

Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency/Corps of Engineers Proposed Rule



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The United States Environmental Protection Agency and the United States Corps of Engineers (collectively “EPA”) announced on November 19th a revised definition of waters of the United States (“WOTUS”).

The agencies are proposing to put back into place the pre-2015 definition of WOTUS.

The definition is also stated to be revised to “reflect consideration of Supreme Court decisions.”

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. It’s importance is magnified by the fact that it is also relevant to non-National Pollution Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, it is easy to understand why the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

EPA had previously withdrawn the revisions to the Clean Water Act definition of WOTUS promulgated during the Trump Administration. EPA argued that the Trump Administration rule was “significantly reducing clean water protections.”

The Trump Administration rule had previously rescinded an Obama era revision of WOTUS. The promulgation of the 2020 rule was argued to be driven by concern that:

... the previous administration’s 2015 rule defining “waters of the United States” may have greatly expanded Washington’s control over local land use decisions.

EPA also stated on November 19th in promulgating the proposed rule that:

... Recent court decisions have reinforced the need for a stable and certain definition of WOTUS. The U.S. District Courts for both Arizona and New Mexico have vacated the Navigable Waters Protection Rule. In light of the court actions, the agencies have been implementing the pre-2015 regulatory regime nationwide since early September 2021. Today’s action is an important step because it would solidify the rules of the road for a stable implementation of “waters of the United States” while the agencies continue

to consult with stakeholders to refine the definition of WOTUS in both implementation and future regulatory actions.

EPA states that the proposed rule maintains exclusions of the pre-2015 regulations as well as the exemptions and exclusions in the Clean Water Act.

EPA also argues that the proposed rule is based on the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and “other waters” to restore and maintain the water quality of downstream foundational waters. It contrasts the 2020 Trump Administration definition, which it argues founded jurisdiction primarily under the relatively permanent standard and:

. . . established a test for jurisdiction that did not adequately address the impacts of degradation of upstream waters on downstream waters, including traditional navigable waters, and was therefore incompatible with the objective of the Clean Water Act.

A link to the 290 page proposed rule and preamble can be found [here](#).