

PROPOSED REVISED WOTUS DEFINITION – KEY CHANGES

- On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) proposed a revised definition of “waters of the United States,” which would delineate the scope of federal regulatory authority under the Clean Water Act in a clear and understandable way.
- The agencies are concerned 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.
- The agencies’ proposal respects the constitutional and statutory limits of federal government to regulate navigable water under the Clean Water Act and gives states and tribes more flexibility to determine how best to manage waters within their borders.
- States already have their own authorities to regulate waters within their borders, regardless of whether they are federally regulated as “waters of the United States.”
- The EPA and the Army reviewed and considered the extensive feedback and recommendations the agencies received from states, tribes, local governments, and stakeholders throughout consultations and pre-proposal meetings and webinars. This input helped highlight the issues that are most important to state and tribal co-regulators and stakeholders with interests in this proposed regulation.
- The agencies’ proposal would eliminate the time-consuming and uncertain process of determining whether a “significant nexus” exists between a water and a downstream traditional navigable water as directed under the agencies’ 2008 *Rapanos* Guidance or whether a water has a significant nexus to a traditional navigable water, interstate water or territorial sea as codified in the agencies’ 2015 Rule defining “waters of the United States.”
- Specifically, the agencies are proposing the following changes (among others) compared to the 2015 Rule and pre-2015 practice:
 - Traditional navigable waters
 - No change, except that the territorial seas are identified in the proposal as a type of traditional navigable water.
 - Interstate waters
 - No longer an independent category of jurisdictional waters under the proposal; jurisdictional if they satisfy the conditions of another category of jurisdictional waters.
 - Independent category of jurisdiction under 2015 Rule and pre-2015 practice.
 - Tributaries
 - Rivers and streams that contribute perennial or intermittent flow to downstream traditional navigable waters in typical year are jurisdictional under the proposal; no ephemeral features are considered jurisdictional under the proposal.
 - Both the 2015 Rule and pre-2015 practice found some ephemeral streams jurisdictional.
 - Ditches
 - Fewer ditches will be considered jurisdictional under the proposal, mostly because no ditches constructed in upland and no ditches with ephemeral flow would be considered jurisdictional.
 - Both the 2015 Rule and pre-2015 practice found ditches jurisdictional where they were a tributary, including ditches constructed in upland with perennial or intermittent flow.

- Lakes and Ponds
 - Lakes and ponds were not a separate category in the 2015 Rule or pre-2015 practice.
 - This proposal more closely adheres to the pre-2015 practice of regulating lakes and ponds as traditional navigable waters or as part of the tributary network of traditional navigable waters, with added clarity to make implementation more straightforward and for consistency.
 - Under this proposed definition, fewer lakes and ponds may be jurisdictional than under the 2015 Rule because non-navigable, isolated lakes and ponds were considered adjacent waters together with isolated wetlands under the expanded definition of “neighboring” in the 2015 Rule.
- Impoundments
 - Impoundments of jurisdictional waters would remain jurisdictional under the proposal, as they were under the 2015 Rule or pre-2015 practice.
- Adjacent Wetlands
 - Under the agencies’ proposal there are more limited circumstances where wetlands would be considered adjacent relative to both the 2015 Rule and pre-2015 practice.
 - Under the 2015 Rule and pre-2015 practice wetlands behind a berm or dike were considered adjacent. Under the agencies’ new proposal wetlands must either abut jurisdictional waters or have a direct hydrological surface connection to jurisdictional waters in a typical year to be jurisdictional themselves; wetlands physically separated from jurisdictional waters by a berm, dike, or other barrier are not adjacent if they lack a direct hydrologic surface connection to a jurisdictional water in a typical year.

HOW TO COMMENT

- The agencies will take comment on the proposal for 60 days after publication in the Federal Register. The agencies will also hold an informational webcast on January 10, 2019, and will host a public listening session on the proposed rule in Kansas City, KS, on January 23, 2019. Additional information on both engagements is available at <https://www.epa.gov/wotus-rule>.
- Comments on the proposal should be identified by Docket ID No. EPA-HQ-OW-2018-0149 and may be submitted online. Go to <https://www.regulations.gov> and follow the online instructions for submitting comments to Docket ID No. EPA-HQ-OW-2018-0149.
- For additional information, including the full EPA public comment policy, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR MORE INFORMATION

- Additional fact sheets along with copies of the proposed rule and supporting analyses are available on EPA’s website at <https://www.epa.gov/wotus-rule>.