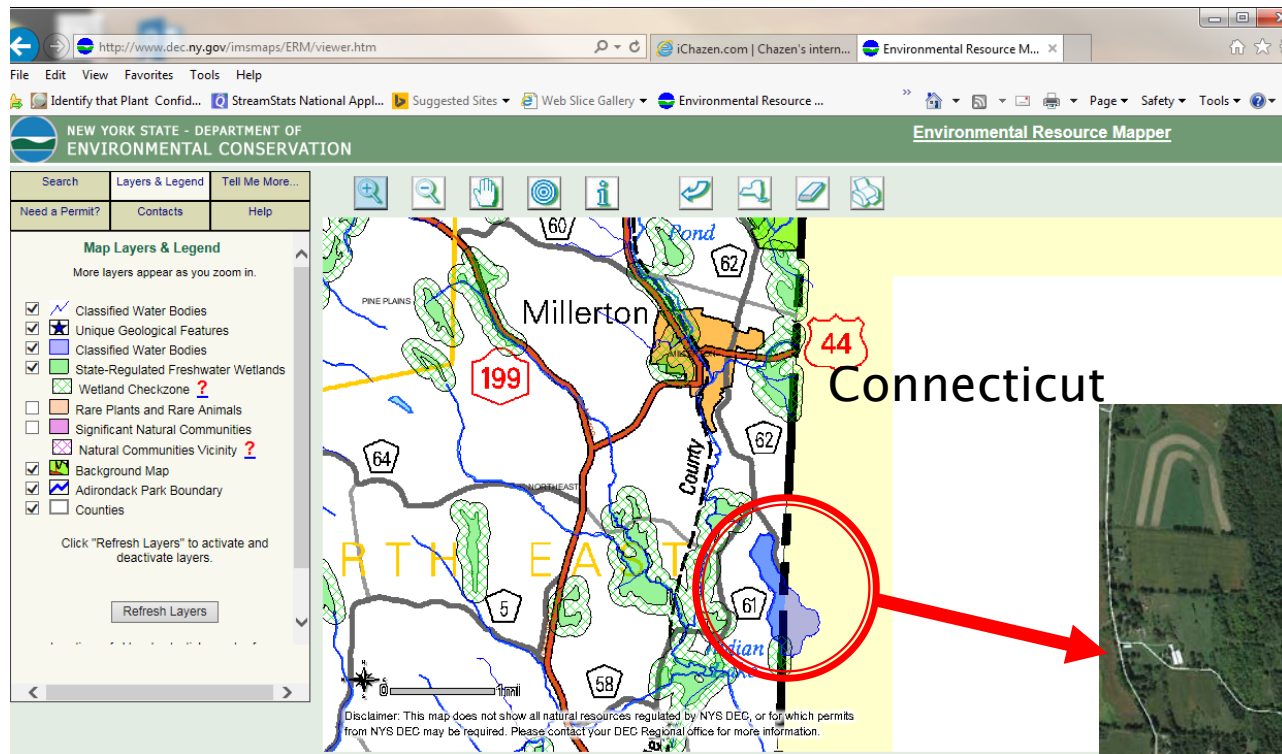


<https://www.nps.gov/voya/learn/historyculture/the-fur-trade.htm>. Artist Frances Anne Hopkins, 1869. National Archives of Canada



# 2007 Definition WOTUS Section 404 – 33 CFR 238.3(a)

## ▶ 2. All Interstate Waters and Wetlands



<http://www.dec.ny.gov/imsmaps/ERM/viewer.htm>

# 2007 Definition WOTUS

## Section 404 – 33 CFR 238.3(a)

### COMMERCE CLAUSE CONNECTION

3. All other waters such as intrastate lakes, 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:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce
- (iii) Which are/could be used for industrial purposes by industries in interstate commerce



<http://www.fda.gov/downloads/food/foodbornellnessContaminants/UCM239497.pdf>



<https://www.epa.gov/eg/stream-electric-power-generating-effluent-guidelines>

[www.fws.gov/birdhabitat/img/home-hero/impact-07-desktop.png](http://www.fws.gov/birdhabitat/img/home-hero/impact-07-desktop.png)



<http://www.fws.gov/birds/surveys-and-data/harvest-surveys/harvest-information-program.php>



[www.danvilleva.gov](http://www.danvilleva.gov)



# 2007 Definition WOTUS

## Section 404 – 33 CFR 238.3(a)

### THE REST OF THE DEFINITION

4. All impoundments of waters otherwise defined as waters of the U.S.
5. Tributaries of waters identified in paragraphs (a)(1)–(4) [above]
6. The territorial seas
7. Wetlands adjacent to waters (other than wetlands that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this definition



<http://www.hoover.archives.gov/research/photos/images/1941-9A.jpg>



[https://www.epa.gov/sites/production/files/styles/large/public/2014-03/san\\_pedro\\_2.jpg](https://www.epa.gov/sites/production/files/styles/large/public/2014-03/san_pedro_2.jpg)

[http://www.nesdis.noaa.gov/images/wave\\_big.jpg](http://www.nesdis.noaa.gov/images/wave_big.jpg)



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[http://www.fws.gov/mountain-prairie/refuges/images/partnerImages/WY-PFW-UG-Wetlands-and\\_Sage-MG\\_1996.jpg](http://www.fws.gov/mountain-prairie/refuges/images/partnerImages/WY-PFW-UG-Wetlands-and_Sage-MG_1996.jpg)



