



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
CATEGORIES OF JURISDICTIONAL WATERS				
Traditional navigable waters (“TNWs”)	(1) All waters which are currently used, 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	(1) All waters which are currently used, 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	(1) All waters which are currently used, 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	<p>No changes to text of current or proposed rules</p> <p>The preamble states that waters are TNWs if they, among other things, are currently used, have historically been used, or are susceptible to being used for commercial recreation</p> <p>Recreational use should not be a standard for determining navigability under the CWA</p> <p>The broader this category is, the broader other categories will be such as tributaries of TNWs and waters “adjacent” to TNWs</p>
Interstate waters	(2) All interstate waters, including interstate wetlands	(2) All interstate waters, including interstate wetlands	(2) All interstate waters, including interstate wetlands	<p>No changes to the text of current or proposed rules</p> <p>The preamble acknowledges that the Supreme Court has never addressed the CWA’s coverage of interstate waters –</p>

¹ Definitions of “waters of the United States” appear in numerous parts of the Code of Federal Regulations, and there is variation among many of the parts. This analysis focuses on the definition in 33 C.F.R. § 328.3.



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				<p>thus, it remains an open question whether <i>non-navigable</i> interstate waters with no connection to interstate commerce are properly jurisdictional</p> <p>The broader this category is, the broader other categories will be such as tributaries of interstate waters and waters “adjacent” to interstate waters</p>
<p>Other waters / case-specific waters</p>	<p>(3) 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 could affect interstate or foreign commerce²</p>	<p>(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</p>	<p>(7) Prairie potholes,³ Carolina bays an Delmarva bays,⁴ pocosins,⁵ Western vernal pools,⁶ and Texas coastal prairie wetlands,⁷ where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section</p> <p>These waters are similarly situated and shall be combined,</p>	<p>Major changes</p> <p>The final rule does not contain an “other waters” provision that is tied to interstate commerce; rather, if a water does not fall within jurisdictional categories (1) through (6), it can still be deemed a WOTUS through a “case-specific” analysis</p> <p>With respect to the five types of regional waters, the agencies</p>

² The regulation specifies that this category “includ[es] any such waters: (1) which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) which are used or could be used for industrial purposes by industries in interstate commerce.”

³ Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
			<p>for purposes of a significant nexus analysis, in the watershed that drains to the nearest (a)(1) through (3) water</p> <p>The above five types of regional waters shall not be combined with any “adjacent” waters when analyzing significant nexus – if any of these five types of waters is also “adjacent,” it is <i>per se</i> jurisdictional and no case-specific analysis is required</p> <p>(8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs</p>	<p>must aggregate them within the entire watershed (of an (a)(1) through (3) water) when analyzing significant nexus; thus, a finding that one has a significant nexus effectively means that all other such waters within that watershed have a significant nexus</p> <p>Category (8) raises the same concerns that the “tributary” and “adjacent” categories do (see below) such as:</p> <ul style="list-style-type: none"> • Difficulty and inconsistency in identifying OHWM; • The use of “desktop tools” to identify OHWM even when one is not identifiable in the field or no longer exists; • Difficulty and inconsistency

