

## New WOTUS Rule Clarifies Clean Water Act Jurisdiction, Awaits Litigation



On January 23, 2020, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers finalized a long-awaited new rule redefining the term “Waters of the United States” (WOTUS) under the Clean Water Act (CWA). The Agencies state that their so-called Navigable Waters Protection Rule will improve and streamline the regulatory definition of WOTUS. The Final Rule focuses on four specific categories of CWA-jurisdictional waters (compared to six in the [December 2018 Proposed Rule](#)) and clearly articulating the exclusions applicable to non-jurisdictional water features. Like the Proposed Rule, the Final Rule adheres to the Justice Scalia test from the Supreme Court’s 2006 non-decision in *Rapanos*, in lieu of that case’s far broader Justice Kennedy’s “significant nexus” test. The Final Rule will take effect 60 days after the Agencies publish it in the Federal Register for public comment, after which the latest string of WOTUS litigation is expected.

### Key Changes and Concepts

#### Basic Definitions

The Final Rule defines jurisdictional surface waters as perennial or intermittent, but not ephemeral (i.e., non-continuous flow only in direct response to precipitation). Importantly, the Rule’s terms are based on how water flows within a “*typical year*.” A typical year is based on the normal range of precipitation and other climate factors over a rolling thirty-year period for a particular geographical area. The Agencies determine this information primarily using the NOAA Global Historic Climatology Network data. The “*typical year*” determination evaluates “normal” precipitation based on three thirty-day periods preceding the observation date. Watershed boundaries, other data, and additional methods can also be

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considered and weighed on a case-by-case basis.

The Final Rule also clarifies that jurisdiction is not lost at a point where the water flows through a natural or manmade break (i.e., a culvert). Certain ephemeral features and temporary underground flow of a channelized river or stream will not be jurisdictional on their own, but will not sever jurisdiction of an upstream, jurisdictional water. Additional key definitions related to specific categories of jurisdiction are highlighted below.

## Overview of the Four Categories of Jurisdiction

### *Territorial Seas and Traditional Navigable Waters*

The Final Rule preserves but consolidates these existing terms. Most commenters supported retention of this longstanding and least controversial category of jurisdiction under the CWA. This category also subsumes and narrows "interstate waters" under the 2015 Rule. The Final Rule clarifies that "interstate waters" do not mean *all* interstate waters, but only those that are traditionally navigable. That is, interstate waters are jurisdictional if they are traditional navigable waters or meet one of the other three categories of jurisdictional waters. Because these terms are based on the traditional navigable waters principle, the Rule also renders inapplicable certain Army Corps guidance documents that conveyed broader connectivity tests, including the 2003 SWANCC and 2008 Rapanos Guidance.

### *Tributaries*

Tributaries must be perennial or intermittent rivers or streams that provide surface water flow to a jurisdictional water in a typical year to be a WOTUS under the Final Rule. By contrast, the 2015 Rule had included ephemeral tributaries if they had features indicative of water flow, such as a high water mark, regardless of the frequency or duration of the flow. The Final Rule also excludes all ditches unless a ditch is a traditionally navigable water, relocates a jurisdictional tributary, is constructed in a tributary or in an adjacent wetland, or meets the flow requirements of a tributary. The Agencies further clarify that artificial or natural breaks, including ephemeral features, do not sever CWA jurisdiction to the upstream portion of a tributary, though the break does not itself become jurisdictional. Similarly, water diversions that completely reroute a tributary will not disrupt jurisdiction, though whether the managed system's infrastructure is also considered a tributary depends on whether the infrastructure also meets the definitions of a tributary (i.e., an underground diversion through a tunnel does not lose jurisdiction, but the tunnel is non-jurisdictional because it is not a surface water channel).

### *Lakes, Ponds, and Impoundments of Jurisdictional Waters*

The Final Rule combines jurisdictional lakes, ponds, and impoundments into one category of jurisdictional waters. They must be traditional navigable waters, contribute surface flow to the territorial seas or a traditional navigable water in a typical year either directly or through one or more jurisdictional waters, or be inundated by flooding in a typical year.

### *Adjacent Wetlands*

The final category includes all wetlands "adjacent" to territorial seas and traditional navigable waters, tributaries to those waters, and lakes, ponds, and impoundments of jurisdictional waters. The Final Rule modifies "adjacent" to mean to abut, to be inundated by flooding in a typical year from, or to be physically separated by one natural feature from a jurisdictional water as defined in the previous three categories. This is a fundamental shift away from the broader "neighboring" test in the 2015 Rule which would have conferred CWA jurisdiction on waters within a certain distance to the jurisdictional water in relation to the ordinary high water mark, floodplain, or high tide line of that water. This final category also modifies the 2018 Proposed Rule test for adjacency, based on comments requesting the Agencies include wetlands separated by natural features.

