

Clean Water Act Jurisdiction Over Waters of the U.S. Redefined Yet Again



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On December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) announced a [final rule](#) once again updating the definition of “waters of the United States” (WOTUS) and, therefore, the scope of federal

jurisdiction under the Clean Water Act (CWA). This is the Biden Administration’s attempt to create a durable definition of WOTUS as [planned](#) in 2021, ostensibly by finding a middle ground between the vacated Obama-era Clean Water Rule and the vacated Trump-era Navigable Waters Protection Rule.

This new final rule has not yet been published in the Federal Register, even though two weeks have passed since a pre-publication version became available. Whenever it is published, the rule will take effect 60 days later. Whether the agencies have finally succeeded in developing an enduring WOTUS definition remains to be seen.

Under their new rule, the agencies define WOTUS as follows:

1. Traditional navigable waters, territorial seas, and interstate waters;
2. Impoundments of WOTUS;
3. Tributaries to (1) or (2) waters, or when the tributaries meet the relatively permanent standard or the significant nexus standard;
4. Wetlands adjacent to (1) waters, or wetlands adjacent to and with a continuous surface connection to relatively permanent (2) or (3) waters, or wetlands adjacent to (2) or (3) waters with a significant nexus; and
5. Intrastate lakes and ponds, streams, or wetlands that meet the relatively permanent standard or the significant nexus standard.

The agencies also identified several specific exclusions from the regulatory definition and, thus, from federal CWA jurisdiction. In addition to preserving the longstanding exclusions for prior converted cropland and waste treatment systems, the new rule makes clear that the following features are not subject to federal jurisdiction:

1. Ditches, provided that they (a) are excavated wholly in and drain only dry land and (b) do not carry a relatively permanent flow of water;
2. Artificially irrigated areas that would revert to dry land if irrigation were to cease;

3. Artificial lakes or ponds created by excavating or diking dry land used exclusively for stock watering, irrigation, settling basins, or rice growing;
4. Artificial reflecting or swimming pools or other ornamental bodies of water;
5. Water-filled depressions created in dry land incidental to construction activity, as well as pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the operation is abandoned and the resulting water body meets the definition of waters of the United States; and
6. Swales and erosional features characterization by low volume, infrequent, or short duration flow.

The new rule also identifies specific factors to consider when evaluating whether hydrologic features, including wetlands, satisfy the “significant nexus” standard. The agencies intend this to develop the information to necessary determine whether a feature in question has a “material influence” on connected waters through evaluating distance to a traditional navigable water or relatively permanent water, hydrologic factors such as volume and duration of flow, size, density, or number of similarly situated waters, landscape position and geomorphology, and regional climate and effects on water flow.

The timing of the new rule is noteworthy, coming less than three months after the U.S. Supreme Court held oral argument in *Sackett v. EPA*, a lawsuit squarely challenging the agencies’ regulatory authority to assert CWA jurisdiction over remote wetlands based on the “significant nexus” test. While the agencies sought to elaborate on this standard in the new rule, the issue remains highly controversial. An adverse decision from the *Sackett* Court this Spring could sink the “durable” new rule only months after its issuance. The tea leaves were left scattered following the *Sackett* oral argument, but the agencies are already making contingency plans. Just five days after releasing the new WOTUS rule, the agencies [identified in the White House’s Unified Agenda](#) a possible rewrite of the rule this Fall.

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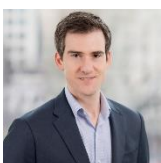
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