# 2007 Definition WOTUS

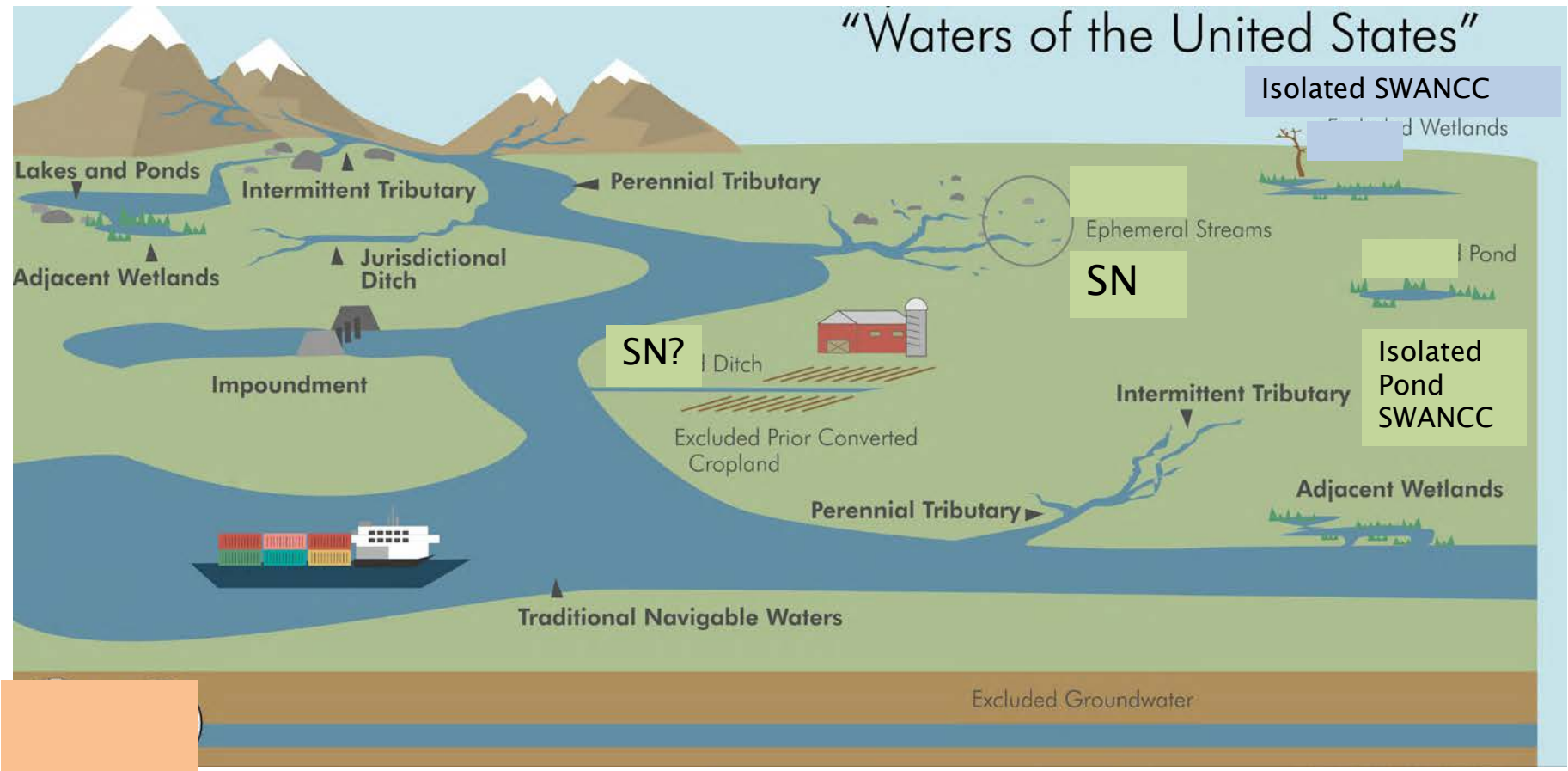
- 2005–05 Regulatory Guidance Letter “Ordinary High Water Mark”
- New Corps Web page dedicated to OHWM
- Focus is on Arid West, Western Mountains, Western Coastal Regions
- OHWM Datasheet
- <http://www.erdc.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/9254/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training.aspx>

<http://media.defense.gov/2014/Aug/04/2000809877/260/200/0/140710-A-DW451-002.JPG>



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# 2007 Definition WOTUS (11 years to 2018)



SN=Significant Nexus Test per Rapanos  
Isolated per SWANCC (Migratory Birds)

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# 2014 – Proposed WOTUS Regulations

- April 21, 2014 Public Notice
- Draft Connectivity of Streams and Wetlands to Downstream Waters Report

WOUS\_ERD2\_SEP2013.pdf



DRAFT  
DO NOT CITE OR QUOTE

EPA/600/R-11/098B  
September 2013  
External Review Draft

## FEDERAL REGISTER

Vol. 79 Monday,  
No. 76 April 21, 2014

Part II

Department of Defense

Department of the Army, Corps of Engineers  
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, et al.  
Definition of "Waters of the United States" Under the Clean Water Act;  
Proposed Rule

### Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence

#### NOTICE

THIS DOCUMENT IS A PRELIMINARY DRAFT. It has not been formally released by the U.S. Environmental Protection Agency and should not be construed to represent Agency policy. It is being circulated for comment on its technical accuracy and policy implications.

Office of Research and Development  
U.S. Environmental Protection Agency  
Washington, DC

<https://www.epa.gov/cleanwaterrule/final-clean-water-rule>

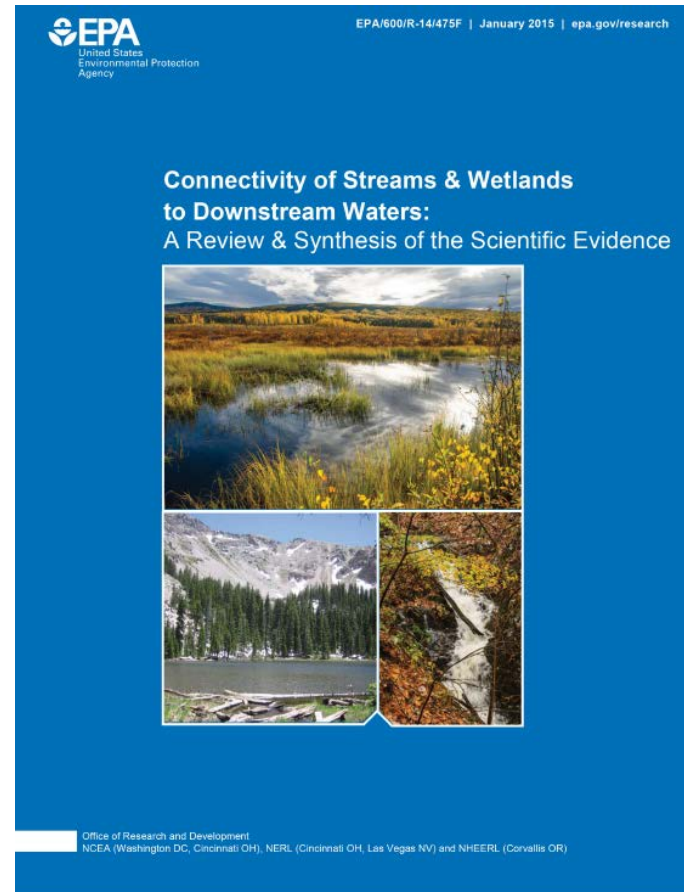
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# 2014 Proposed WOTUS Regulations

