

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

February 14, 2019

# Today's Presentation

- Background on the “waters of the United States” (WOTUS) rulemaking process.
- Proposed revised definition of WOTUS and exclusions from definition.
- Overview of supporting documents for proposal.
- Next steps.

# Background: Executive Order 13778

- On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
- Calls on EPA and the Army to review the final 2015 Waters of the United States Rule (2015 Rule) and “publish for notice and comment a proposed rule rescinding or revising the rule....”
  - Directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*.

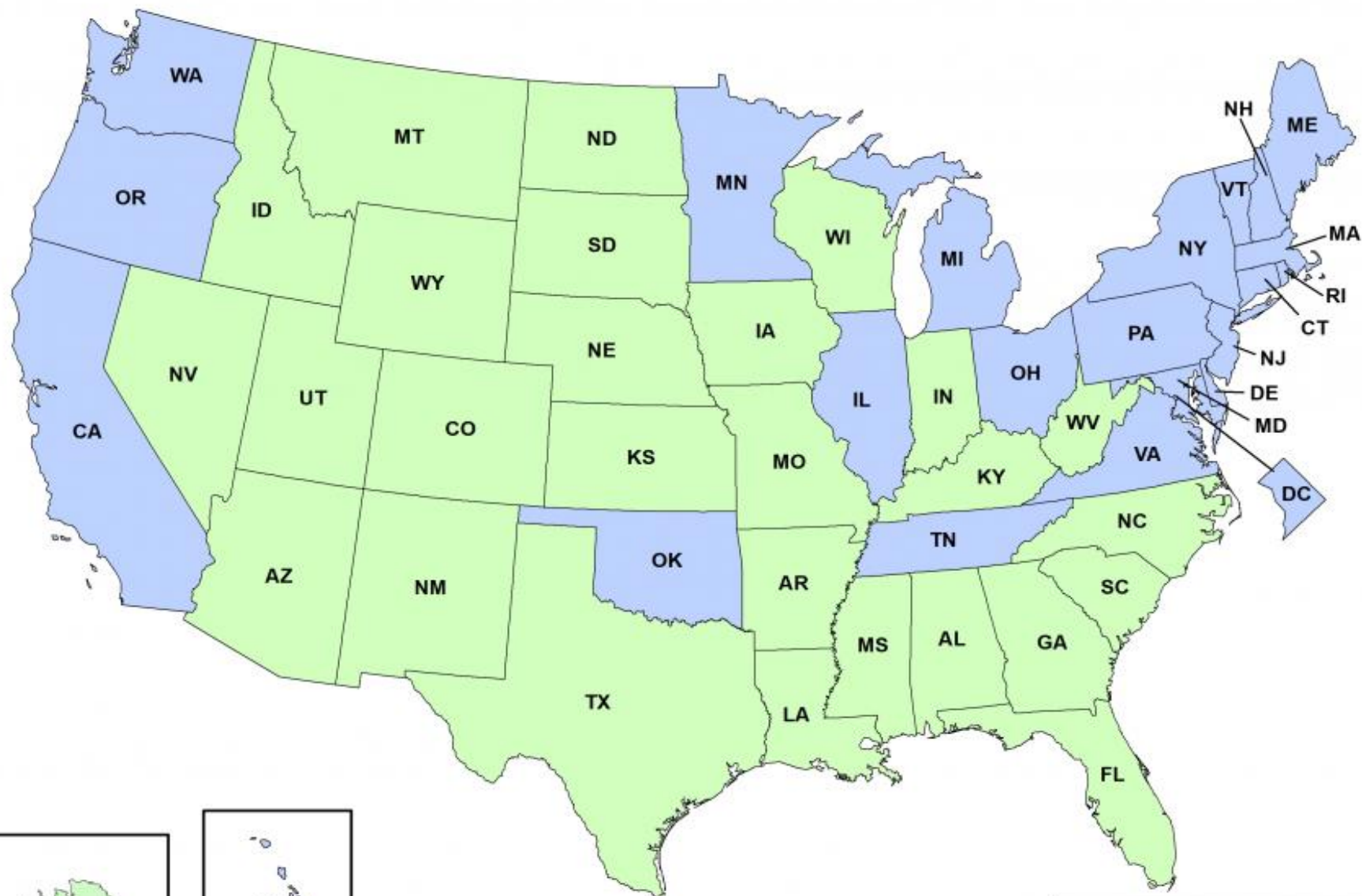
# Background: Rulemaking Process

- Agencies are pursuing a two-step process:
  - Step 1: Publication of a proposed rule to repeal the 2015 Rule and recodify prior regulation.
    - The agencies are currently reviewing the 800,000 comments we received on the Step 1 proposed rule and supplemental notice.
  - Step 2: Development of a revised definition, consistent with the Executive Order.
    - Today's presentation focuses on the Step 2 proposed rule.



