

Preparing to Comply with ‘Waters of the United States’

The Environmental Protection Agency and U.S. Army Corps of Engineers recently issued a final rule that re-defines the “waters of the United States” (WOTUS) and the jurisdictional scope of the Clean Water Act (CWA). The rule is set to take effect Aug. 28, 2015 and replaces guidance issued in 2008 to clarify the scope of federal authority following the 2005 Supreme Court ruling in *Rapanos v. United States*.

What are WOTUS?

The final rule defines eight classes of jurisdictional waters:

- 1) Traditional navigable waters
- 2) Interstate waters
- 3) Territorial seas
- 4) Tributaries of waters identified in (1) – (3) above
- 5) Impoundments of WOTUS
- 6) Waters adjacent to waters identified in (1) – (5) above
- 7) Regional types of wetlands (e.g., prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands) provided they have a significant nexus to a water identified in (1) – (3) above
- 8) Waters in the 100-year floodplain or within 4,000 feet of a water identified in (1) – (5) above provided they have a significant nexus to a water identified in (1) – (3) above

What are not WOTUS?

The following features are excluded from CWA jurisdiction:

- Waste treatment systems designed to meet the requirements of the CWA
- Prior converted cropland
- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
- Ditches that don’t contribute flow to (1) – (3) waters
- Artificially irrigated areas that would revert to dry land
- Artificial lakes, ponds, reflecting pools, swimming pools and small ornamental features created in dry land
- Water filled depressions created in dry land incidental to construction activity
- Erosional features (gullies, rills, ephemeral features) that don’t meet the tributary definition
- Puddles
- Groundwater
- Stormwater control features created in dry land
- Wastewater recycling structures constructed in dry land

Why does WOTUS matter to builders and developers?

The scope of WOTUS is important to builders and developers because land development and home building involve substantial earth-moving activities – such as clearing and grading – and the CWA requires landowners to obtain a federal permit for activities that result in the discharge of dredged or fill material into WOTUS.

Must my current projects comply?

If you have already received a permit for a project, you will not have to obtain a new one, and your permit is grandfathered from the new definition of WOTUS.

Any permit application deemed complete before June 29, 2015 is also exempt from the new WOTUS definition.

What if I don’t comply?

If you fail to obtain a permit and discharge dredged or fill material into a WOTUS, you will be in violation of the CWA and subject to fines of \$37,500 per day from the time the discharge occurred.

Where can I get more information?

Visit nahb.org/wotus or contact NAHB staff:

Owen McDonough
202-266-8662
omcdonough@nahb.org

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202-266-8230
tward@nahb.org

It is also suggested that you work with your environmental consultant to determine if your property is subject to the new WOTUS definition.

Key Changes to the WOTUS Definition

Concept	Previous Regulation & Guidance	New Regulation	What to Watch For
Tributary	2008 guidance defined as jurisdictional “non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).” However, neither the 1986 regulation nor the 2008 guidance explicitly defined tributary.	Tributary is defined for the first time and includes any water with a bed, banks, and ordinary high water mark (OHWM) that contributes flow (regardless of how often or how much) to a (1) – (3) water. All waters meeting the tributary definition are jurisdictional by rule. Note that a feature need not be “relatively permanent” to meet the tributary definition.	Small, perhaps even dry channels that only flow seasonally or when it rains are likely to meet the tributary definition and could be automatically jurisdictional. Previously, many of these features, particularly those that only flow when it rains, were only jurisdictional if the government could prove they had a significant nexus to downstream waters.
Adjacency	Adjacent wetlands were jurisdictional. Adjacent was simply defined as “bordering, contiguous, or neighboring.” 2008 guidance asserted jurisdiction over “wetlands that directly abut” relatively permanent tributaries of traditional navigable waters.	Adjacent is re-defined and expanded to include all adjacent <i>waters</i> , not just adjacent <i>wetlands</i> . Under the “adjacent” definition, “neighboring” is explicitly defined for the first time and includes all waters within: <ul style="list-style-type: none"> • 100 feet of the OHWM of a jurisdictional water; • the 100-year floodplain and not more than 1,500 feet from the OHWM of a jurisdictional water; • 1,500 feet of the high tide line of a jurisdictional water; and • 1,500 feet of the OHWM of the Great Lakes. If any portion of a water falls within these bright-line distances, the entire water meets the adjacent definition. All waters meeting the adjacent definition are jurisdictional by rule.	Any water or wetland that falls (either entirely or partially) within the bright-line distances of “adjacency” is automatically jurisdictional. Previously, many of these features, including isolated ponds and wetlands, were only jurisdictional if the government could prove that they had a significant nexus to downstream waters. Be particularly aware of the distances in the new regulation and remember that the nearest OHWM or high-tide line by which the distances are measured may not be on your property.
Significant Nexus	2008 guidance applied a case-by-case significant nexus analysis to non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut relatively permanent non-navigable tributaries. The significant nexus analysis assessed flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, <i>and</i> biological integrity of downstream traditional navigable waters.	A case-by-case significant nexus analysis is not needed for non-navigable tributaries, wetlands adjacent to non-navigable tributaries, or wetlands adjacent to but that do not directly abut non-navigable tributaries because all of these features will be jurisdictional by rule under either the tributary or adjacent waters definitions above. A significant nexus test is necessary for (7) & (8) waters. A significant nexus exists when a water significantly affects the chemical, physical, <i>or</i> biological integrity of a (1) – (3) water. Functions (either alone or in combination) relevant to a significant nexus analysis include: <ul style="list-style-type: none"> • Sediment trapping • Nutrient recycling • Pollutant trapping / transformation / filtering / transport • Runoff storage • Contribution of flow • Export of organic matter / food resources • Provision of life cycle dependent aquatic habitat 	If you are working in an area where category (7) waters (e.g., prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands) are present, there is a good chance that a water on your property that fits one of these descriptions will be found to meet the significant nexus test and be jurisdictional. Also, be aware that a significant nexus analysis must be performed on any water that falls (either entirely or partially) within the 100 yr floodplain or within 4,000 foot from the OHWM of the nearest (1) – (5) water. Remember, the nearest (1) – (5) water may not be on your property.