- 2014, 2015 Comment period extended  
(July 21, 2014 and October 21, 2015)
- 2015 Final Stream and Wetland Connectivity Report  
(January 15, 2015)

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

<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=62072551&CFTOKEN=98003338>



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# Proposed 2014 WOTUS Regulations

3 Parts:

What's regulated. What's not regulated. Definitions.

## Regulated (paragraphs i–v similar to 2007)

(vi) All waters, including wetlands, adjacent to a water identified in paragraphs (1)(i) through (v) of this definition; and

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(3) Definitions—

(i) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”

(ii) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

# 2015 WOTUS Regulations (3 mo. – Aug–Oct 2015)

- Published June 29, 2015
- Effective August 28, 2015
- **SIGNIFICANTLY** Different than Proposed Rule



## FEDERAL REGISTER

Vol. 80 Monday,  
No. 124 June 29, 2015

Part II

Department of Defense

Department of the Army, Corps of Engineers  
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, *et al.*  
Clean Water Rule: Definition of "Waters of the United States"; Final Rule

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

Other information on same page provided  
in support of the rule

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# 2015 WOTUS Regulations – Stayed

**STAYED for 2.5 years OCT. 2015 TO AUG. 2018**

- **August 27, 2015** – US District Court for District of North Dakota Southeast Division – Memorandum Opinion and Order Granting Plaintiff’s Motion for Preliminary Injunction – Case 3:15-cv-00059-RRE-ARS, Document 70, Filed 08/27/15
- **October 9, 2015** – National stay on rule via court action – 6<sup>th</sup> Circuit

## The Washington Post

The Volokh Conspiracy | Opinion

### Sixth Circuit puts controversial ‘waters of the United States’ (WOTUS) rule on hold

By **Jonathan H. Adler** October 9, 2015

<http://www.washingtonpost.com/volokh-conspiracy/wp/2015/10/09/sixth-circuit-puts...>

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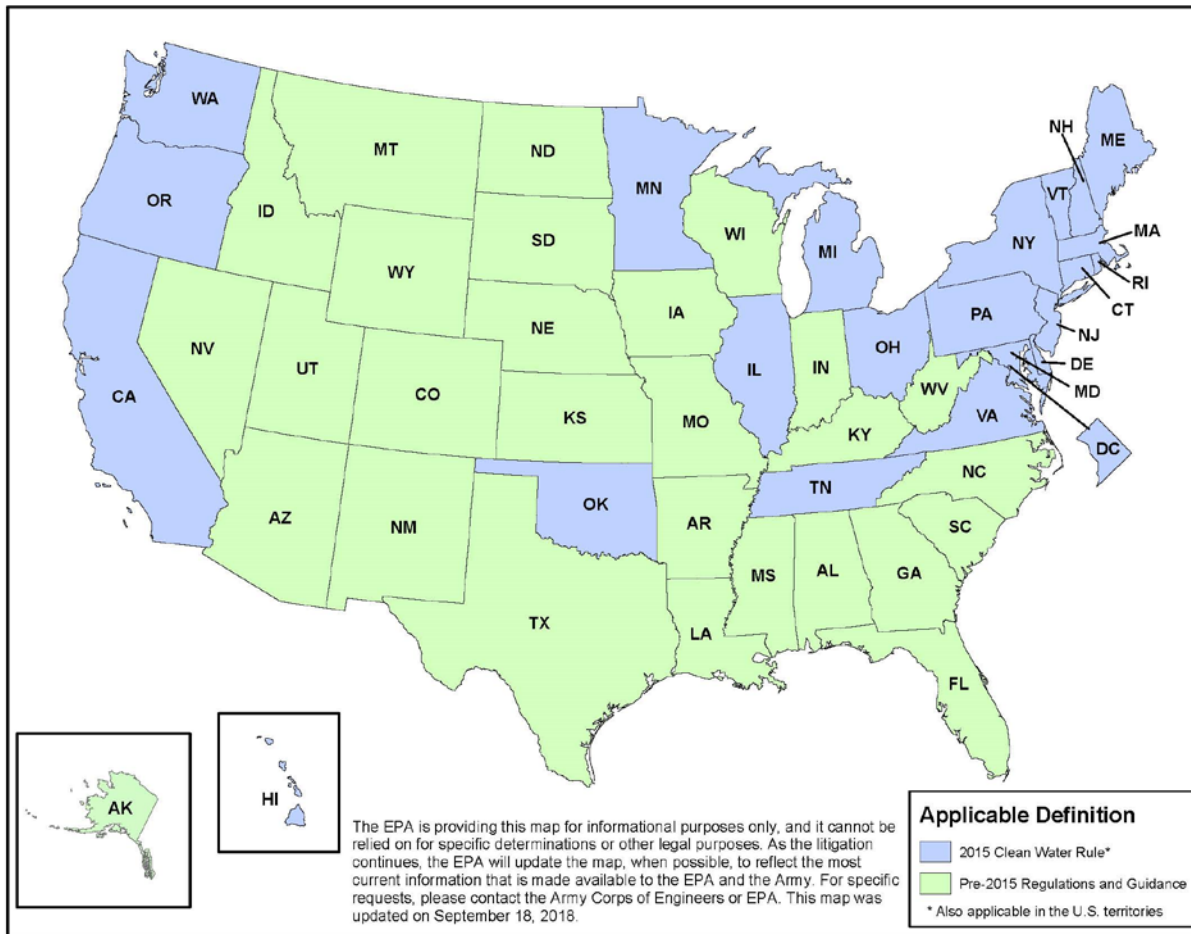


