

# 2018 Proposed Definition of Waters of the U.S.

## New WOTUS Definition Marks Significant Improvement

The definition of “waters of the United States” (WOTUS) is of critical importance to the home building industry. Builders must regularly obtain state and federal permits to discharge stormwater and place dredge and fill materials into water and wetland features that meet the regulatory definition of a WOTUS.

NAHB has advocated for a WOTUS definition that achieves the goals of the Clean Water Act, follows Congress’s intent, adheres to prior Supreme Court rulings, and can be consistently applied in the field. The 2015 definition failed to address longstanding problems under the original WOTUS regulatory definition finalized in 1986. Instead, the 2015 rule significantly expanded the area subject to federal jurisdiction by capturing more isolated wetlands, ephemeral streams and even man-made roadside drainages ditches.

On Dec. 11, 2018, the Trump administration proposed a new WOTUS definition, released by the Environmental Protection Agency and the U.S. Army Corps of Engineers (“the agencies”), which is a significant improvement over these prior regulatory WOTUS definitions.

### **Key Elements of the Proposed Rule**

The proposed WOTUS rule includes:

- Traditional navigable waters
- Certain tributaries, lakes, and ponds
- Impoundments of jurisdictional waters
- Wetlands that are adjacent (i.e., touching) jurisdictional waters
- A limited subset of ditches

Certain waters are excluded, including:

- Most ditches, all ephemeral wetlands and streams (i.e., waterbodies that contain water only after it rains)
- Groundwater
- Prior converted cropland
- Artificial lakes and ponds excavated in uplands
- Stormwater control measures
- Some wastewater and waste treatment systems

The proposal also includes new or revised definitions for several key terms (see Figure 1).

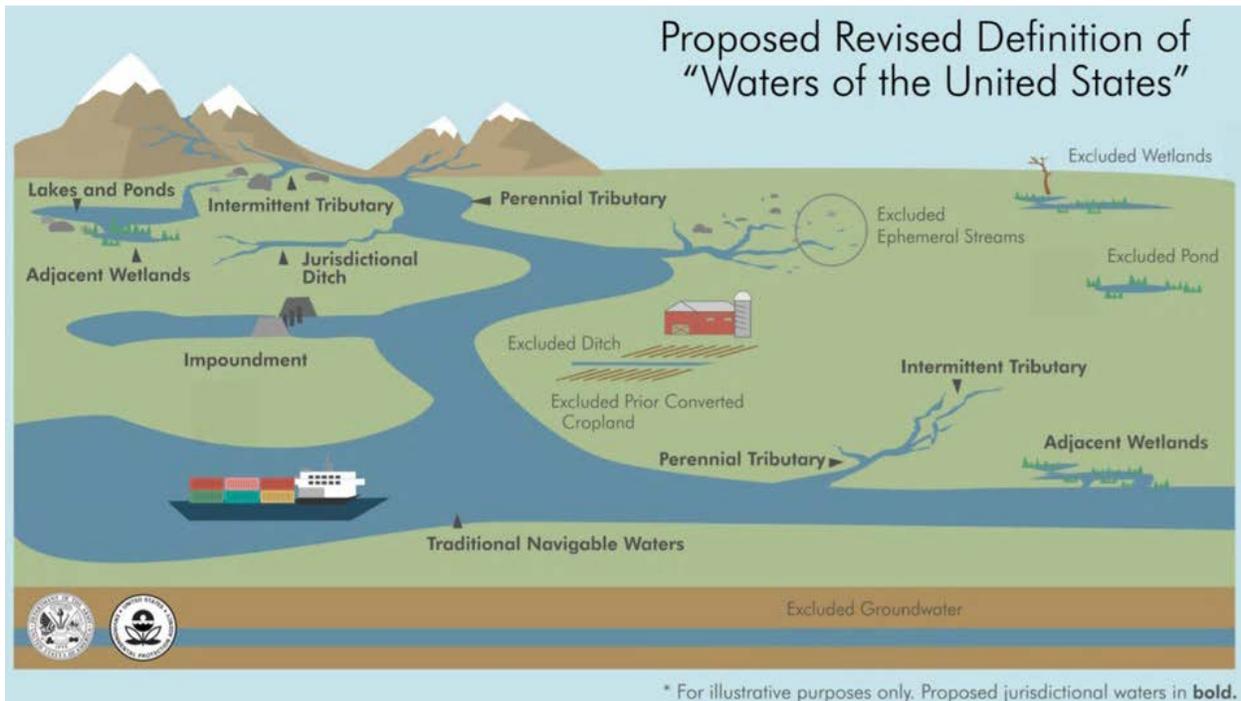


Figure 1: Proposed Revised Definition of "Waters of the United States." Modified from U.S. EPA. Available at <https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-infographic>.

