

Proposed Regulations on Waters of the United States  
Analysis of Selected Subsections

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# Proposed Regulations on Waters of the United States

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On April 21, 2014, the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed regulations revising the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA) and Corps jurisdictional regulations. While the rule proposes language to a number of sections of the Code of the Federal Register (CFR), this analysis only refers to Part 122, EPA Administered Permit Programs – the National Pollutant Discharge Elimination System or “NPDES” program.

EPA has indicated that the purpose of the proposed regulations is to clarify what waters are (and are not) covered by the CWA and that the new regulations will not have substantial direct effects on the regulated community since they will not significantly change what is currently considered jurisdictional waters or WOTUS.

### Expansion of WOTUS

The proposed regulations begin with the traditional definition of WOTUS, such as those waters that are susceptible for use in interstate or foreign commerce, interstate waters, certain wetlands, territorial seas and impoundments of these waters, and tributaries thereto. But the proposed regulations then expand the definition of WOTUS in the following manner:

- “Adjacent” Waters – The current regulations provide that wetlands adjacent to WOTUS are included, although “adjacent” is not defined. The proposed regulations provide that *all* waters (including wetlands) that are adjacent to

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WOTUS are included. A definition of “adjacent” is also provided in the proposed rules that include *neighboring* waters. “Neighboring” includes waters within the *floodplain* of a WOTUS. “Floodplain” is an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of *moderate to high* water flows. EPA has stated that it will use “best professional judgment” when determining where a floodplain exists.

- “Tributaries” – The current regulations provide that tributaries of a WOTUS are jurisdictional waters, although “tributary” is not defined. The proposed rules keep the same reference but have an expansive definition of what a tributary is, including man-altered or man-made ponds, canals, and ditches, with limited exceptions.
- Waters with “Significant Nexus” – Finally, on a case-specific basis, the proposed regulations provide that other waters and wetlands, alone or in combination with other waters, that have a significant effect on WOTUS in the region, are also considered jurisdictional waters.

### Specific Exclusions

The proposed regulations also define waters that are not considered jurisdictional waters. Ditches are specifically not considered WOTUS under the following circumstances:

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- Ditches that are excavated wholly in uplands, only drain uplands, and have less than perennial flow; and, ditches that do not contribute flow, either directly or through another water, to WOTUS.
- Waste treatment systems, including treatment ponds or lagoons, constructed for water quality improvement purposes designed to meet CWA requirements.

### Assessment

Unless there is a specific exclusion, the proposed revisions will require that the provisions of the NPDES program (including the conditions of Municipal Separate Storm Sewer System permits) apply to ditches, stormwater conveyances and attenuation ponds if they meet certain tests. First, is the water body “adjacent” or has a “significant nexus” to classic WOTUS or a tributary thereof? To be adjacent, the water body must be within a classic WOTUS’s floodplain or is a tributary that is directly *or indirectly* connected to the waterbody. To have a significant nexus, a water body must be within the classic WOTUS’s watershed, the flow from which significantly affects the waterbody.

Thus (unless specifically excluded) a water body that is adjacent to a jurisdictional water is WOTUS. Also, if a water body is not adjacent but has a significant nexus, then that water body is also WOTUS, unless specifically excluded.

Additionally, all tributaries (i.e. ditches and stormwater conveyances) that have a direct connection and contribution to jurisdictional water - even if not “adjacent” or are without a “significant nexus” - will be considered to be WOTUS.

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### Consequences

Given the assessment of the proposed regulations and considering all tests in total, in many areas throughout the southeast the following types of water bodies will now be considered to be jurisdictional waters of the United States:

- Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) within the floodplain of a classic WOTUS; and
- Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) that have a direct connection to WOTUS.

Note that the expansion of the number of jurisdictional waters may be especially pronounced in coastal areas, where ditches may exist that are built in and drain uplands but have significant groundwater inputs. If they have constant flows from groundwater, they could be considered to be WOTUS even if constructed in uplands.

Since the regulations are jointly issued by EPA and the Corps, there are at least two significant consequences of which local governments in Region 4 should be aware:

1. Municipal Separate Storm Sewer System permit requirements and water quality standards must be met in stormwater conveyances and retention structures that

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are determined to be WOTUS, including applicable water quality criteria and other permit conditions.

2. Dredge and fill permitting policies of the Corps will be applicable to stormwater attenuation ponds, drainage ditches and other conveyances that are determined to be WOTUS, even during routine maintenance activities.

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