# 2015 WOTUS Regulations – August 2018

## Definition of "Waters of the United States": Rule Status and Litigation Update

The EPA and the Army continue to review the U.S. District Court for the District of South Carolina's decision to nationally enjoin the agencies' final rule that added an applicability date to the 2015 Clean Water Rule. Pursuant to the court's order, the 2015 Clean Water Rule is now in effect in 22 states, the District of Columbia, and the U.S. territories. Parties to the case, including the EPA and the Army, have filed motions appealing the order and seeking a stay of the district court's decision. While the litigation continues, the agencies are complying with the district court's order and implementation issues that arise are being handled on a case-by-case basis. The agencies recognize the uncertainty this decision has created and are committed to working closely with states and stakeholders to provide updated information on an ongoing basis regarding which rules are in place in which states. If a state, tribe, or an entity has specific questions about a pending jurisdictional determination or permit, please contact a local U.S. Army Corps of Engineers District office or the EPA.

# 2015 WOTUS Regulations – August 2018



[https://www.usace.army.mil/missions/civil-works/regulatory-program-and-permits/juris\\_info/](https://www.usace.army.mil/missions/civil-works/regulatory-program-and-permits/juris_info/)

# 2015 WOTUS Regulations – CURRENT

## 3 Parts (along with Preamble)

- Regulations defining Waters of the United States (Paragraphs a1–a8)
- Regulations defining what is not a Water of the United States (Paragraphs b1–b7)
- Regulations defining terms (Section c)

## Biggest Areas of Concern

- Within 4,000 feet of a tributary
- Significant Nexus “A water has significant nexus when any single function or combination of functions performed by the water, alone or with similarly situated waters in the region contribute significantly to the chemical, physical or biological integrity of the nearest water (a)(1) through (a)(3)
- Similarly situated aquatic resources
- What is a “Tributary” relative to Ditches, Ephemeral Streams (OHWM, contribution of flow, was it previously a stream?)
- “Neighboring” relative to tributaries automatically regulated

# 2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

Baker, Susan L CIV USARMY CELRB (US) <[susan.l.baker@usace.army.mil](mailto:susan.l.baker@usace.army.mil)>

## 2015 Clean Water Rule Cheat Sheet

**WATERS OF THE U.S.:** The term “waters of the United States” means:

- (a)(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (a)(2) All interstate waters, including interstate wetlands;
- (a)(3) The territorial seas;
- (a)(4) All impoundments of waters otherwise identified as waters of the United States under this section;
- (a)(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
  - (c)(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.



From Definition Section of Regulations

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Tributaries

- May be natural, modified, constructed including ditches
- May be ephemeral, intermittent or perennial
- Ditches have additional criteria
- Tributaries must contribute flow  
Flow can be through a jurisdictional or non-jurisdictional feature or impoundment.
- Must have bed/bank & OHWM
- Upper limit where bed/bank and/or OHWM disappear.
- There may be breaks in OHWM but tributary still jurisdictional. Measure and map breaks.
- Ditches are constructed features.
- Ditches are regulated only if they both meet defn of “tributary” and are not excluded under paragraph (b)(3)



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**(a)(6)** All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

**(c)(1)** Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.

**(c)(2)** Neighboring. The term neighboring means:

**(c)(2)(i)** All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

**(c)(2)(ii)** All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

**(c)(2)(iii)** All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.



From Definition Section of Regulations

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~~(a)(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.~~