Compared to previous WOTUS definitions, key changes include:

1. **Broader ditch exclusions:** The proposed rule excludes all ditches unless they satisfy the conditions of a traditional navigable water, alter an existing tributary or are constructed in an adjacent wetland and meet the definition of tributary. For example, all ditches that connect to a traditional navigable water above the tidal influence zone are non-jurisdictional, while those ditches connected to a traditional navigable water that is subject to the ebb and flow of the tide are jurisdictional.

The new ditch exclusions differ significantly from the 2015 rule, which regulated all ditches unless they were: 1) excavated in uplands, drained only uplands, **and** had less than perennial flow or 2) did not contribute flow to an otherwise jurisdictional water. As a result, ditches with ephemeral flows could become jurisdictional. Further, under the 2015 rule, ditches could make isolated wetlands jurisdictional by connecting them to other jurisdictional waters.

2. **New definition of tributary:** To be jurisdictional, the proposed rule requires a tributary to contribute perennial or intermittent flow directly or indirectly (i.e., through another waterbody) to a traditional navigable water.
  - The focus on perennial and intermittent flow is narrower than the 2015 rule, which only required a tributary to contribute "flow." That broad definition encompassed ephemeral features that formed from rain or snowfall—features that are excluded in the proposed rule.
  - The exclusion of ephemeral features is further reinforced in the proposal by a new definition for "intermittent" that requires flow "more than in direct response to precipitation."
3. **New definition of adjacency:** Under the proposed rule, only those "adjacent wetlands" that abut or

have a direct hydrologic surface connection to a jurisdictional water are to be deemed jurisdictional.

- The focus on wetlands is narrower than the 2015 rule, which covered “adjacent **waters**,” including wetlands, ponds, lakes, oxbows, impoundments, and similar waters.
- In the proposed rule, “abut” means to “touch at least at one point or side of a water” and is more consistent with Justice Scalia’s opinion in *Rapanos* than the previous rules.
- As a result of the new definition, the problematic term “neighboring” from the 2015 rule is eliminated. In the 2015 rule, “neighboring” was expansively defined to include features or portions of them located within the 100-year floodplain and 1,500 feet of a jurisdictional water. These concepts were extremely difficult to apply in the field.

**4. Elimination of the “significant nexus” test:** The proposed rule defines WOTUS to encompass traditional navigable waters and features that contribute surface perennial or intermittent flow to such waters. As a result, no significant nexus test for isolated features is necessary.

- Due to removal of the significant nexus test, “similarly situated” waters are no longer relevant. Under the 2015 rule, broad swaths of isolated features could become jurisdictional if found to have a connection to a jurisdictional water through a significant nexus analysis.
- Likewise, the proposed rule does not automatically extend jurisdiction to waters within a given area. The 2015 rule extended federal regulation to waters within the “100-year floodplain” or “within 4,000 feet” of another jurisdictional water when just a portion of them were found have a connection through a significant nexus analysis.

**5. New definition of upland:** The proposed rule defines “upland” as land area that does not have all three wetland factors (i.e., hydrology, hydrophytic vegetation and hydric soils).

The new definition prevents land that meets fewer than all three of the wetlands criteria from being delineated as wetlands. Previously, if land had wetland vegetation and wetland soils, some delineators would assume that wetland hydrology was present even if it was not observed and deem the area a regulated wetland.

**6. Exclusions:** In addition to ephemeral features, the proposed rule maintains the exemptions for prior converted cropland and stormwater control measures. In addition, it adds an exemption for “water-filled depressions” created in uplands due to construction or from excavation to obtain fill.

### Proposal’s Impact on Home Builders

The proposed rule will provide many benefits to home builders compared to previous definitions—mostly in the form of more consistency, predictability, and the reduced need for obtaining federal wetlands permits (See Appendix I). The overall wetlands area subject to jurisdiction would decrease since the new definition excludes all ephemeral features, limits adjacency to only wetlands that directly touch a traditional navigable water or have a surface water connection to a traditional navigable water, and removes the ability of the Corps to assume that scattered wetlands within an area can be automatically deemed jurisdictional.

For home builders, this will keep some projects within the half-acre threshold for Nationwide General Permits, reducing the need for more expensive and time-consuming individual permits. The elimination of the significant nexus test will also save money and provide consistency to builders across geographic areas.

### **Potential Consequences and Next Steps**

Though the rule appears to achieve many of EPA's goals, it could cause states to reexamine their water and wetlands protection laws and potentially lead some states to consider expanding the areas subject to permitting requirements due to the perceived narrowing of federal jurisdiction. Currently, 25 states regulate waters more broadly than required by the Clean Water Act. Although 19 of the remaining states have adopted limitations – such as property rights acts or “no more stringent than” federal requirements laws – adoption of legislation, rule changes, and/or guidance documents could be used to expand state authority.