⁴ Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

⁵ Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

⁶ Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

⁷ Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
			<p>(a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section</p> <p>For waters determined to have a significant nexus, the <i>entire</i> water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark</p> <p>Waters identified in this paragraph shall not be combined with “adjacent” waters when analyzing significant nexus. If any waters described in this paragraph are “adjacent,” they are <i>per se</i> jurisdictional and no case-specific analysis is required</p>	<p>in determining the boundaries of the 100-year floodplain.</p> <p>The Agencies claim that final rule “greatly reduced” the universe of “other waters” that could be jurisdictional on a case-specific basis compared to the proposal, which would have subjected any water to a significant nexus analysis. However, that claim seems disingenuous given how broadly the agencies have defined “tributary” (see below) and given that only waters more than 4,000 feet from <i>any</i> tributary are excluded.</p> <p>In fact, the final economic analysis states: “The agencies have determined that the <i>vast majority of the nation’s water features</i> are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.” (Economic Analysis at 11) Thus, very few waters have actually been excluded from the potential for</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				case-specific regulation.
Impoundments	(4) All impoundments of waters otherwise defined as waters of the United States under the definition	(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section	(4) All impoundments of waters otherwise identified as waters of the United States under this section	No major changes to current rule, except this category will be much larger due to expansion of “tributaries” and will result in many farm ponds being jurisdictional impoundments.
Tributaries	(5) Tributaries of waters identified in paragraphs (1) through (4)	(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section “Tributary” is newly defined as a water physically characterized by the presence of a bed, banks, and ordinary high water mark (OHWM), which contributes flow, directly or through another water, to an (a)(1) through (4) water. Wetlands, lakes, and ponds are tributaries even without a bed, banks, and OHWM if they contribute flow, directly or indirectly, to an (a)(1) through (4) water Natural or man-made breaks do not sever jurisdictional	(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section “Tributary” is newly defined as a water that contributes flow, either directly or through another water (including any other WOTUS or even non-jurisdictional waters), to an (a)(1) through (3) water that is characterized by the presence of physical indicators of a bed, banks, and OHWM. Physical indicators demonstrate sufficient volume, frequency, and duration of flow to qualify as a tributary Natural or man-made breaks do	Adds new definition of “tributary” to current rule; definition in the final rule is even broader than the proposed rule <i>Actual presence</i> of a bed, banks, and OHWM is not even required; only the “presence of physical indicators” of those features is required Contribution of flow and physical indicators of bed, banks, and OHWM can be identified <i>conclusively</i> (and hence, jurisdiction will be established) through “desktop tools” such as aerial photos, remote sensing or mapping information, light detection and ranging (LiDAR) data, NRCS



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
		<p>status if a bed, banks, and OHWM are identifiable upstream of the break</p> <p>Tributaries can be natural, man-altered, or man-made and includes rivers, streams, lakes, ponds, impoundments, canals, and ditches that are not excluded</p>	<p>not sever jurisdiction so long if a bed, banks, and OHWM are identifiable upstream of the break</p> <p>Can be natural, man-altered, or man-made and includes rivers, streams, canals, and ditches that are not excluded</p> <p>OHWM is defined using the Corps’ existing definition in 33 C.F.R. § 328.3</p>	<p>soil surveys, state or local stream maps, stream gage data, historical water flow records, etc.</p> <p>Jurisdiction can be <i>conclusively</i> established even if bed, banks, and OHWM is absent in the field or no longer exists– this assertion of jurisdiction over <i>historical</i> tributaries directly contradicts the discussion in the proposal’s preamble about how ephemeral features that no longer possess a bed, banks, and OHWM due to pre-CWA activities such as farming will <i>not</i> be viewed as tributaries</p> <p>Flow can be ephemeral, intermittent, or perennial, and distance from navigable waters is irrelevant</p> <p>Heavy emphasis on OHWM is problematic:</p> <ul style="list-style-type: none"> • Many of the OHWM indicators are subjective and can be found anywhere water simply flows across land, even with very small volume, frequency, and duration of