~~(a)(7)(i) Prairie potholes.~~

~~(a)(7)(ii) Carolina bays and Delmarva bays.~~

~~(a)(7)(iii) Pocosins.~~

~~(a)(7)(iv) Western vernal pools.~~

~~(a)(7)(v) Texas coastal prairie wetlands.~~

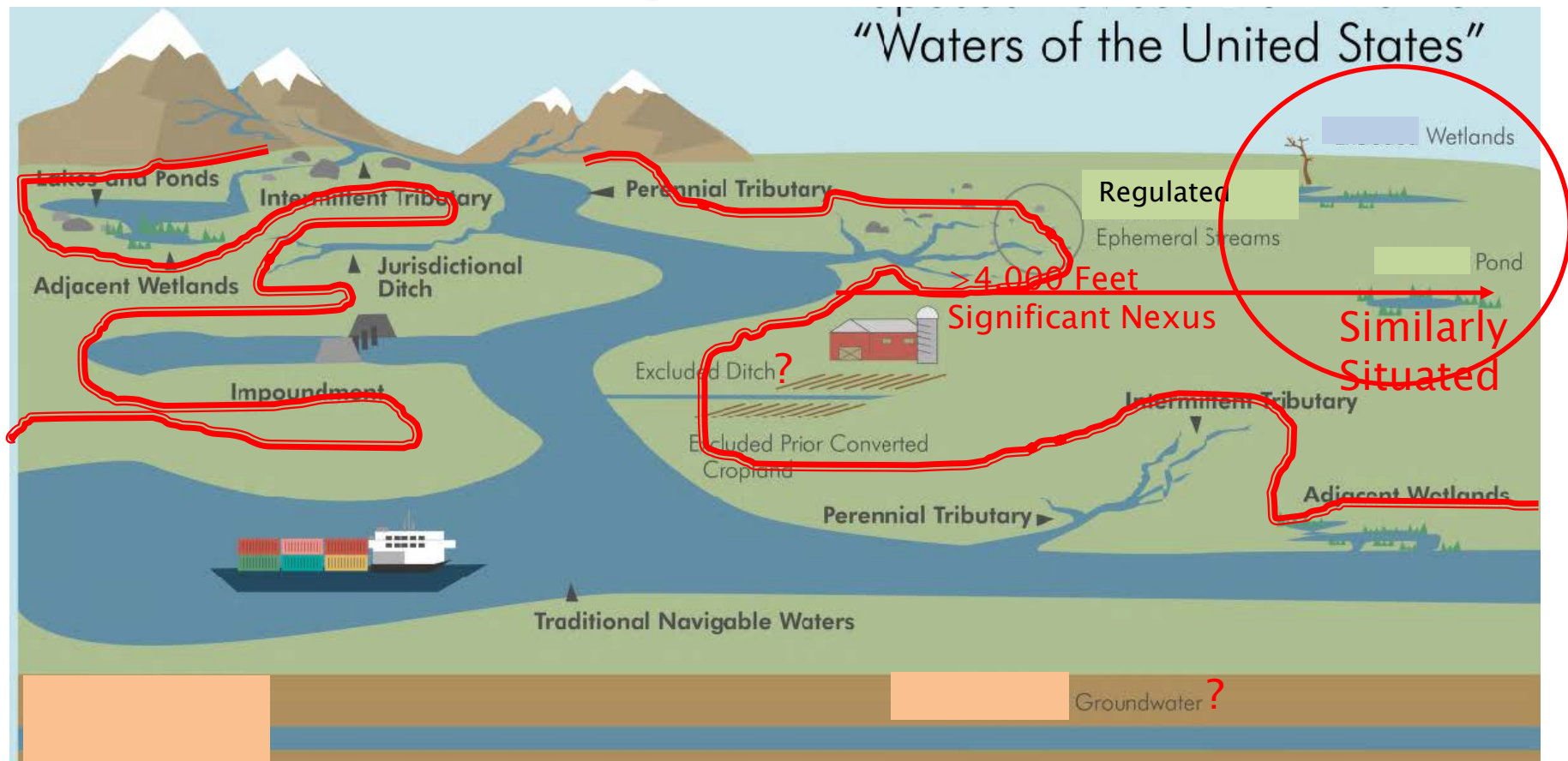
Not found in NYS

(a)(8) All waters located within the 100- year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

*Not an official document; refer to 33CFR328.3 for official information.*



# 2015 WOTUS Regulations



## Neighboring - (c)(2) - Automatically Regulated

- W/in 100 feet all tributaries
- W/in 100-year floodplain & w/in 1,500 feet OHWM all tributaries
- W/in 1,500 feet of TNW, Seas, Great Lakes

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# 2015 WOTUS Regulations – CURRENT

## From Buffalo Corps District Consultant Training November 2018

### 2015 Clean Water Rule Cheat Sheet

**EXCLUSIONS: 33CFR328.3(b)** The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

- (b)(1)** Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- (b)(2)** 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 Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (b)(3)** The following ditches:
  - (b)(3)(i)** Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
  - (b)(3)(ii)** Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
  - (b)(3)(iii)** Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.
- (b)(4)** The following features:
  - (b)(4)(i)** Artificially irrigated areas that would revert to dry land should application of water to that area cease;
  - (b)(4)(ii)** 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;
  - (b)(4)(iii)** Artificial reflecting pools or swimming pools created in dry land;
  - (b)(4)(iv)** Small ornamental waters created in dry land;
  - (b)(4)(v)** 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;
  - (b)(4)(vi)** Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and



# 2015 WOTUS Regulations – CURRENT

From Buffalo Corps District Consultant Training November 2018

**EXCLUSIONS: 33CFR328.3(b)** The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

- (b)(5)** Groundwater, including groundwater drained through subsurface drainage systems.
- (b)(6)** Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- (b)(7)** 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.

*Not an official document; refer to 33CFR328.3 for official information.*

**BBB–TMB Comment**

**Take care that an Excluded Feature is not actually a regulated water**

# 2015 WOTUS Regulations – CURRENT

Significant nexus. Means that a water, including wetlands, either alone or in combination with **similarly situated waters in the region**, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (1)(iii) [(a)(1) through (a)(3)] of this definition. For an **effect to be significant, it must be more than speculative or insubstantial**. Waters are **similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters**. For purposes of determining whether or not a water has a significant nexus, the **water's effect on downstream (1)(i) through 1(iii) waters shall be assessed by evaluating the aquatic functions** identified in paragraphs (3)(v)(A) through (l) of this definition. A water has a **significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes to the chemical, physical, or biological integrity of the nearest water identified in paragraphs 1(i) through 1(iii) of this definition. Functions are sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of flood waters, runoff storage, contribution of flows, export of organic matter, export of food resources, life dependent aquatic habitat.**

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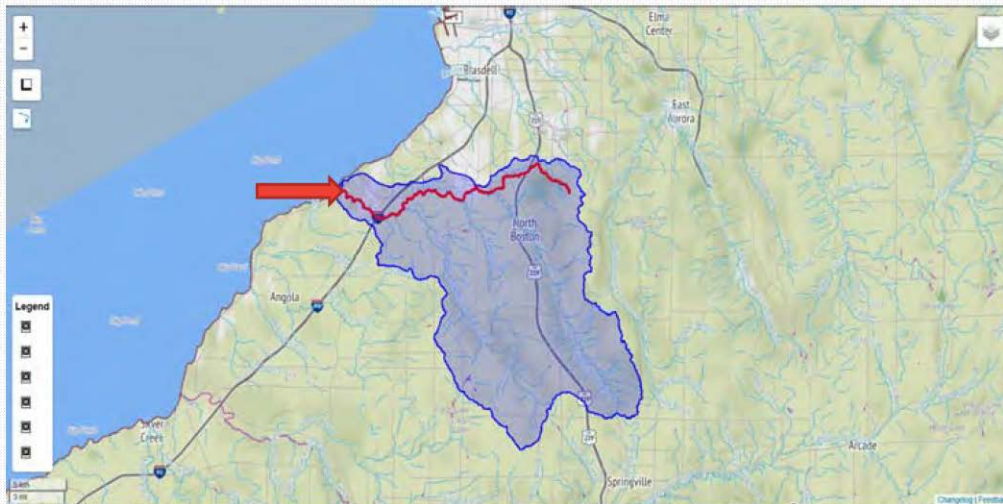
# 2015 WOTUS Regulations – CURRENT

Significant Nexus Assessment for (a)(8) Waters

From Buffalo Corps District Consultant Training November 2018

Currently no published “step by step” guidance on significant nexus determinations, but ESRI Map Layers identified.

