



EPA and Army Corps Announce Latest Update to Definition of “Waters of the United States”

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Proposed WOTUS Rule

On November 18, 2021, the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, the “Agencies”) released a pre-publication version of their [proposed rule](#) defining Waters of the U.S. (“WOTUS”) under the Clean Water Act (“CWA”) (the “Proposed Rule”). The Proposed Rule unwinds much of the 2020 Navigable Waters Protection Rule (“2020 NWPR”), issued during the Trump administration and restores the regulations in effect prior to the Obama Administration’s 2015 rule. The Proposed Rule sometimes refers to the earliest rule as the “1986 Regulations;” this alert refers to it as the “Pre-2015 Regulation.”

The Proposed Rule is part of a two-part rulemaking process to revise the definition of WOTUS. This first part is designed to restore the Pre-2015 Regulations, as amended to be consistent with U.S. Supreme Court decisions. The Agencies also anticipate developing a second rule that builds upon the regulatory foundation in this Proposed Rule with the benefit of additional stakeholder engagement. The second rule could consider more categorical approaches to jurisdiction.

The Agencies have not provided an estimated timeline for publication of the Proposed Rule in the Federal Register. Once the Proposed Rule is published, public comments will be due 60 days after the date of publication.

Background

The WOTUS definition establishes the geographic scope for jurisdiction under the CWA, impacting a myriad of regulatory issues, including the applicability of water quality standards; impaired waters and total maximum daily loads; oil spill prevention, preparedness, and response programs; state and tribal water quality certification programs; National Pollutant Discharge Elimination System permit requirements; and dredge and fill permit requirements.

The CWA does not define WOTUS, leaving the definition open to statutory interpretation and agency rulemaking. The rulemaking history is as follows:

- 1986 Regulations (“Pre-2015 Regulation”)
- 2015 Clean Water Rule
- 2019 Repeal of Clean Water Rule
- 2020 NWPR
- 2021, August - Court vacation of NWPR and interim application of Pre-2015 Regulation
- 2021, November - “Proposed Rule”

Additional background is outlined in our previous [alert](#) on the [2020 NWPR](#), as well as our [alerts](#) on the 2015 Clean Water Rule and associated [legal challenges](#).

The Proposed Rule

In this Proposed Rule, the Agencies intend to define the scope of waters protected under the CWA. The Proposed Rule defines WOTUS as those waters identified as WOTUS in the Pre-2015 Regulations, as informed by more recent U.S. Supreme Court case law. In the Proposed Rule, the Agencies interpret WOTUS to include:

- traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands;
- most impoundments of “waters of the United States;”

- tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard;
- wetlands adjacent to impoundments and tributaries, that meet either the “relatively permanent” standard or the “significant nexus” standard established by *Rapanos v. United States*, 547 U.S. 715 (2006);
- and “other waters” that meet either the “relatively permanent” standard or the “significant nexus” standard.

The “relatively permanent” standard encompasses those waters that are relatively permanent, standing or continuously flowing, and waters with a continuous surface connection to such waters. While waters that meet the relatively permanent standard will fall within the CWA’s scope, the Agencies concluded that the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the CWA due to the standard’s exclusion of major categories of waters, which is not supported by the texts or objectives of the CWA. The Agencies also found that relying solely on the relatively permanent standard runs counter to the science demonstrating how ephemeral streams and adjacent wetlands that do not have a continuous surface water connection to other jurisdictional water can affect the integrity of downstream waters, including traditional navigable waters, interstate waters, and territorial seas.

The “significant nexus” standard applies to waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. In the Proposed Rule, the Agencies note that significant nexus analyses underpin determinations of jurisdiction for certain categories of waters under the Proposed Rule, but that several terms in this standard were not defined in *Rapanos*. Accordingly, the Agencies state that they are soliciting comment on approaches for implementing the Proposed Rule, including (1) which waters are “similarly situated,” and thus should be analyzed in combination, (2) the “region,” for purposes of a significant nexus analysis, and (3) the types of functions that should be analyzed to determine if waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

Impact of the Proposed Rule

While the Proposed Rule aims to establish regulatory certainty as to which waters are CWA jurisdictional, significant uncertainty remains. First, this rule is only the initial part of a proposed two-part rulemaking, and the scope of the second rulemaking remains unclear. The second rulemaking will likely attempt to create additional categorical approaches to jurisdiction and to further clarify the significant nexus standard, and it could clarify the meaning of terms like “similarly situated” and the “region,” and the types of functions the Agencies will analyze in evaluating jurisdiction over particular waters. Second, litigation over the regulatory definition of WOTUS is virtually guaranteed to continue.

The greatest impact from this Proposed Rule will likely be on ephemeral streams, which were categorically excluded in the 2020 NWPR but will be subject to regulation under the Proposed Rule, and wetlands, which will likely be regulated more expansively under this Proposed Rule. These waters are expected to continue to be at the forefront of the ongoing WOTUS debate. Accordingly, project and resource developers should carefully consider how this Proposed Rule may affect their permitting obligations for proposed development and work in or near waterbodies and wetlands.

The public comment period for the Proposed Rule will extend 60 days after it is published in the Federal Register. Virtual hearings will be conducted on January 12, January 13, and January 18.

For More Information

If you would like more information about the Proposed Rule or other issues related to implementation of the Clean Water Act, please contact [Duncan Greene](#), [Joseph Nelson](#), [Jenna Mandell-Rice](#), [Jonathan Simon](#), or any member of the firm’s Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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