# Rulemaking Process: Applicability Date Rule

- **Applicability Date Rule:** Final rule published February 6, 2018, with an immediate effective date. This meant that the 2015 Rule would not become applicable before February 6, 2020.
  - Direction - Until February 6, 2020 or a new rule defining WOTUS was finalized, the agencies would continue to implement the regulatory definition in place prior to the 2015 Rule, consistent with the 2003 and 2008 guidance, in light of the *SWANCC* and *Rapanos* decisions.
  - On August 16, 2018, district court in South Carolina enjoined and vacated the Applicability Date Rule nationwide. On November 26, 2018, district court in Washington vacated the Applicability Date Rule nationwide. Did not alter which rule applies where. Currently, 2015 Rule in effect in 22 states, DC, and Territories, pre-2015 practice in 28 states. (See map.)



The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on September 18, 2018.

#### Applicable Definition

- 2015 Clean Water Rule\*
  - Pre-2015 Regulations and Guidance
- \* Also applicable in the U.S. territories

# Goals of Proposed Rule

- Respond to Executive Order 13778, which calls for rescinding or revising the 2015 definition of WOTUS.
- Increase predictability, consistency, and regulatory certainty through a clearer definition of WOTUS.
- Restore and maintain water quality while respecting primary state and tribal authority over their land and water resources.
- Operate within legal limits established by Congress as clarified by the Supreme Court.



# Overview of Proposed Rule to Revise the Definition of WOTUS

- Proposed regulatory text:
  - List of categories of waters that would be WOTUS
  - List of categories of waters/features that would not be WOTUS
  - Definitions section
- Supporting documents:
  - Resource and Programmatic Assessment (RPA)
  - Economic Analysis (EA)



# Overview: Waters Proposed to Be WOTUS

- Traditional navigable waters, including territorial seas
- Tributaries
- Certain ditches
- Certain lakes and ponds
- Impoundments
- Adjacent wetlands

# Proposed Categories of WOTUS

## **Traditional Navigable Waters (TNWs)**

- TNWs are waters that meet any of the conditions in (a)(1) -- waters currently used, used in the past, or susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to ebb and flow of tide.
- Incorporates territorial seas, which had previously been its own category although also a TNW.
- Essentially the same as 2015 Rule and pre-2015 practice.

# Proposed Categories of WOTUS

## Tributaries to TNWs

- “Tributary” means river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a TNW in a typical year, either directly or indirectly through another WOTUS or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream.
- A tributary is jurisdictional if it:
  - flows through a culvert, dam, or similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break
  - is altered or relocated, so long as it continues to satisfy the tributary definition.
- Differs from 2015 Rule by excluding ephemeral flows and not including OHWM in tributary definition. Pre-2015 practice requires a case specific assessment of non-relatively permanent waters (e.g., streams that do not flow at least seasonally) to determine jurisdiction.



# Proposed Categories of WOTUS

## Ditches

- Proposal defines ditch as “an artificial channel used to convey water.”
- Ditches are jurisdictional where they:
  - are a TNW, including subject to ebb and flow of the tide;
  - satisfy the conditions of the tributary definition, and are either:
    - constructed in a tributary, or relocate or alter a tributary; or are
    - constructed in an adjacent wetland.
- Differs from 2015 Rule which did not define ditch and excluded fewer ditches. Pre-2015 practice excludes ditches excavated wholly in and draining only upland that have less than relatively permanent flow.



# Proposed Categories of WOTUS

## **A Lake or Pond is jurisdictional where it:**

- Is a TNW;
  - Contributes perennial or intermittent flow to a TNW in a typical year, either directly or indirectly through another WOTUS or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream; or
  - Is flooded by a WOTUS in a typical year.
- 2015 Rule text and pre-2015 practice did not explicitly address lakes and ponds as a separate category. Under the 2015 Rule, lakes and ponds could be jurisdictional as TNWs, adjacent waters, or tributaries. Pre-2015 practice is similar to 2015 Rule except pre-2015 practice did not treat lakes and ponds as adjacent waters.

# Proposed Categories of WOTUS

## **Impoundments of WOTUS are jurisdictional.**

- Alteration of a WOTUS by impounding would not change its jurisdictional status.
- Most impoundments do not cut off a connection between upstream tributaries and a downstream TNW. As a result, the upstream tributaries would remain jurisdictional under the proposal.
- No change from the 2015 Rule and pre-2015 practice.