The SPOE watershed is drawn using the ESRI watershed delineation tool.



Identify flowpath from  
(a)(8) water to nearest  
(a)1 –(a)(5) water

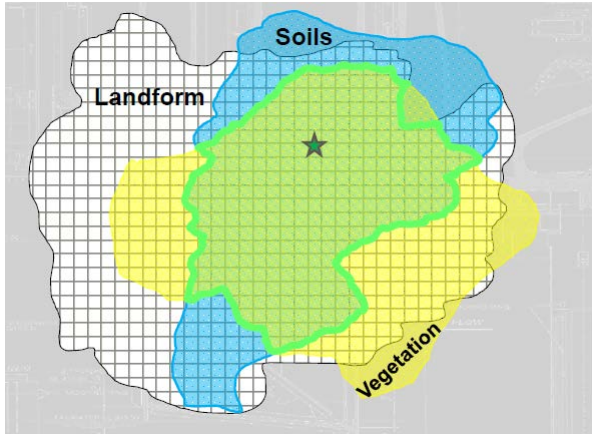
Identify closest TNW

Delineate Single Point of  
Entry (SPOE) Watershed to  
TNW.

# 2015 WOTUS Regulations – Current

Significant Nexus Assessment for (a)(8) Waters

From Buffalo Corps District Consultant Training November 2018



What are similarly situated waters

## Similarly Situated Waters – Aggregate #1

GIS “Venn Diagram”

- Waters within (a)(8) limits and waters within (a)(6) limits subject to established normal farming ranching or silvicultural activities that
  - Have similar functions (same Cowardin system) palustrine, lacustrine, riverine) **AND**
- Are located sufficiently close to each other:
  - Within the same uninterrupted, contiguous area of land as the subject water, with relatively homogeneous SOILS, VEGETATION, and LANDFORM

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# 2015 WOTUS Regulations – Current

Significant Nexus Assessment for (a)(8) Waters

From Buffalo Corps District Consultant Training November 2018



What are similarly situated waters

## Similarly Situated Waters – Aggregate #2

GIS “Venn Diagram”

- Waters having similar functions (same Cowardin Class) (emergent, forested) **AND**
- Are located sufficiently close to a WOTUS:
  - Waters which lie within (a)(8) water thresholds within the SPOE of subject water & waters within (a)(6) limits that are subject to normal farming, ranching or silvicultural activities.

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# 2015 WOTUS Regulations – CURRENT

- (i) Sediment trapping,
- (ii) Nutrient recycling,
- (iii) Pollutant trapping, transformation, filtering, and transport,
- (iv) Retention and attenuation of flood waters,
- (v) Runoff storage,
- (vi) Contribution of flow,
- (vii) Export of organic matter,
- (viii) Export of food resources, and
- (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1)-(a)(3)



**“Lack of connectivity may be the significant nexus”**

What are functions of similarly situated waters

What are functions of TNW

What is connection/nexus

Is it significant?

**“Significant is more than speculative or insubstantial”**

Similarly situation waters do not need to perform all 9 functions – only 1 function of significance required.

Hydrologic connectivity should be considered but not required.

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# 2018 WOTUS Regulations – PROPOSED

December 11, 2018 USEPA and Corps proposed new Definition of WOTUS

See Fact Sheet material in package

Proposed Rule was published in the Federal Register on February 14, 2019

EPA Expects rule to be finalized in 2020

Much more Scalia than Kennedy



**FACT SHEET**

## Proposed Revised Definition of "Waters of the United States"

### BACKGROUND

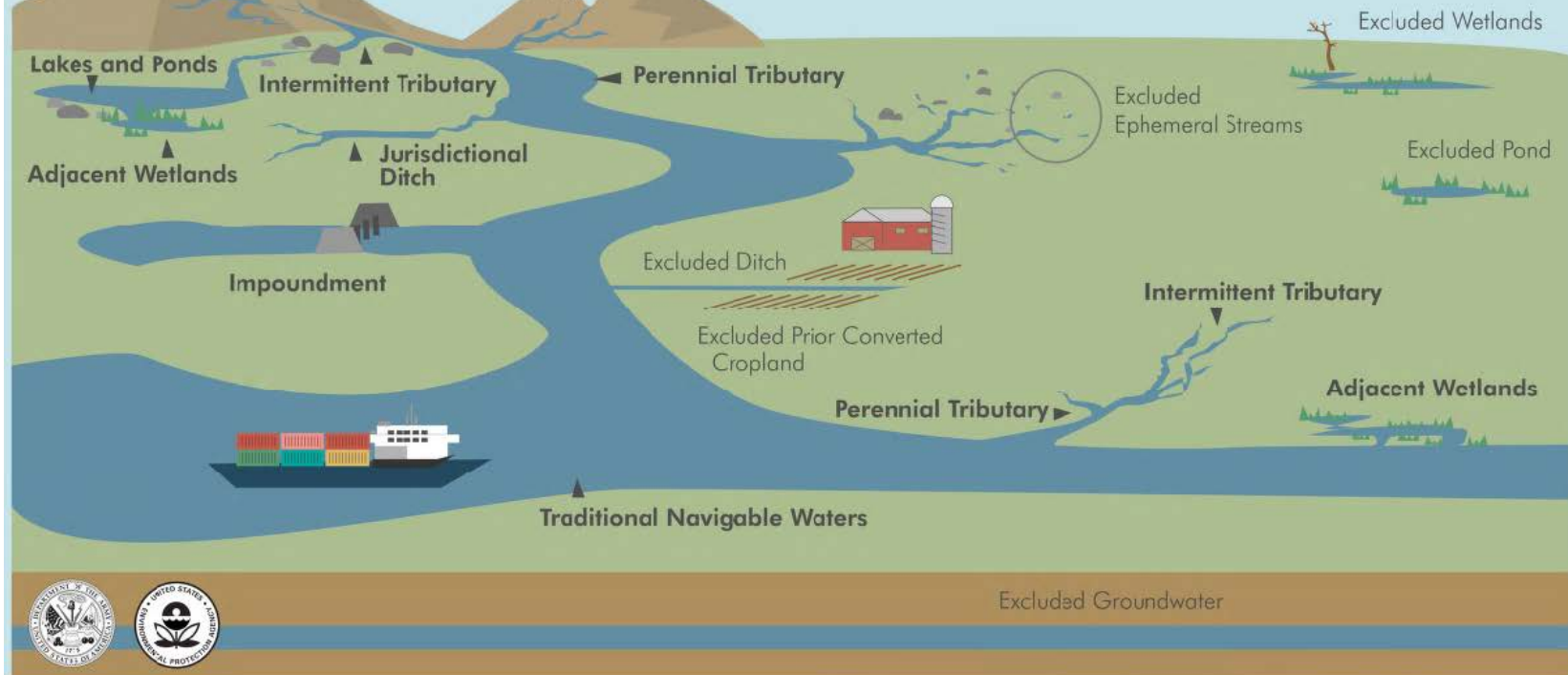
- On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) proposed a revised definition for "waters of the United States," which would establish the scope of federal regulatory authority under the Clean Water Act in a more clear and understandable way.

