

# WOTUS Federal Register Notice 2019-00791 Comments

## DEPARTMENT OF DEFENSE

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

## ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA-HQ-OW-2018-0149; FRL-9988-15-OW]

RIN 2040-AF75

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

Thank you for providing an opportunity to comment on the proposed revised definition for Waters of the United States (WOTUS; Docket ID No. EPA-HQ-OW-2018-0149). I wish to have the following comments entered into the official record for the proposed changes to the Clean Water Act (CWA) entailed with this docket number. I have been working as a wetlands and wildlife biologist in Washington State since 1990 and am certified by the Society of Wetland Scientists as a Professional Wetland Scientist; PWS No. 1802.

There are several provisions with the proposed WOTUS changes that I believe are not consistent with the CWA legal record, agency practice or wetland science and, therefore, will not meet the principal CWA objective: “[to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters] (CWA § 101.(a)). I recommend that the current CWA definitions in CWA § 328.3 not be revised and retained in their current form.

First, as the Connectivity Report<sup>1</sup> discusses in a number of sections (see pp. ES-2, 2-29 and 3-1) and as acknowledged in the Federal Register notice for the proposed WOTUS definition, ephemeral waters play an important role in maintaining the quality and quantity of water in downstream waters, including navigable waters. This hydrologic support from ephemeral waters is essential to sustaining the volume and quality of navigable waters and all of the attendant economic and ecological benefits associated these jurisdictional waters, including commercially important fisheries, municipal water supply, water-dependent commerce and recreation. Therefore, I ask that ephemeral waters be retained as WOTUS if those ephemeral waters are a tributary to another class of WOTUS. As the U.S. Supreme Court ruled in the *SWANCC* decision, isolated waters with no surface connection to another WOTUS should not be regulated as a WOTUS. Any stream or water, including wetlands, with a surface water connection to a WOTUS should also be regulated as a WOTUS, consistent with the current CWA definitions found in § 328.3.a (1)–(7) and U.S. Army Corps of Engineers (Corps) practice. This should apply to perennial, intermittent and ephemeral waters.

Second, the proposed definition of *adjacent wetlands* in § 328.3(c)(1) needs to be revised to include saturation as well as inundation from a water listed in paragraphs (a)(1) through (5): “[A] direct hydrologic surface connection occurs as a result of inundation or saturation from a paragraph (a)(1) through (5) water to a wetland or via ~~perennial or intermittent~~ flow between a

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<sup>1</sup> U.S. EPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)*. U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-11/098B, 2013.

wetland and a paragraph (a)(1) through (5) water.” Failing to include saturation in this definition is not consistent with wetland or shallow subsurface hydrology nor the longstanding wetland regulatory definition and practice, which considers soil water within 12 inches of the surface, in at least 5 out of 10 years, to be wetland hydrology. There is frequently a saturated zone that meets the wetland hydrology criterion fringing water bodies; a zone that is not inundated as frequently yet still has waterlogged soils that are anaerobic and reduced. Including saturation in the adjacent wetlands definition will simplify jurisdictional determinations and allow greater predictability for regulatory staff and the public. Not including saturation in the definition will greatly complicate federal jurisdictional determinations and project review for sites.

Third, the proposed exclusion (and definition) of groundwater should be clarified by a statement that groundwater does not include shallow subsurface water found within 12 inches of the surface, in a typical year. Since for wetland delineation purposes, water within 12 inches of the ground surface is considered to be surface water, clarifying that groundwater is found below this depth will help make delineations and federal jurisdictional determinations easier and more straightforward, improving project review and turnaround. For the purposes of CWA administration, groundwater should be defined as water found within the soil or substrate, the upper extent of which is deeper than 12 inches below the ground surface. Regulating shallow subsurface water (within 12 inches of the surface) will not encroach on state and local regulation of wetlands as this has been the federal regulatory standard for decades and should continue to be so. There is frequently a shallow subsurface wetted fringe abutting waters that directly communicates with the water body that shares the same water quality conditions and responds to changes volume changes in the water body. Failing to include this saturated zone in federal jurisdiction, including cases where a berm or road bed precludes wetland inundation from the water body, will not protect water quality and, therefore, saturation needs to be included in the definition of an adjacent wetland.

Comments on other proposed changes include the following:

“Typical year” should not be defined in the adopted rule. The current standard of “at least 5 out of 10 years” is sufficient to define wetland hydrology, has been the accepted regulatory standard for decades and is well understood to be “normal circumstances” by agency staff and the regulated public.

The “significant nexus” standard should be retained as part of the WOTUS definition as this standard speaks to the potential impacts of a given water on downstream water quality and, in some cases, quantity. Corps staff are well versed in making jurisdictional determinations using this standard.

“Tributaries” should be viewed as any water that contributes flow to a traditional navigable water or territorial sea in a typical year. For intermittent flow, “seasonal” could be included parenthetically within the definition as currently proposed in the “intermittent” definition found in § 328.3(c)(5). Three months as a period of minimum flow should be included in the definition of “tributary” and “intermittent” as well as including “the lateral extent of a tributary is established by its ordinary high water mark” in the tributary definition.

“Ditches” should not be defined as a separate category of WOTUS but should be considered as a tributary (when applicable), as is the current practice. Many ditches capture and convey flow from naturally occurring streams that may transect uplands and, in some settings (roadside or agricultural ditches) ditches can also be a significant source of pollutants. While there may be some justification for not including as WOTUS ditches constructed wholly in upland and that do

not intercept natural stream flow or wetlands. Where ditches discharge to a WOTUS they are functioning as a tributary and should be regulated as such. Including a temporal flow requirement for ditches does not seem necessary nor would it improve permit review.

Lakes and ponds that contribute flow to a WOTUS should also be classified as regulated tributaries, regardless of the duration of flow during a normal year.

For adjacent wetlands, as discussed above, a “direct hydrologic surface connection” needs to include saturation as well as inundation from a WOTUS. Not including saturation as a WOTUS regulatory criterion is not consistent with conditions in the field or delineation standards and will significantly complicate jurisdictional determinations for adjacent wetlands. Since this is and has been the federal standard for determining wetlands for several years, this will not be an encroachment on state and local regulatory authority; it simply maintains the status quo. Also, limiting inundation to a wetland/WOTUS overtopping upland or a constructed barrier fails to account for instances when water is flowing through the upland (shallow subsurface) or barrier. In recent years, some road projects bisecting wetlands have been constructed with a permeable base that allows surface water to pass through the road base, which would also constitute inundation.

The wetland section of the notice (p. 4188) references Cowardin et al. (1979; *Classification of Wetlands and Deepwater Habitats of the United States*) for wetland classifications. An updated second edition of Cowardin et al. (1979) was published in 2013 (Federal Geographic Data Committee. 2013. Classification of wetlands and deepwater habitats of the United States. FGDC-STD-004-2013. Second Edition. Wetlands Subcommittee, Federal Geographic Data Committee and U.S. Fish and Wildlife Service, Washington, DC.). To ensure consistency with current wetland science, I would recommend updating the wetland classification citation to the 2013 edition.

Prior converted cropland (PCC) – For abandonment of PCC, the agencies should use a change in use analysis (non-agricultural use or filling that functionally eliminates any wetland features and functions, such as crushed rock fill for a parking area) as well as evidence that a site is no longer in agricultural production, such as the establishment of woody vegetation. The five-year timeframe for agricultural use is appropriate and a formal determination from NRCS should be the only means for designating a site PCC.

Thank you again for providing this opportunity to comment on this important matter.

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