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Environmental Alert

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Revised definition of “Waters of the United States” released

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The final rule redefines the scope of waters protected under the Clean Water Act.



What's the Impact?

- / Farmers, industry developers, businesses, and other stakeholders must consider how their activities could be impacted by the new rule
- / Review your projects and plans to determine what impacts are and are not allowed on waterbodies, and what permit requirements are triggered for unavoidable impacts

On December 30, 2022, the U.S. Department of Army, Army Corps of Engineers, and the U.S. Environmental Protection Agency (the Agencies), [announced the publication](#) of the final “Revised Definition of ‘Waters of the United States’” (WOTUS) rule, re-defining the scope of waters protected under the Clean Water Act (CWA).

By way of background, the Agencies finalized three rules revising the definition of WOTUS since 2015.¹ The most recent rule, the 2020 “Navigable Waters Protection Rule” (2020 NWPR), substantially departed from prior rules defining WOTUS.

On January 20, 2021, President Biden signed Executive Order 13990 directing all executive departments and Agencies to review and, as appropriate, take action to address the promulgation of federal regulations and other actions that conflict with national policies of science-based decision making. Accordingly, on June 9, 2021, after completing a review of the 2020 NWPR, the Agencies announced their intent to revise the rule because it was found to be incompatible with the objective of the CWA; this final rule is what followed.

This final rule is founded upon the pre-2015 definition of WOTUS, updated in consideration of the relevant provisions of the CWA, the scientific record, recent Supreme Court rulings, and the Agencies’ technical expertise after more than 45 years of implementing the longstanding pre-2015 WOTUS framework.

The revised WOTUS definition

The final rule sets forth seven categories of waterways that will be federally regulated:

- / Traditional navigable waters, such as large rivers, lakes, and waterbodies affected by tides;
- / Territorial seas that extend three miles out to sea from the coast;
- / Interstate waters, such as streams, lakes, or wetlands that cross or form part of state boundaries;
- / Impoundments, such as reservoirs and beaver ponds;
- / Tributaries, such as branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that ultimately flow into traditional navigable waters, territorial seas, interstate waters, or impoundments of jurisdictional waters;²
- / Adjacent wetlands that are next to, abutting, or near (most commonly located within a few hundred feet) other jurisdictional waters or behind natural or constructed features;³ and
- / Additional waters, such as lakes, ponds, streams, or wetlands that do not fit into the above categories but may be considered jurisdictional if either the relatively permanent standard or the significant nexus standard are met.

Categories five, six, and seven provide that tributaries, adjacent wetlands, and additional waters may be considered WOTUS if either the relatively permanent standard or the significant nexus standard are met. The **relatively permanent test** requires any waterbody meeting the standard

¹ See 80 FR 37054 (June 29, 2015); 84 FR 56626 (October 22, 2019); 85 FR 22250 (April 21, 2020).

² Tributaries are jurisdictional if they meet either the relatively permanent standard or significant nexus standard.

³ Adjacent wetlands are jurisdictional if they meet either the relatively permanent standard or the significant nexus standard, or where the wetland is adjacent to a traditional navigable water, the territorial seas, or an interstate water.

to be relatively permanent, standing, or continuously flowing and connected to traditional navigable waters, territorial seas, or interstate waters. The **significant nexus test** requires that any waterbody meeting the standard (alone or in combination) significantly affect the chemical, physical, or biological integrity of traditional navigable waters, territorial seas, or interstate waters.

This final rule expands the WOTUS definition and differs from the 2020 NWPR in that jurisdiction is no longer found primarily under the relatively permanent standard but may also be established under the significant nexus standard. As a result, the re-defined scope of waters subject to CWA regulations will protect more wetlands and streams than the previous rule did.

This final rule also deviates from the pre-2015 definition of WOTUS in that the “additional waters” category will be re-subjected to CWA regulation. “Additional waters,” which encompasses isolated waters that do not fit in other WOTUS categories, were found to be outside the scope of CWA permitting in the Supreme Court decision *SWANCC v. USACE*.⁴ The Agencies have reasoned that inclusion of this category, using the standards referenced above, properly balances the CWA’s broad statutory objective while giving meaning to the word “navigable.” The viability of this approach may be impacted by the Supreme Court’s impending decision in *Sackett v. EPA*.⁵

WOTUS exclusions

While the Agencies’ definition of WOTUS does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the CWA, it does codify eight exclusions from regulation:

- / Prior converted cropland, adopting USDA’s definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985;
- / Waste treatment systems, including treatment ponds or lagoons that are designed to meet the requirements of the CWA;
- / Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water;
- / Artificially irrigated areas, which would revert to dry land if the irrigation ceased;
- / Artificial lakes or ponds, created by excavating or diking dry land, that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- / Artificial reflecting pools or swimming pools, and other small ornamental bodies of water created by excavating or diking dry land;
- / Waterfilled depressions, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of

⁴ *SWANCC v. USACE*, 531 U.S. 159 (2001).

⁵ *Sackett v. EPA*, No. 21-454.

WOTUS; and

- / Swales and erosional features (e.g., gullies, small washes) that are characterized by low volume, infrequent, or short duration flow.

Outlook

Guidance published with the final rule will allow attorneys and consultants to provide more efficient and effective advice regarding its implementation for farmers, industry developers, businesses and other stakeholders who are wondering what impacts are and are not allowed on waterbodies, and what permit requirements are triggered for unavoidable impacts. This guidance includes two joint memoranda along with the final rule. [One memorandum](#) was issued by the Agencies to ensure the accuracy and consistency of jurisdictional determinations under this final rule, and the [other memorandum](#) was issued by the Agencies in conjunction with the U.S. Department of Agriculture to provide clarity on the Agencies' programs under the CWA and Food Security Act.

Despite the improved clarity and guidance touted by this final rule, we anticipate significant legal challenges to slow effective implementation and create uncertainty for agriculture, manufacturing, and real estate development. Not only may the upcoming ruling in *Sackett v. EPA* create consequences for the viability of the final rule, but accusations of the Agencies' overreach suggest that some lawmakers may attempt to overturn the final rule under the controversial Congressional Review Act.

The final rule is due to become effective in early March 2023, sixty days after formal publication in the *Federal Register*. However, with the sixty day window for the legislature to repeal the rule closing simultaneously, and the *Sackett v. EPA* decision expected to come out mid-year, this will be a topic to watch closely in 2023.

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