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# 2018 WOTUS Regulations – PROPOSED

## Proposed Revised Definition of “Waters of the United States”



\* For illustrative purposes only. Proposed jurisdictional waters in **bold**.

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# How to Prepare for Continuing Flux

- ▶ Review expiration dates for all JD letters, permits, verifications.
- ▶ Manage any authorized non-jurisdictional waters **NOW**.
- ▶ If possible, let NOTHING LAPSE. Keep permits current – do the work.
- ▶ For new Jurisdictional Determinations under 2015 rule –
  - AVOID jurisdictional determinations on potentially “isolated” waters.
  - Obtain JDs for portion of site with no aquatic resources wetlands, or
  - Obtain JD only for those areas with necessary impacts.
- ▶ Review impacts to municipal projects – length of time to ramp up and inability to make changes without substantially “redo” of processes for such projects.
- ▶ Educate clients about rule & manage expectations.
- ▶ Significant nexus process and standards for review will “shake out” with time.

# Contact Information

Barbara B. Beall, PWS, LEED® AP  
The Chazen Companies  
North Country Office  
20 Elm Street, Suite 110  
Glens Falls, NY 12801  
[bbeall@chazencompanies.com](mailto:bbeall@chazencompanies.com)  
518-824-1934

Terresa Bakner, Esq.  
Whiteman Osterman & Hanna  
One Commerce Plaza  
Albany, NY 12260  
[tbakner@woh.com](mailto:tbakner@woh.com)  
518-487-7615

## **New York State Freshwater Wetlands Act**

- ▶ 12.4 acres or more.
- ▶ Unusual Local Importance.
- ▶ Located in the Adirondack Park.
- ▶ Exceptions for permitting agricultural activities, commercial/recreational fishing, and public health activities.

# Freshwater Wetlands Act

- ▶ **Statutory Definition of “Freshwater Wetlands” (§ 24-0107(1)):**
  - ▶ Lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation;
  - ▶ Lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period;
  - ▶ Lands and waters substantially enclosed by aquatic or semi-aquatic vegetation, the regulation of which is necessary to protect said vegetation.



# Freshwater Wetlands: N.Y.S. DEC Regulations

6 N.Y.C.R.R. § 664.7(b): Two or more areas of land and/or water may be considered to be a single wetland for regulatory purposes if

- ▶ they are determined by the commissioner to function as a unit, or
- ▶ to be dependent upon each other, and;
- ▶ if they are no more than 50 meters (approximately 165 ft.) apart.

**Freshwater Wetlands Delineation Manual:** Sets Hydrological Indicators

# Freshwater Wetlands: N.Y.S. DEC Regulations

## Unusual Local Importance (6 N.Y.C.R.R. §§ 664.5(a), 664.7(c))

- ▶ If it contains any Class I characteristic, or four Class II characteristics, it can be nominated in a ULI petition.
- ▶ For any area not containing a Class I characteristic or four Class II characteristics, DEC considers its benefits enumerated in § 24-0105(7) and takes into account expressed local interest.

# Freshwater Wetlands: N.Y.S. DEC

## Regulations

**Class I Wetlands: a Class I wetland if it has any of these characteristics (6 N.Y.C.R.R. § 664.5(a)):**

- ▶ Kettlehole bog;
- ▶ Habitat of an endangered/threatened animal species;
- ▶ Habitat of an endangered/threatened plant species;
- ▶ Supports an unusual animal in abundance or diversity;
- ▶ Tributary to a water which could create flooding for an urban area;
- ▶ Adjacent to a reservoir used for public water supply, or;
- ▶ Contains four or more Class II Characteristics.

# Freshwater Wetlands: N.Y.S. DEC Regulations

**Class II Wetlands: a Class II wetland if it has any of these characteristics (6 N.Y.C.R.R. § 664.5(b)):**

- ▶ Purple loosestrife and/or reed constitutes 2/3rds+ of cover;
- ▶ Two or more wetland structural groups;
- ▶ Contiguous to a tidal wetland;
- ▶ Associated with a permanent open water outside the wetland;
- ▶ Adjacent or contiguous to streams classified as C(t) or higher;
- ▶ A migration habitat of an endangered or threatened animal;
- ▶ Habitat of a vulnerable animal species;
- ▶ Contains a vulnerable plant species.



