

# *Waters of the U.S.*



**GUNSTER**  
FLORIDA'S LAW FIRM FOR BUSINESS

# *Existing WOTUS Rule*

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Waters of the United States means:

- (1) All waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands
- (3) All “other waters” the use, degradation or destruction of which could affect interstate or foreign commerce
- (4) All impoundments of waters otherwise defined as waters of the United States
- (5) Tributaries of (1) – (4)
- (6) The territorial seas
- (7) Wetlands adjacent to/neighboring (1) – (6)

# *Proposed WOTUS Rule*

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- (1) All waters used in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands
- (3) The territorial seas
- (4) All impoundments of waters in (1)-(3) and (5)
- (5) “Tributaries” of (1)-(4)
- (6) Waters, including wetlands, adjacent to/“neighboring” (1)-(5)
- (7) Other waters with a “significant nexus”
- (8) New Definitions: Tributary, Neighboring, Significant Nexus
- (3) All “other waters” the use, degradation or destruction of which could affect interstate or foreign commerce
- (4) All impoundments of waters otherwise defined as waters of the United States
- (5) Tributaries of (1) – (4)
- (6) The territorial seas
- (7) Wetlands adjacent to/neighboring (1) – (6)

# *Tributaries*

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- Water with a bed, a bank, and a ordinary high water mark which contributes flow directly or indirectly to a water in (1)-(4), or even without a bed, bank, or OHWM if they contribute flow directly or indirectly to water in (1)-(3).
- *BUT*, a water doesn't lose its tributary status if for any length there are one or more man-made breaks (such as culverts or dams) or natural breaks (such as wetlands) so long as a bed, bank and OHWM can be identified upstream of the break.
- *BUT*, a tributary can be natural, man-altered, or man-made and includes “canals and ditches” not excluded elsewhere.

# *Exclusions*

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- Waste Treatment Systems, including treatment ponds and lagoons
- Prior converted cropland, as determined by EPA
- Ditches that are excavated wholly in uplands, drain only in uplands, AND have less than perennial flow
- Ditches that do not contribute flow, either directly or indirectly to a water in (1)-(4)
- The following:
  - Artificially irrigated areas that would revert to upland should irrigation stop
  - Artificial reflecting pools or swimming pools
  - Small ornamental waters
  - Water-filled depressions incidental to construction activity
  - Groundwater
  - Gullies and rills and non-wetland swales
  - Puddles

# *My Opinion*

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## 1. Ditches = covered

According to USGS only 1%-16% of streams in Florida, by length, have intermittent flow, i.e., most streams in Florida have perennial flow.

# *Significant Nexus*

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- Water that alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in (1)-(3)) significantly affects the chemical, physical, or biological integrity of a water in (1)-(3).
- It must be more than speculative or insubstantial.
- Similarly situated means performing similar functions and located sufficiently close together or sufficiently close to a water of the United States so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water in (1)-(3).



# *My Opinion*

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## 1. Ditches = covered

According to USGS only 1%-16% of streams in Florida, by length, have intermittent flow, i.e., most streams in Florida have perennial flow.

## 2. Significant Nexus – What does this mean?

EPA says its “clarifying” the meaning of Waters of the U.S. coming after the Supreme Court decision in Rapanos. So the Rule is clarifying Rapanos by using its most confusing element, i.e., a significant nexus. What ?!?

## 3. Similarly Situated – What are the implications?

Your neighbor needs a jurisdictional determination and you’re in his watershed. Sounds like you’re getting a jurisdictional determination too.



# Adjacent

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- Adjacent means bordering, contiguous or **neighboring** (existing definition)
- New definitions:
  - Neighboring: Includes waters located within the riparian area or floodplain of a water identified in (1)-(5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.
  - Riparian Area: An area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.
  - Floodplain: An area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

# My Opinion

1. Ditches = covered  
According to U.S. Army Corps of Engineers, ditches in Florida, by length, have intermittent flow.  
2. Significant Nexus  
EPA says its “  
the Supreme Court  
Rapanos by using  
What ?!?
3. Similarly Situation  
Your neighbor  
watershed. So  
too.
4. Floodplain includes  
those?
5. What in the heck



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# *Process Going Forward*

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- Comment Period Closes October 2014;
- EPA 2015 Regulatory Agenda reflect Final Rule Publication in April 2015;
- EPA/USACE time-pressed to conclude before the end of the second term;
- EPA Science Advisory Board not done reviewing underlying technical report; and
- EPA/USACE will not finalize rule before SAB is done.

## *Next Speakers*

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- Don Ross: Technical Basis for WOTUS
- Mike Dennis: WOTUS in Practice
- Matt Leopold: Legal Implications