# Proposed Categories of WOTUS

## Adjacent Wetlands

- Defined as wetlands that abut or have a direct hydrologic surface connection to a WOTUS in a typical year.
  - Direct hydrologic surface connection occurs as a result of inundation from a WOTUS to a wetland or via perennial or intermittent flow between a wetland and a WOTUS.
  - Wetlands physically separated by upland, dikes, etc., and lacking a direct surface hydrologic connection are not adjacent.
- Several differences, such as 2015 Rule used distance thresholds to define “neighboring,” a key concept in the 2015 Rule definition of “adjacent.” Pre-2015 practice considered hydrology as well as ecologic factors.



# Interstate Waters

**Interstate waters** are not a separate jurisdictional category in the Step 2 proposal. These waters must meet one of the 6 categories of jurisdictional waters to be WOTUS.

- Change from 2015 Rule and pre-2015 practice, where interstate waters are a separate category of WOTUS.
- Agencies are soliciting comment on whether to include as distinct category, and on rationale and potential effects not having a separate category may have on aquatic resources.



# Waters/Features Excluded from Proposed WOTUS Definition

- Waters not listed as WOTUS
- Groundwater
- Ephemeral features and diffuse stormwater run-off
- Ditches not identified as WOTUS
- Prior converted cropland (PCC)
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes and ponds constructed in upland
- Water-filled depressions created in upland incidental to mining or construction activity
- Stormwater control features constructed in upland
- Wastewater recycling structures constructed in upland
- Waste treatment systems

# Proposed Exclusion from WOTUS

## **Waters not listed as WOTUS**

- Categorically excludes all waters not listed as WOTUS in paragraph (a) of the regulation.
- Clarifies that a feature is not jurisdictional just because it is not explicitly excluded in paragraph (b).
- Intended to avoid confusion caused by features being called different names across the country.

# Proposed Exclusion from WOTUS

## Groundwater

- Excludes groundwater, including groundwater drained through subsurface drainage features.
- Does not exclude instances where groundwater emerges and becomes baseflow for intermittent or perennial streams.
- The agencies have never interpreted WOTUS to include groundwater, and the proposed approach is unchanged from 2015 Rule and pre-2015 practice.



# Proposed Exclusion from WOTUS

## **Ephemeral Features and Diffuse Stormwater Run-off**

- Emphasizes that ephemeral streams and other ephemeral features are not WOTUS under the proposed rule.
- Agencies are clarifying that directional sheet flow over upland is excluded.
- No categorical exclusion for ephemeral features in 2015 Rule or pre-2015 practice; ephemeral tributaries were jurisdictional by rule under 2015 Rule; pre-2015 practice required case specific significant nexus determination for less than seasonal streams to be found jurisdictional as a tributary.
- No specific exclusion for sheet flow in 2015 Rule or pre-2015 practice.



# Proposed Exclusion from WOTUS

## **Ditches Not Identified as WOTUS**

- All ditches excluded from WOTUS except for three instances identified as jurisdictional in paragraph (a) (i.e., TNW, former tributary, constructed in adjacent wetland).
- Approach balances exclusion with need to preserve jurisdiction over tributaries and adjacent wetlands.
- Non-jurisdictional ditches may be point sources.
- 2015 Rule and pre-2015 practice generally excluded ditches excavated wholly in uplands, draining only uplands, and having less than relatively permanent flow.

# Proposed Exclusion from WOTUS

## **Prior Converted Cropland (PCC)**

- Continues longstanding exclusion for PCC.
- Proposed definition indicates PCC exclusion no longer applies for CWA purposes where cropland is abandoned and land has reverted to wetlands.
  - Considered abandoned when not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.
  - PCC cropland left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use and thus maintains excluded PCC status.
- Change from implementation of 2015 Rule and pre-2015 practice, in which either abandonment or change in use is considered.

# Proposed Exclusion from WOTUS

## **Artificially Irrigated Areas**

- Exclude artificially irrigated areas that would revert to upland should irrigation cease.
- Exclusion only applies to area being directly artificially irrigated.
- Proposal adds cranberry and rice fields to exclusion; otherwise consistent with 2015 Rule and pre-2015 practice.



# Proposed Exclusion from WOTUS

## **Artificial Lakes and Ponds Constructed in Upland**

- Excludes water storage reservoirs, farm ponds, log cleaning ponds, and cooling ponds constructed in upland that are not considered jurisdictional under paragraph (a)(4) as a lake or pond, or an (a)(5) impoundment.
- Removes language regarding “exclusive use” of the pond “for such purposes as stock watering, irrigation, settling basins, or rice growing,” which is consistent with the 2015 Rule and clarifies pre-2015 practice.