NAHB will continue to work closely with our members and the agencies during the comment period to collect and provide feedback as we advocate for a rule that provides a clear definition of what constitutes waters of the United States, which does not encompass man-made systems or remote features with marginal ecologic value and is not beyond congressional intent of the Clean Water Act.

If you have any questions or need more information, please contact Michael Mittelholzer at 800-368-5242 x8660 or Evan Branosky at x8662.

## Appendix I: Comparison of Previous and Proposed WOTUS Definitions

1986 Rule (33 CFR 328.3)	2015 Rule (80 FR 37106, June 29, 2016)	Proposed Rule	Notes
<b>Category 1:</b> Traditional navigable waters	<b>Category 1:</b> Traditional navigable waters	<b>Category 1:</b> Traditional navigable waters including the territorial seas	<b>Proposed Rule</b> <ul style="list-style-type: none"> <li>Adds territorial seas to the definition of traditional navigable waters.</li> <li>Removes the interstate waters and wetlands category.</li> </ul>
<b>Category 2:</b> Interstate waters and wetlands	<b>Category 2:</b> Interstate waters and wetlands	<b>Category 2:</b> Tributaries of Category 1 waters	<b>Proposed Rule</b> <ul style="list-style-type: none"> <li>Defines “tributary” to mean surface water flowing perennially or intermittently during a typical year</li> </ul>
<b>Category 3:</b> Waters that could affect interstate or foreign commerce	<b>Category 3:</b> The territorial seas	<b>Category 3:</b> Ditches that are Category 1 waters or alter an existing tributary, or are constructed in an adjacent wetland and meet the definition of tributary	<b>Proposed Rule</b> <ul style="list-style-type: none"> <li>Excludes ditches unless they meet the categorical description, including ephemeral and non-tidal ditches, and those that connect to isolated wetlands.</li> </ul>
<b>Category 4:</b> Impoundments of jurisdictional waters	<b>Category 4:</b> Impoundments of jurisdictional waters	<b>Category 4:</b> Lakes and ponds that are Category 1 waters or contribute perennial/intermittent flow to them;	<b>Proposed Rule</b> <ul style="list-style-type: none"> <li>Does not include lakes and ponds with ephemeral flow to Category 1 waters.</li> </ul>
<b>Category 5:</b> Tributaries of Category 1-4 waters	<b>Category 5:</b> Tributaries of Category 1-3 waters	<b>Category 5:</b> Impoundments of Category 1-4 and Category 6 waters;	<b>2015 Rule</b> <ul style="list-style-type: none"> <li>Uses definition of “tributary” that includes ephemeral features and most ditches.</li> </ul>
<b>Category 6:</b> The territorial seas	<b>Category 6:</b> Waters adjacent to Category 1-5 waters	<b>Category 6:</b> Wetlands adjacent to Category 1-5 waters;	<b>2015 Rule</b> <ul style="list-style-type: none"> <li>Defines neighboring to include groups of water within a geographic area.</li> <li>Extends adjacency to waters including wetlands, rather than just wetlands.</li> </ul> <b>Proposed Rule</b> <ul style="list-style-type: none"> <li>Defines adjacent to encompass wetlands that touch jurisdictional waters.</li> <li>Narrows jurisdiction from “waters” (including wetlands) to just wetlands.</li> </ul>
<b>Category 7:</b> Wetlands adjacent to Category 1-6 waters	<b>Category 7:</b> Waters with a “significant nexus” including those “similarly situated” to Category 1-3 water		<b>2015 Rule</b> <ul style="list-style-type: none"> <li>Uses “significant nexus” test on a case-by-case basis to establish connection to a jurisdictional water.</li> <li>Extends federal jurisdiction to “similarly situated” but isolated features.</li> </ul> <b>Proposed Rule</b> <ul style="list-style-type: none"> <li>Does not include significant nexus test.</li> </ul>
	<b>Category 8:</b> Waters located within the 100-year floodplain of Category 1-3 waters and all waters within 4,000 ft of a Category 1-5 water with a “significant nexus” to a Category 1-3 water		<b>2015 Rule</b> <ul style="list-style-type: none"> <li>Extends jurisdiction to features within “4,000 ft” and the “100-year floodplain” if they have a significant nexus to a jurisdictional water.</li> <li>Renders a feature jurisdictional when only a portion of it has a significant nexus.</li> <li>Uses areas (i.e., floodplain, 4,000 ft) that are difficult to apply in the field .</li> </ul>