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				<p>flow</p> <ul style="list-style-type: none"> • OHWM has long been confusing and inconsistently applied • The Corps revised OHWM guidance manuals in 2014 without notice and comment, behind the scenes of the WOTUS rulemaking effort <p>Unlike the proposal, the definition of “tributary” in the final rule no longer encompasses lakes, wetlands, or ponds that contribute flow but lack a bed, banks, and OHWM; however, such waters will presumably still be jurisdictional as “adjacent” waters</p>
Territorial sea	(6) The territorial seas	(3) The territorial seas	(3) The territorial seas	Renumbered to (3); no changes between proposal and final
Adjacent	<p>(7) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6)</p> <p>“Adjacent” defined as “bordering, contiguous, or</p>	<p>(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section</p> <p>“Adjacent” definition retained, but new definition of</p>	(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters	<p>Major changes</p> <p>Expands adjacent category beyond just “wetlands” to any type of water, such as lakes, oxbows, and impoundments. As a result of this change and the expansion of “tributary” to</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
	<p>neighboring”</p>	<p>“neighboring” includes:</p> <ul style="list-style-type: none"> • Waters within the riparian area or floodplain of an (a)(1) through (5) water • Waters with a shallow subsurface or confined surface hydrologic connection to an (a)(1) through (5) water 	<p>“Adjacent” definition retained, but new definition of “neighboring” includes:</p> <ul style="list-style-type: none"> • Waters where <i>any</i> portion falls within 100 feet of the OHWM of an (a)(1) through (5) water • Waters where <i>any</i> portion falls within the 100-year floodplain of an (a)(1) through (5) water <i>and</i> ≤ 1,500 feet from the OHWM of such a water • Waters where <i>any</i> portion falls within 1,500 of the high tide line of an (a)(1) <i>or</i> (3) water • Waters where <i>any</i> portions is within 1,500 of the OHWM of the Great Lakes <p>Adjacent waters include not only those lateral to an (a)(1) through (5) water, but also waters that connect segments of an (a)(1) through (5) water and headwaters of such waters</p> <p>Definition states that waters</p>	<p>include ephemeral features with “indicators” of bed, bank and OHWM, many waters previously considered to be isolated (<i>e.g.</i>, on farmlands, industrial sites, etc.) will be jurisdictional “adjacent” waters unless they meet one of the narrow exclusions</p> <p>Final rule adds a confusing and expansive new definition of “neighboring” (within the definition of “adjacent”) – the definition is considerably different from that in the proposal, but appears just as broad, or perhaps broader</p> <p>Given the concerns regarding the vagueness of the OHWM concept and the use of “desktop tools” to determine what is a tributary, it will be virtually impossible to know what waters are categorically jurisdictional as “adjacent” based on the distance thresholds from an OHWM</p> <p>It will also be difficult to determine what waters are adjacent because they fall</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
			<p>being used for “established normal farming, ranching, and silviculture activities (33 U.S.C. § 1344(f)) are not adjacent”</p>	<p>within 100-year floodplains – the agencies conceded that floodplain maps are not always available and when they are, they may be outdated or inaccurate</p> <p>Where FEMA maps do not exist, the agencies could turn to other Federal, state, or local maps, NRCS soil surveys, tidal gage data, site-specific modeling, or even “historical evidence”</p> <p>Landowners cannot possibly be expected to know whether a water on their property is “adjacent” by virtue of being within the 100-year floodplain and less than 1,500 feet from the OHWM of a jurisdictional water</p> <p>The new language on waters used in normal farming and ranching activities is not helpful – just because such waters are not “adjacent” does not mean they are not jurisdictional; they can still be tributaries or case-specific WOTUS</p> <p>The final rule does not state</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				that adjacency can be established based on shallow subsurface hydrologic connections, but such connections can still be considered in making case-specific significant nexus determinations
CATEGORIES OF NON-JURISDICTIONAL WATERS				
Exemptions generally		The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(1) through (7)	The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(4) through (a)(8)	<p>New addition to regulatory text – clarifies that exclusions take precedence</p> <p>Excluded waters, however, can still serve as a hydrological connection for purposes of evaluating contribution of flow (tributary definition) or in case-specific determinations of significant nexus, and they can still be regulated as point sources</p> <p>Under the proposal, exclusions would have trumped all jurisdictional categories, but the final rule (at 165) makes it clear that the agencies did not intend to exclude any traditional navigable waters, interstate waters, or territorial</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				<p>seas – thus, a ditch could lose the exclusion just because it crosses state lines</p>
<p>Waste treatment systems⁸</p>	<p>Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States</p>	<p>Waste treatment systems, including treatment ponds and lagoons, designed to meet the requirements of the Clean Water Act</p>	<p>Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act</p>	<p>Minor changes to current rule</p> <p>The preamble to the final rule states that the agencies are not changing the substance of the exclusion</p> <p>The agencies deleted the parenthetical in the current rule (because 40 C.F.R. § 423.11(m) no longer exists)</p> <p>The agencies had proposed to add a comma after the term “lagoons,” which would have required that all treatment systems (not just treatment ponds and lagoons) be designed to meet the requirements of the Act</p> <p>In the final rule, the agencies removed the new comma, signaling that only treatment</p>

⁸ The waste treatment exclusion in the EPA regulations governing NPDES permitting (40 C.F.R. § 122.2) is unique because it contains a sentence purporting to limit the exclusion to “manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.” That sentence, however, is accompanied by a footnote to the regulatory text clarifying that it has been suspended since July 21, 1980.

Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				ponds or lagoons must be designed to meet the requirements of the Act
Prior converted cropland	Waters of the United States do not include 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.	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.	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.	No change to current rule
Ditches		Two types of ditches are excluded: <ul style="list-style-type: none"> • Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow • Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, territorial sea, or jurisdictional impoundment 	Three categories of ditches are excluded: <ul style="list-style-type: none"> • 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 do not flow, either directly or through another water, into a traditional navigable water, interstate water, or territorial sea 	Adds new exclusion to rule text; changed between proposal and final rule Because ditches are expressly mentioned in the definition of “tributary,” many will be categorically jurisdictional as tributaries It will be difficult for a landowner to determine in the field whether a given ditch is a relocated tributary (i.e., “either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				<p>redirected”) or was excavated in a tributary given the problems with the “tributary” definition discussed above – in particular, the Agencies may rely on “desktop tools” to assert that the ditch was, at some point in time, a relocated tributary or excavated in a tributary</p> <p>Irrigation ditches that flow perennially or intermittently are likely to be jurisdictional – intermittently flowing ditches cannot “drain wetlands,” which Agency staff have explained means that they do not “interact” with wetlands – all that is necessary to trigger a finding of jurisdiction is that the ditch touches a wetland; it does not matter that the ditch is not receiving significant flow from the wetland or that it does not alter the wetland’s hydrology</p> <p>Agency staff have also explained that the wetland does not have to be jurisdictional, so if an intermittent ditch touches a</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				<p>non-jurisdictional wetland, the ditch is jurisdictional (if it otherwise meets the tributary definition)</p> <p>Finally, the preamble suggests that when an intermittent ditch drains a wetland, the portion that intersects the wetland is jurisdictional, but the upstream and downstream portions will have to be assessed further – it is unclear how one is to determine that upstream or downstream portions could still be excluded</p>
<p>Artificially irrigated areas</p>		<p>Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease</p>	<p>Artificially irrigated areas that would revert to dry land should application of water to that area cease</p>	<p>Adds new exclusion to rule text</p> <p>“Dry land” is not defined – the Agencies claim that its meaning is “well understood based on the more than 30 years of practice and implementation,” yet they declined to define the term because they “determined that there was no agreed upon definition given geographic and regional variability”</p> <p>Because this exclusion (and many others) uses the term</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				<p>“dry land,” there will be a lot of confusion in applying it</p> <p>Among other things, the Agencies could rely on “desktop tools” to claim that a patch of land was, at some point, not considered to be “dry land” and deny the exclusion on that basis</p> <p>“Dry land” is also problematic because a water feature need not be jurisdictional to disqualify a particular area of land from being considered “dry land”</p>
<p>Artificial lakes and ponds</p>		<p>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</p>	<p>Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds</p>	<p>Adds new exclusion to rule text; changed between proposal and final</p> <p>See “dry land” discussion in “artificially irrigated areas” above – it will be difficult to prove that a particular lake or pond was created in dry land</p> <p>The final rule improves upon the proposal somewhat because lakes and ponds that fall under this exclusion need not be “used exclusively” for the purposes specified in the</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				proposal – accordingly, multi-purpose ponds can be excluded, and the list of types of ponds in the exclusion is “illustrative,” not “exhaustive”
Artificial reflecting pools or swimming pools		Artificial reflecting pools or swimming pools created by excavating and/or diking dry land	Artificial reflecting pools or swimming pools created in dry land	Adds new exclusion to rule text See “dry land” discussion in “artificially irrigated areas” above – it will be difficult to prove that a particular pool was created in dry land
Small ornamental waters		Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons	Small ornamental waters created in dry land	Adds new exclusion to rule text See “dry land” discussion in “artificially irrigated areas” above – it will be difficult to prove that a particular water was created in dry land
Incidental water-filled depressions		Water-filled depressions created incidental to construction activity	Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water	Adds new exclusion to rule text See “dry land” discussion in “artificially irrigated areas” above – it will be difficult to prove that a particular depression was created in dry land
Erosional features		Gullies and rills and non-	Erosional features, including	Adds new exclusion to rule