# Proposed Exclusion from WOTUS

## **Water-Filled Depressions Created in Upland**

- Excludes water-filled depressions created in upland incidental to mining or construction activity.
- Pits excavated in upland for purpose of obtaining fill, sand, or gravel are excluded as a type of “mining.”
- Such depressions do not become WOTUS if abandoned.
  - Similar to 2015 Rule; pre-2015 practice would exclude such depressions unless abandoned.
- Mining was explicitly added to the 2015 Rule exclusion compared to pre-2015 practice.

# Proposed Exclusion from WOTUS

## **Stormwater Control Features in Upland**

- Excludes features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.
- Exclusion helps to avoid disincentives to environmentally beneficial trends such as green infrastructure for controlling stormwater.
- Excluded features may be point sources.
- Similar to 2015 Rule and pre-2015 practice.

# Proposed Exclusion from WOTUS

## **Wastewater Recycling Structures in Uplands**

- Excludes wastewater recycling structures constructed in upland, such as detention, retention, and infiltration basins and ponds, and groundwater recharge basins.
- Proposal seeks to avoid discouraging, or creating barriers to, water reuse and recycling projects.
- Clarifies the agencies' current practice that waters and water features used for water reuse and recycling would not be jurisdictional when constructed in upland.



# Proposed Exclusion from WOTUS

## Waste Treatment Systems

- Proposal newly defines excluded waste treatment systems: 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 may be point sources.
- Differs from 2015 Rule and pre-2015 practice by incorporating a definition of “waste treatment system.”

# Notes for Exclusions Generally

- Certain excluded features may convey perennial or intermittent flow to a downstream jurisdictional water, thereby serving as a connection for upstream and downstream jurisdictional tributaries.
- Excluded features that connect jurisdictional waters do not become WOTUS themselves.
- Where an exclusion is for a feature created in upland, the feature must be created wholly in upland to be categorically excluded; features partially constructed in upland could potentially meet definition of WOTUS. However, the mere interface between the excluded feature constructed wholly in upland and a WOTUS would not make that feature jurisdictional.
- Some excluded features might be point sources.

# Geospatial Datasets of WOTUS

- During extensive pre-proposal outreach, agencies heard numerous calls for enhancing geospatial data tools, while building off existing federal, state, and tribal expertise.
- Proposal solicits comment on how to create a regulatory framework that would authorize interested states, tribes, and federal agencies to develop geospatial datasets of waters within their borders.
  - Datasets would be subject to EPA and Army Corps approval before use for jurisdictional purposes.
  - Datasets could identify both WOTUS and non-WOTUS.
- No framework in proposed rule; would be focus of subsequent rulemaking informed by public comment.



# Supporting Documents: Resource and Programmatic Assessment (RPA)

- Evaluates, where possible, how proposal could affect categories of aquatic resources across the country – identifies data limitations.
- Discusses potential effects of the proposed rule on CWA programs.
- Discusses state and tribal programs and how they currently address waters that are and are not WOTUS.
- State “snapshots” that summarize the status of their laws and programs.

# Supporting Documents: Economic Analysis

- Evaluates costs and benefits in two stages:
  - Stage 1 updates the economic analysis from the 2015 Rule and 2017 Step 1 proposal to reflect state programs, revised wetlands valuation, and other enhancements.
  - Stage 2 considers potential effects to 311, 402, and 404 programs and provides three case studies to analyze potential effects.
  - Largely qualitative due to data limitations; monetizes national cost savings and forgone benefits of Stage 1 analysis and for 404 program for Stage 2 analysis.

# Additional Information

- Step 2 proposed rule signed on December 11, 2018. It was published in the Federal Register February 14, 2019.
- The Federal Register notice for the proposed rule is available at: <https://www.epa.gov/wotus-rule/revised-definition-waters-united-states-proposed-rule>. Additional information and documents relating to the proposed rule are available at: <https://www.epa.gov/wotus-rule/step-two-revise>.
- **The 60-day public comment period closes April 15, 2019.** Written comments can be submitted via the public docket, identified by Docket ID No. EPA-HQ-OW-2018-0149, to the Federal eRulemaking Portal: <https://www.regulations.gov>.
- The agencies solicit comment on all aspects of the proposed rule, Resource and Programmatic Assessment, and Economic Analysis. Also, the preamble and supporting documents highlight specific issues and considerations for comment.



# Public Hearing – February 27-28

- The agencies will hold a public hearing on February 27 beginning at 4:00 PM (CST) and concluding no later than 8:00 PM, and then on February 28 beginning at 9:00 AM (CST) and concluding 12:00 PM at **The Reardon Convention Center in Kansas City, Kansas.**
- For additional information and to register, please visit: <https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-public-hearing>.
- **The last day to pre-register to speak at the hearing will be February 21, 2019.** Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk, pending availability.



[www.epa.gov/wotus-rule](http://www.epa.gov/wotus-rule)