

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



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The United States Environmental Protection Agency and the United States Corps of Engineers (collectively, “EPA”) announced on December 30th a final rule revising the Clean Water Act definition of Waters of the United States (“WOTUS”).

In announcing the final rule, EPA states in part that it establishes a:

... durable definition of “waters of the United States” (WOTUS) to reduce uncertainty from changing regulatory definitions, protect people’s health, and support economic opportunity.

EPA also argues that the final rule:

... restores essential protections that were in place prior to 2015 under the Clean Water Act for traditional navigable waters, the territorial seas, interstate waters, as well as upstream water resources that significantly affect those waters. As a result, this action will strengthen fundamental protections for waters that are sources of drinking water while supporting agriculture, local economies, and downstream communities.

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollutant 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 debate 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EPA had previously withdrawn the revisions to the Clean Water Act definition of WOTUS promulgated during the Trump Administration. It argued that the Trump Administration rule was “significantly reducing clean water protections.”

The Trump Administration had previously rescinded an Obama era revision of WOTUS.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

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

EPA announced its intent on June 9, 2021, to revise the Trump definition of WOTUS. A proposed rule was published on November 18, 2021.

The final rule is described by EPA as putting forth a definition of WOTUS that provides jurisdiction over waterbodies that Congress intended to protect under the Clean Water Act. These are stated to include:

- Traditional navigable waters (e.g., certain large rivers and lakes)
- Territorial seas
- Interstate waters

As to upstream waters, EPA argues that the final rule’s provisions:

- Significantly affect the integrity of downstream waters that Congress intended to protect, the rule provides a reasonable approach that recognizes regional and geographic differences. The rule accounts for regional differences in waters because regionally tailored implementation tools as well as local and regional conditions help determine whether waters are covered under this rule.

The standards for determining jurisdiction for tributaries, adjacent wetlands, and additional waters apply what are described as “longstanding approaches.” The two standards include:

- Relatively Permanent (i.e., waterbodies must be relatively permanent, standing, or continuously flowing waters connected to paragraph (a)(1) waters or waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters.
- Significant Nexus (exists if the waterbody [alone or in combination] significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.)

The rule will be challenged by a number of states, industries, and trade associations. Regardless of the outcome, it is important to remember that delegated states (including Arkansas) have their own statutes to authorize their environmental regulatory activities. Further, many of these states have key jurisdictional definition that may in fact be broader than the corresponding federal terms.

An example is found in Arkansas.

The arguably corresponding statutory term “waters of the state” is broader than the current or prior definitions of WOTUS. The Arkansas Air and Water Pollution Control Act provides that “[i] shall be unlawful to place . . . waste in a location where it is likely to cause pollution of any waters of the state.”

Waters of the state are defined as:

All streams, lakes, marshes, ponds, water courses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies where accumulations of water, surface and underground, natural or artificial, public or private, which are confined within, flow through or border upon the state or any portion of the state.

As a result, non-Clean Water Act NPDES programs undertaken by Arkansas should not be affected by a change in the definition of WOTUS because they are driven by the state definition “waters of the state.”

A link to the pre-publication final rule notice can be found [here](#).