



# U.S. EPA, Army Corps of Engineers Update WOTUS Rule, Reinstate Pre-2015 Definition

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**UPDATE:** On January 18, the Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) published their final rule on “Waters of the United States” (WOTUS) in the Federal Register. The rule will become **effective on March 20, 2023**. The statutory authority for the final rule comes from the Clean Water Act (CWA) – the CWA gives the federal government jurisdiction over some of the nation’s surface water features.

This WOTUS regulation constitutes the newest regulatory definition of jurisdictional waters for purposes of CWA section 404 (governing Corps dredge and fill permitting for wetlands), CWA section 401 (governing state water quality certifications for federal CWA permits) and CWA section 402 (governing EPA, or, in delegated states, state agency national pollution discharge elimination system [NPDES] permits).

On December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (the Agencies) released the pre-publication version of their final rule defining “waters of the United States” (WOTUS). The new rule, which will become effective 60 days after publication in the Federal Register, attempts to clarify which bodies of water, wetlands and waterways are protected under the federal Clean Water Act (CWA).

## A Brief Overview of WOTUS

Defining WOTUS has long been a challenge for agencies, courts, advocates and the regulated community alike. While everyone agrees that large, navigable waterways (such as interstate rivers) and their adjacent riparian areas are WOTUS, there has been extensive debate about what should be considered “adjacent,” as well as how the CWA applies to water features that are isolated or seasonal (such as prairie wetlands or intermittent streams). With so much uncertainty surrounding the definition of WOTUS, it can be difficult for entities to know whether their activities are subject to regulation under relevant portions of the CWA (in

particular, sections 402 and 404 of the CWA that address the discharge of pollutants and the dredging and filling of wetlands).

In 2006, the Supreme Court heard the now infamous *Rapanos v. United States*, 547 U.S. 715, in which the federal government alleged a real estate developer had illegally discharged fill into wetlands that qualified as WOTUS. The Court split 4-1-4, resulting in two competing tests for distinguishing WOTUS. One of these tests is Justice Kennedy's "significant nexus" test, which holds that wetlands are considered adjacent/qualify as WOTUS if they are either connected to larger waterways with "relatively permanent" surface water connections or if they have a "significant nexus" to the protected body of water. The Kennedy concurrence is also sometimes called the pre-2015 definition of WOTUS, and the Biden administration's new rule largely incorporates this definition. The new rule is a departure from the WOTUS rule promulgated under the Trump administration, which favored the competing *Rapanos* test: Justice Scalia's "continuous surface connection" test (as the name implies, that test held that a water feature must have a continuous surface connection to established WOTUS in order to be considered WOTUS itself).

Earlier this term, the Supreme Court heard oral argument for *Sackett v. EPA*, Case No. 21-454, and it could release its decision on the case at any time. Like *Rapanos*, the *Sackett* case addressed the jurisdictional question of which wetlands should be considered WOTUS under the CWA (and thus require a section 404 permit). Many Republican critics of the new WOTUS rule argue that EPA should have waited for the Supreme Court to release its *Sackett* decision before issuing a new rule. EPA contends that the Court only has jurisdiction over a narrow legal question in *Sackett* and that the rule is written to withstand any outcome in the *Sackett* case.

### **The Biden Administration's New WOTUS Rule**

The Biden administration's new WOTUS rule is largely a return to the pre-2015 definition of WOTUS. In a fact sheet released alongside the rule, the Agencies state they chose this definition because "it has supported decades of clean water progress and has been implemented by every administration in the last 45 years" (notably, the CWA celebrated its 50th birthday in 2022).

The new rule attempts to strike a balance between the WOTUS rules of the previous two administrations. The Biden administration rule will protect more wetlands and streams than the previous regulation issued under President Trump. However, the Biden administration rule is less expansive than the Obama administration's WOTUS rule, which included isolated wetlands and attempted to draw 'bright lines' of federal jurisdiction for adjacent wetlands by establishing measurable distances for qualifying areas (for example, wetlands located within a 100-year floodplain or 4,000 feet of a navigable waterway were considered adjacent). It is still unclear how the new Biden administration rule will treat isolated wetlands, but the fact sheet implies that they will be evaluated individually and not as part of a broader ecosystem (as was the case under the Obama-era rule).

In an attempt to make the regulations more accessible, the Agencies list the following types of waters as WOTUS or potential WOTUS: traditional navigable waters, territorial seas, interstate waters, impoundments, tributaries, adjacent wetlands and additional waters (the significant nexus test would be applied to determine whether these additional waters are jurisdictional). The Agencies also exclude the following types of waters from WOTUS: prior converted cropland, waste treatment systems, ditches, artificially irrigated areas, artificial lakes or ponds, artificial reflecting pools or swimming pools, water-filled depressions and swales/erosional features (such as gullies or small washes). These exclusions have stayed consistent

throughout the Obama, Trump and Biden administrations.

### **Potential Challenges to the Rule**

Although EPA touts its new WOTUS rule as a “durable” middle ground, there is no question it will be heavily litigated. Additionally, some lawmakers are calling for using the controversial Congressional Review Act to overturn the rule, though this may simply be posturing given the current composition of Congress. The Congressional Review Act allows the legislature to repeal an agency’s rule within 60 days if Congress can pass a joint resolution of disapproval in both the House and the Senate. The resolution must either be signed by the President or can pass over the President’s veto by a two-thirds vote of both Houses of Congress. Senate Environment and Public Works ranking member Shelley Moore Capito (R-WV) is leading this effort.

### **Additional Information**

Additional information about the new WOTUS rule, along with the final rule and its supporting analyses, are available on EPA’s website. We will continue to monitor this issue and provide updates as needed.