WETLANDIA: A Graphical Guide to the Waters of the United States (WOTUS) Definition

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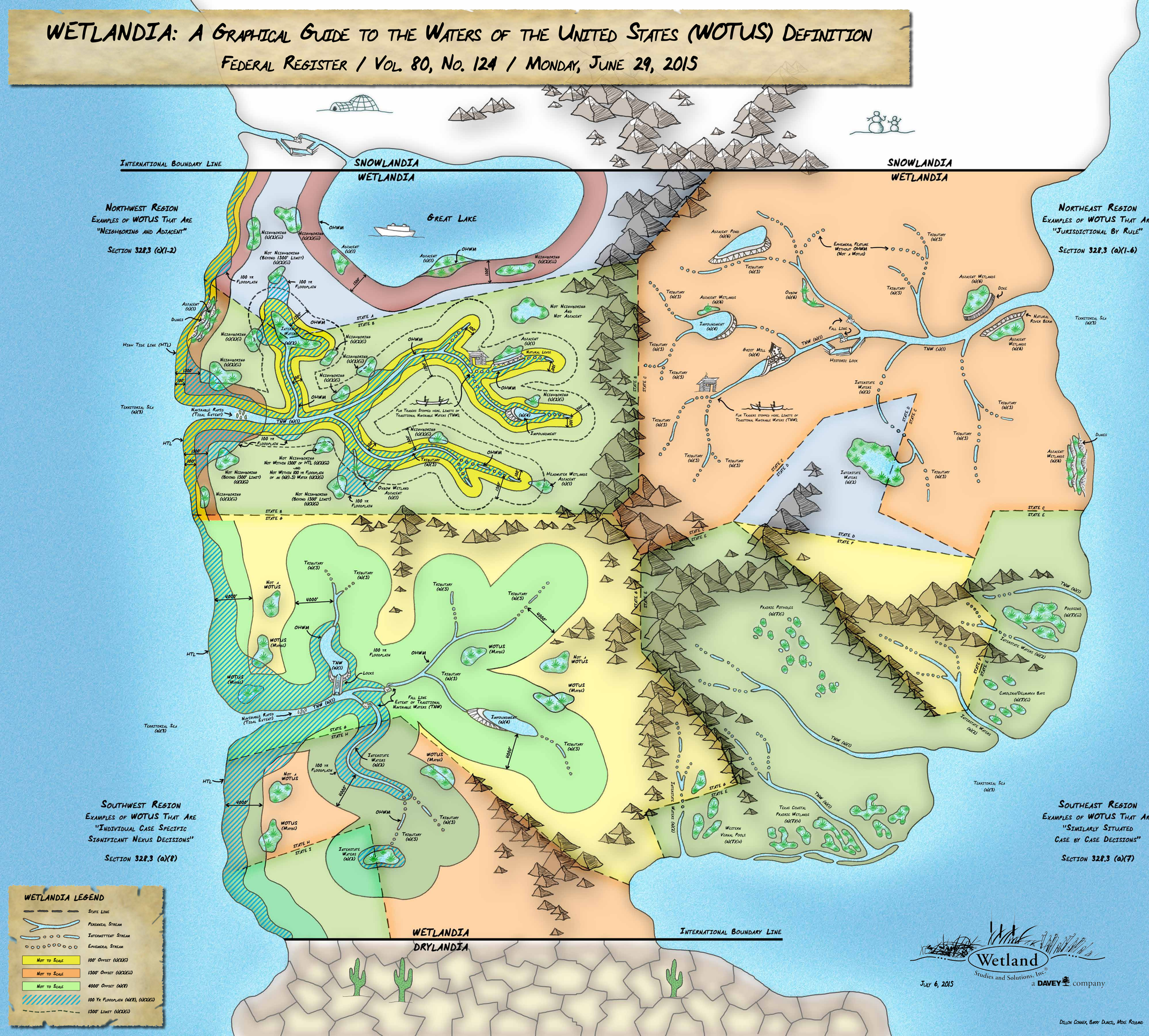

Part 328
Definition of Waters of the United States

1. The authority citation for part 328 is revised to read as follows:
Authority: 33 U.S.C. 1251 et seq.

2. Section 328.3 is amended by revising paragraphs (a) through (b), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§328.3Definitions.

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(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:

(1) A_1: 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;

(2) A_2: interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) A_4: impoundments of waters otherwise identified as waters of the United States under this section;

(5) A_5: tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) A_6: waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) A_7: waters in paragraphs (a)(7)(i) through (v) 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. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be considered, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(8) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occupying in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are forested, depressional wetlands that occur along the Atlantic coastal plain.

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

(iv) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depressions, soils with poor drainage, and wet winters and hot, dry summers.

(v) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, mounds, interconnected flats, and mima mound wetlands located along the Texas Gulf Coast.

(7) A_8: waters located within the 100-year floodplain of a water identified in paragraph (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 (a)(1) through (3) 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. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(8) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) through (7) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act;

(2) 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.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artifically irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land built as farm and stock watering ponds, irrigation ponds, settling basins, rice growing ponds, nutrient ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) 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;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, nonwetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) 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 storagetanks structures built for wastewater recycling.

(c) Definitions. In this section, the following definitions apply:

(1) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (3) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacent, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacent is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (3) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (3) or are located at the head of a water identified in paragraphs (a)(1) through (3) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silvicultural activities (33 U.S.C. 1344(f)) are not adjacent.

(2) Neighboring. The term neighboring means:

(i) A_2: waters located within 100 feet of the ordinary high water mark or a water identified in paragraphs (a)(1) through (3) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) A_3: waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) A_4: waters located within 1,500 feet of the high tide line or a water identified in paragraphs (a)(1) or (a)(3) of this section, and A_5: waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section) to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and that to qualify as a tributary, a tributary can be a natural, manmade, or manmade water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary by, for any length, there are one or more constructed breaks (such as culverts, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the bank of a stream, karst features, bedrock fissures, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together to affect downstream waters. For purposes of determining whether or not a water has a significant nexus, the waters' effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. If water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, retention, and transport,

(iv) Retention and attenuation of flood waters,

(v) Hydro storage, (vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, watering, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.

(7) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a spring tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gauges, or other suitable means that delineate the average height reached by a spring tide. The line encompasses spring high tides and other high tides that occur with regular frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the passing of a water weather: a coast of strong winds such as those accompanying a hurricane or other intense storm.

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