

Proposed Changes to Clean Water Act Regulations

On April 21, 2014, the Environmental Protection Agency and Army Corps of Engineers proposed these changes to their interpretation of which waters are automatically subject to Clean Water Act regulations without first conducting a “significant nexus” scientific analysis.

“Jurisdictional” by regulation (automatically subject, no analysis required):

- Traditional navigable waters
- Interstate waters
- Wetlands adjacent to either traditional navigable waters or interstate waters
- Non-navigable tributaries to traditional navigable waters that are relatively permanent
- Wetlands that directly abut relatively permanent waters
- Tributaries to traditional navigable waters or interstate waters
- Wetlands and other waters adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters

Jurisdictional if a fact-specific analysis finds a “significant nexus” to regulated waters:

- ~~Tributaries to traditional navigable waters or interstate waters~~
- ~~Wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters~~
- Waters that fall under the “other waters” category of the regulations and are ~~a) physically proximate or b)~~ not physically proximate to other jurisdictional waters

Generally not jurisdictional under current Clean Water Act regulations:

- Wet areas that are not tributaries or open waters and do not meet the agencies’ regulatory definition of “wetlands”
- Waters excluded from coverage by under the Clean Water Act by existing regulations
- Waters that lack a “significant nexus” where one is required for a water to be protected
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created incidental to construction activity
- Groundwater, including groundwater drained through subsurface drainage systems
- Gullies and rills, and swales and ditches that are not tributaries or wetlands.

NAR Fact Sheet

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Code of Federal Regulations, Title 33, Section 328.3 - Definitions:

~~For the purpose of this regulation these terms are defined as follows:~~

(a) ~~For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this definition, ¶~~the term *waters of the*

United States means:

(1) All waters which are currently used, or 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;

(2) All interstate waters, including interstate wetlands;

~~(3) The territorial seas; All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or 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; or~~

~~(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or~~

~~(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;~~

(4) All impoundments of waters ~~otherwise defined as waters of the United States under the definition identified in paragraphs (a)(1) through (3) and (5) of this section;~~

(5) ~~All ¶~~tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

~~(6) The territorial sea; All waters, including wWetlands, adjacent to waters ~~(other than waters that are themselves wetlands)~~ identified in paragraphs (a)(1) through (5) of this section; and~~

~~(7) 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 (a)(1) through (3) of this section.~~

~~(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of the 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.~~

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~~Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.~~

~~(b) The term *wetlands* means 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. Wetlands generally include swamps, marshes, bogs, and similar areas.~~

~~(c) The term *adjacent* means bordering, contiguous, or neighboring. 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 wetlands.”~~

~~(b) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section—~~

~~(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Waters Act~~

~~(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.~~

~~(3) Ditches that are excavated wholly in uplands, drain only to uplands, and have less than perennial flow.~~

~~(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.~~

~~(5) The following features:~~

~~(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;~~

~~(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;~~

~~(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;~~

~~(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;~~

~~(v) Water-filled depressions created incidental to construction activity;~~

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- (vi) Groundwater, including groundwater drained through subsurface drainage systems; and
- (vii) Gullies and rills and non-wetland swales.

(c) Definitions—

(1) *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.”

(2) *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)(a) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *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.

(4) *Floodplain*. The term *floodplain* means 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.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.

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(6) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater 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.

(7) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.