

## The EPA Reverts to Pre-2015 Definition in Proposed WOTUS Revision

Alert

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On December 7, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) took their latest stab at clarifying the jurisdiction of the Clean Water Act (CWA), proposing (another) new definition of “waters of the United States” (WOTUS) sure to give industry déjà vu. The [proposed rule](#) comes after an Arizona district court vacated EPA’s 2020 Navigable Waters Protection Rule, and continues the long history of what constitutes a WOTUS. EPA and the Corps describe the proposed rule as returning to regulatory language similar to the framework in place from 1986 to 2015.

### Background

The text of the CWA regulates discharges into “navigable water,” which is defined as “waters of the United States, including the territorial seas.” What is less clear is when a water body is a “water of the United States.” Challenges to regulatory enforcement and constitutional authority have been continuous since the early 1980s, resulting in a series of U.S. Supreme Court decisions culminating with the *Rapanos v. United States* plurality decision in 2006. *Rapanos* reversed the conviction of a commercial developer for filling a wetland, but the Court did so with only a plurality of justices agreeing on a navigability standard. After *Rapanos*, courts and EPA latched onto Justice Kennedy’s “significant nexus” test from his concurring opinion. The Obama Administration promulgated the original WOTUS rule in 2015, greatly expanding the definition of a WOTUS, and the Trump Administration narrowed the definition when it promulgated the Navigable Waters Protection Rule in 2020. The changing regulations and interpretation have been accompanied by litigation, which is [continuing now](#).

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## Proposed WOTUS Revision

The EPA and the Corps' proposed WOTUS rule includes seven categories of water bodies:

- Traditional navigable waters: water bodies used for interstate or foreign commerce, and all waters subject to fluctuating tides
- Interstate waters: interstate bodies regardless of navigability
- Other waters: water bodies with a significant nexus to other navigable sources
- Impoundments: reservoirs
- Tributaries: upstream water sources that flow into navigable bodies
- Territorial seas: limited to three miles seaward from the low tide line along coasts
- Adjacent wetlands: a wetland that is contiguous or otherwise hydrologically connected to a navigable water body, including a wetland separated from another water source by a dike or similar structure

These proposed categories of waters subject to CWA jurisdiction generally follow the structure of EPA and the Corps' regulations from 1986, modified slightly based on the *Rapanos* decision. The EPA and Corps' application of these categories to determine applicability has the potential to expand CWA enforcement over entities that discharge or have the potential to discharge pollutants into a WOTUS.

The proposed rule retains exemptions for prior converted cropland (to encourage conservation of farmland) and waste treatment systems (to clarify that waste treatment lagoons and ponds are excluded).

## Implications and Next Steps

Returning the definition of WOTUS to its pre-2015 framework has the regulated community concerned that the uncertainty following *Rapanos* may resume. Despite the agencies describing their recent rule language as a return to past practice, their interpretation has the potential to expand CWA enforcement beyond previous limits. In particular, the proposed rule explains that a return to the pre-2015 "significant nexus" standard will enable them to consider climate change when evaluating upstream impacts. For example, the proposed rule describes a previously navigable lake as no longer meeting the WOTUS definition as it evaporates in a more arid climate. Conversely, a warmer climate can also bring more rainfall in certain areas, and could result in new hydrologic connections between water bodies.

Collectively, despite going back to pre-2015 interpretations, applicability determinations and enforcement may not track with past practices. When evaluating the proposed rules, entities should consider not only the pre-2015 landscape but also how a final rule could be interpreted now and in the future. We encourage entities to provide two-fold feedback to EPA and the Corps by: (1) recalling issues that were ambiguous or confusing pre-2015 and requesting updates or clarity in any final rule; and (2) considering areas that are unclear, untenable or could result in uncertainty in the future and providing alternatives.

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EPA sought comment on specific items, including a number of big-ticket items:

- Whether it would be useful to similarly streamline the proposed rule by consolidating the traditional navigable waters, interstate waters, and the territorial seas provisions into one provision since under the 1986 regulations and the proposed rule the jurisdictional status of the other categories of waters relies on their connection to a traditional navigable water, interstate water, or the territorial seas (and, where required, meeting either the relatively permanent or the significant nexus standard)
- How tribal boundaries impact interstate waters
- The scope of “other waters” and how much detail should be provided in the rule
- All aspects of the tributary provisions
- Approaches to wetlands adjacent to impoundments
- Whether/how to promulgate exclusions, and approaches to exclusions
- The definition of “significantly affect” and the factors considered when determining whether the type and strength of biological connections
- Waters traditionally not considered waters of the U.S. despite not being explicitly excluded
- Implementation of *Rapanos*, including with regard to ditches
- Other approaches to the relatively permanent standard and making jurisdictional determinations under the relatively permanent standard;
- Whether the rule should clarify the required sources of intermittent flow
- Whether guidance should be provided on specific features that can serve as physical connections between a wetland and a relatively permanent water
- How to apply the significant nexus in the field

The comment period is open until February 7, 2022. If you have questions, please contact your Stinson environmental attorney.

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