Notably, under the Final Rule, a wetland is no longer “adjacent” if it is adjacent to another *wetland*, effectively preventing the possibility of chain wetlands. Additionally, if wetlands are separated by an artificial structure, there must be a hydrological surface connection between the wetland and a jurisdictional water at least once in a typical year in order for there to be jurisdictional adjacency. Unlike in the Proposed Rule, wetland complexes that are crossed by roads and similar structures *are* jurisdictional if those structures allow for a surface water connection between segregated wetland portions, such as through a culvert, in a typical year.

The Final Rule retained a number of existing definitions regarding adjacent wetlands, including the definition of “wetland.” Like the 2015 Rule, the Agencies defined the term “upland” to mean any land above the ordinary high water mark or high tide line that does not satisfy all three wetland factors of hydrology, hydrophytic vegetation, and hydric soils.

### **Exempt Waters from CWA Jurisdiction**

The Final Rule exempts twelve categories of waters from CWA jurisdiction. Similar to prior versions of the regulations, groundwater, prior converted cropland, artificially irrigated areas, certain artificial lakes and ponds, certain ditches, stormwater control features, water-filled depressions constructed or excavated in certain areas, and waste treatment systems are exempt. The Final Rule also makes clear that groundwater recharge, water reuse, and wastewater recycling systems are exempt, and includes a catch-all exempting all waters that do not fall into one of the four categories of jurisdictional waters. The Final Rule also exempts all ephemeral surface features as well as diffuse stormwater runoff and overland sheet flow (initially proposed as one category but now two separate categories in response to comments to clarify).

### **Practical Applications and Effects of the Final Rule**

The Final Rule will take effect 60 days after the Agencies publish it in the Federal Register. But its ultimate fate remains uncertain. A number of states and environmental groups already are publicly committed to challenging the Final Rule [in federal district courts](#) across the country. While those parties have not tipped their hand on litigation strategy yet, they almost certainly will attack the Final Rule on statutory grounds under the CWA and procedural grounds alleging deficient rulemaking process and public engagement, as well as potentially on constitutional grounds concerning the scope of federal authority under the Commerce Clause. With an expected barrage of WOTUS litigation—coupled with the lack of nationwide injunctions and the Supreme Court’s holding that these lawsuits belong in district courts—stakeholders should be prepared for continued uncertainty over the scope of CWA jurisdiction resulting from disparate court decisions and possible injunctions on the Final Rule’s applicability.

In light of this uncertainty, members of the regulated community should carefully consider their permitting strategy for upcoming projects, not to mention those for which permit applications already are pending. While relying on the Final Rule after it takes effect would be appropriate and could lead to greater flexibility and lower mitigation costs, it also would carry some risk given the litigation onslaught the Final Rule will face and the potential of an adverse court decision prior to a CWA permit decision. By contrast, taking a more conservative approach under the current jurisdictional standard might reduce that risk though result in more near-term restrictions and mitigation costs.

In the long term, if the Final Rule survives litigation, the regulated community likely will benefit from greater consistency and certainty in jurisdictional determinations from the Army Corps. The Final Rule would accomplish this in large part by abandoning the fuzzy “[significant nexus](#)” concept and focusing instead on a more straightforward question—is there fairly consistent surface water and is the water traditionally navigable or connected to a water that is traditionally navigable? That said, the answer will not always be as straightforward as the question itself, and the Agencies retained substantial discretion to consider a variety of factors when making jurisdictional determinations.

Limiting jurisdiction in this way may result in some unintended consequences. For example, ephemeral and other previously-jurisdictional waters that no longer qualify as WOTUS under the Final Rule might be considered point sources that require CWA permits if they discharge pollutants to jurisdictional waters. Accordingly, it is crucial for landowners to evaluate any waters for which they are responsible to consider the possibility of a change in jurisdictional status and the implications that such a change could present, including any additional federal, state, or tribal permitting requirements that may be triggered.

Finally, the attempt to create bright-line definitions based on flow, precipitation, and other climate information will increase the attention on the scientific databases the Agencies rely on for decision-making and create opportunities for litigants to challenge the applicability for the Final Rule to specific projects. Any such future challenges will likely raise issues whether there is sufficient data available for determining CWA jurisdiction. The robustness of many databases is limited in temporal and geographic scope. Even with bright-line, legally-based definitions, implementation of the Final Rule will require more robust data collection to support permit applications nationwide.

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