# Freshwater Wetlands: N.Y.S. DEC Regulations

## Class II Criteria Continued:

- ▶ Supports an animal unusual in abundance or diversity for the county;
- ▶ Demonstrable archaeological or paleontological significance;
- ▶ Associated with an unusual geological feature;
- ▶ Tributary to a water which could create flooding for an urban area;
- ▶ Hydraulically connected to an aquifer;
- ▶ Acts in a tertiary treatment capacity for a sewage disposal system;
- ▶ Within an urbanized area;
- ▶ One of the three largest wetlands within a municipality, or;
- ▶ Within a publicly-owned recreation area.

# Freshwater Wetlands: N.Y.S. DEC Regulations

## ▶ Patrick Farm, Town of Ramapo

- ▶ ULI petition filed
- ▶ 2012/2018: DEC declared that wetland area did not meet the criteria to require designation as a Wetland of Unusual Local Importance
  - No Class 1 Characteristics
  - Also failed to have 4 of the Class II Characteristics
  - No significant benefit under § 24-0105(7) of the Freshwater Wetland Act
- ▶ 2015: Two wetland areas, although hydrologically connected, were greater than 50 Meters (164.04 ft.) apart and were considered to be separate wetlands for purposes of mapping.

## **Freshwater Wetlands: N.Y.S. DEC Regulations**

### **6 N.Y.C.R.R. § 663.5(e)(1): Standards for Freshwater Wetland Permit:**

A permit may be issued if it is determined that the activity:

- ▶ would be compatible with the conservation of the wetland;  
and
- ▶ would result in no more than insubstantial degradation;  
and
- ▶ would be compatible with public health and welfare.

## Freshwater Wetlands: N.Y.S. DEC

### Regulations

#### 6 N.Y.C.R.R. § 663.5(e)(2): Standards for Permit Issuance Continued:

If the proposed activity cannot meet the three tests for compatibility, then a permit may be issued if:

- ▶ For wetland Classes I, II, III and IV, the proposed activity must be compatible with the public health and welfare and be only practicable alternative;
- ▶ For wetland Classes I, II, and III, the proposed activity must minimize degradation, or;
- ▶ For wetland Class IV, the proposed activity must make a reasonable effort to minimize degradation to wetlands.



# Other Items Regulated by the N.Y.S. DEC

## Article 15: Water Resources

- **Stream Disturbances**
  - Statutory Authority: § 15-0501
  - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.2
- **Dams and Impoundment Structures**
  - Statutory Authority: § 15-0503
  - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.3
- **Docks, Moorings or Platforms**
  - Statutory Authority: § 15-0503
  - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.4
- **Excavation and Fill in Navigable Waters**
  - Statutory Authority: § 15-0505
  - N.Y.S. DEC Regulations: 6 N.Y.C.R.R. § 608.5

## Article 25: Tidal Wetlands Act

- Statutory Authority: Article 25
- N.Y.S. DEC Regulations: 6 N.Y.C.R.R. Pt. 661

# Water Quality Certification:

- ▶ **Section 401 of the Federal Water Pollution Control Act/Clean Water Act**

Any applicant for a Federal permit to conduct any activity which may result in any discharge into the navigable waters shall provide the permitting agency a certification from the State in which the discharge originates. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the EPA Administrator.

- ▶ 6 N.Y.C.R.R. § 608.9

- ▶ Park Ridge Neighborhood Ass'n v. Crotty, 38 A.D.3d 903, 832N.Y.S.2d 653 (2d Dept 2002)

# Regulations for N.Y.C.'s Drinking Water Sources (“Watershed Regulations”)

## Statutory Authority:

Art. 11 of the New York State Public Health Law  
§ 24-302 of the New York City Administrative Code





## **Regulations for N.Y.C.'s Drinking Water Sources ("Watershed Regulations")**

### **§ 18-39 of Rules and Regulations for the Contamination, Degradation and Pollution of N.Y.C.'s Water Supply and its Sources:**

- ▶ The construction of an impervious surface within:
  - ▶ the limiting distance of 100 ft. of a watercourse or wetland, or;
  - ▶ within the limiting distance of 300 ft. of a reservoir, reservoir stem, or controlled lake, is prohibited.
- ▶ Storm Water Pollution Prevention Plans required for most development proposals within certain distances of water bodies.

# LOCAL REGULATIONS OF WETLANDS

## Town of Southeast Freshwater Wetlands Law (Ch. 78)

### Wetlands shall include:

- ▶ Soil types that are poorly drained.
- ▶ Lands and submerged lands called marshes, swamps, bogs, and flats supporting aquatic or semi aquatic vegetation.
- ▶ Lands and submerged lands containing remnants of vegetation that is not aquatic or semi aquatic because it has died of wet conditions.
- ▶ Lands enclosed by aquatic or semi aquatic vegetation and dead vegetation, the regulation of which is necessary to protect the aquatic and semi aquatic vegetation.
- ▶ Lands possessing such characteristics less than one acre in size, but are hydrologically connected to and within 50 meters (165 ft.) of other wetlands that, together, exceed one acre.

# Town of Southeast Freshwater Wetlands Law

## Wetland Buffer by Hydrological Soil Group

<b>HSG</b>		<b>Buffer (feet)</b>
A	High infiltration, transmission deeply drained	100
B	Moderate infiltration and transmission and moderately drained	133
C	Slow infiltration, transmission poor to well drained	166
D	Very slow infiltration, transmission, permanent water	200

## Watercourse Buffer by Hydrological Soil Group or Slope Percentage

<b>HSG</b>	<b>Slope%</b>	<b>Buffer (feet)</b>
A or A and B	0-3%; 3-8%	100
B or C	8-15%	100
C or D	15-25%	130
D or E	25-35%	170
F	35-60%	200

## Contact Information

Daniel M. Richmond, Esq.

Partner

LEED Accredited Professional

Zarin & Steinmetz

81 Main Street, Suite 415

White Plains, NY 10601

Tel: (914) 682-7800

Fax: (914) 683-5490

[dmrichmond@zarin-steinmetz.com](mailto:dmrichmond@zarin-steinmetz.com)