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
		wetland swales	gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways	<p>text</p> <p>Erosional features will not be excluded if they meet the tributary definition (that is, if desktop tools can find “indicators” that make it a current or historical tributary)</p> <p>The preamble indicates that features “colloquially called” gullies or the like can meet the definition of tributary and thus, would be jurisdictional</p> <p>Again, because of the broad and uncertain scope of the term “tributary,” it will be impossible for landowners to determine whether a particular mark on their land that is left by flowing water is an excluded erosional feature or a jurisdictional tributary</p>
Puddles			Puddles	<p>Adds new exclusion to rule text – the proposal did not contain this exclusion, but the Agencies added it to the final rule in response to comments</p>
Groundwater		Groundwater, including groundwater drained through	Groundwater, including groundwater drained through	<p>Adds new exclusion to rule text – states would continue to</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
		subsurface drainage systems	subsurface drainage systems	regulate groundwater under the final rule, but groundwater can still serve as a hydrological connection for purposes of making case-specific determinations of significant nexus
Stormwater control features			Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land	<p>Adds new exclusion to rule text</p> <p>See “dry land” discussion in “artificially irrigated areas” above – it will be difficult to prove that a particular feature was created in dry land</p> <p>Because of the “dry land” restriction, channelized or piped streams will still be jurisdictional</p> <p>The regulatory text appears to broadly encompass stormwater control features in any areas, but the preamble limits this exclusion to engineered structures in municipal or urban areas</p> <p>This exclusion does not cover transportation ditches, and the Agencies will likely take the position that it does not cover</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
				stormwater control features in rural areas either
Wastewater recycling structures			Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling	Adds new exclusion to rule text See “dry land” discussion in “artificially irrigated areas” above – it will be difficult to prove that a particular structure was created in dry land
SIGNIFICANT NEXUS TEST				
Significant nexus as a foundational principle	Not mentioned or defined	Means that a water, including wetlands, either alone or in combination with other similarly situated waters in the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea, significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea Significant effect means more than speculative or insubstantial	Means that a water, including wetlands, either alone or in combination with other similarly situated waters in the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea, significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea Significant effect means more than speculative or insubstantial Waters are similarly situated if	Major change The Agencies’ categorical assertions of jurisdiction over all tributaries and adjacent waters is based on their claim that <i>all</i> tributaries and <i>all</i> adjacent waters meet the new significant nexus test The definition of significant nexus appears far broader than what the Supreme Court intended when it used that term in prior WOTUS decisions – to use one example, the fact that provision of life cycle dependent aquatic habitat can,



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
		<p>Waters are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a WOTUS that they can be evaluated as a single landscape unit</p>	<p>they function alike and are sufficiently close to function together in affecting downstream waters</p> <p>Determining significant nexus requires an assessment of the following aquatic functions:</p> <ul style="list-style-type: none"> • Sediment trapping • Nutrient recycling • Pollutant trapping, transformation, filtering, and transport • Retention and attenuation of flood waters • Runoff storage • Contribution of flow • Export of organic matter • Export of food resources • Provision of life cycle dependent aquatic habitat <p>A water has a significant nexus if <i>any single function</i> or combination of functions performed by the water, alone or together with similarly situated waters in the watershed, contributes to the chemical, physical, or biological integrity of the nearest traditional navigable water,</p>	<p><i>by itself</i>, trigger a significant nexus determination could sweep in isolated, intrastate waters contrary to SWANCC</p> <p>The significant nexus concept allows for aggregation of similar waters across vast areas of land, <i>i.e.</i>, the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry – the agencies acknowledge such watersheds can be very large</p>



Comparison of Final Rule Defining “Waters of the United States”

Category/Issue	Current Rule ¹	Proposed Rule	Final Rule	Analysis
			interstate water, or territorial sea	