

I. Introduction

The US EPA and the US Army Corps of Engineers (the “Corps”) have unveiled their long-awaited proposed interpretation of “waters of the United States” or “WOTUS.” This term describes the scope of federal jurisdiction under the Clean Water Act, and it has been one of the most hotly litigated issues in environmental law and hotly debated issues in Congress in recent memory.

In May of 2023, the US Supreme Court provided significant clarification to stakeholders by holding that “waters of the United States” refers “only to geographical features that are described in ordinary parlance as ‘streams, oceans, rivers and lakes,’ and to adjacent wetlands that are ‘indistinguishable’ from those bodies of water due to a ‘continuous surface connection,’” *Sackett v. EPA*, 598 U.S. 651 (2023). The decision also rejected the so-called “significant nexus” test that the US EPA and the Corps had long used for assessing whether a water body or feature is a WOTUS.

This week’s pre-publication proposal (Proposed Rule) represents the US EPA and the Corps’ effort to implement *Sackett* and restore predictability to an area of law that has been debated in Congress and the courts for more than 40 years. When the Clean Water Act was enacted in 1972, “waters of the United States” was not clearly defined. While the US EPA and the Corps have provided regulatory interpretations for WOTUS over the years, numerous legal challenges and multiple Supreme Court cases have repeatedly reshaped the scope of federal authority. As with prior WOTUS rulemakings during the Obama, Trump and Biden administrations, this Proposed Rule is expected to prompt significant public engagement, as well as numerous court and legislative battles.

Against that backdrop, the Proposed Rule introduces several new approaches, including examining whether a particular feature is “relatively permanent” or “continuously flowing” based on an evaluation of whether it flows continuously during a “wet season.” The “wet season” is intended to be a flexible period that will vary depending on the region and is also expected to vary in length. The proposal also floats a new “reach” methodology for assessing tributaries in which non-continuously-flowing reaches may detach jurisdiction from upstream continuously flowing reaches in some cases. Public comments on the proposal will be due 45 days after the Proposed Rule is published in the *Federal Register*.

II. Summary of Proposed Rule

Under the Proposed Rule, the term “waters of the United States” would include (1) traditional navigable waters and the territorial seas; (2) most impoundments of “waters of the United States;” (3) relatively permanent tributaries of traditional navigable waters, the territorial seas and impoundments; (4) wetlands adjacent (i.e., abutting and having a continuous surface connection) to traditional navigable waters, impoundments and tributaries; and (5) lakes and ponds that are relatively permanent and have a continuous surface connection to a traditional navigable water, the territorial seas or a tributary. The Proposed Rule would also amend the exclusions for waste treatment systems, prior converted cropland and certain ditches, and add an exclusion for groundwater. Finally, the Proposed Rule would add definitions for “relatively permanent,” “continuous surface connection,” “tributary,” “waste treatment system,” “ditch” and “prior converted cropland.”

a. Deletion of Interstate Waters Category

The Proposed Rule would remove the category of “interstate waters” from the definition of “waters of the United States.” According to the agencies, this deletion is intended to clarify that waters would not be jurisdictional simply because they cross a state boundary. Rather, under the proposal, interstate waters would only be “waters of the United States” if they are themselves jurisdictional by some other means, such as being a traditional navigable water or jurisdictional tributary.

b. Definition of “Relatively Permanent”

Under both the existing and Proposed Rule, the jurisdictional status of lakes, ponds, tributaries and wetlands, depends, at least in part, on whether those waters are “relatively permanent” and have a “continuous surface connection” with another jurisdictional water. The Proposed Rule adds definitions of “relatively permanent” and “continuous surface connection” for the first time, as those terms were used in *Sackett*, but not defined by the US Supreme Court.

The term “relatively permanent” would be defined to mean “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.” According to the agencies, the phrase “at least during the wet season” is intended to include “extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season.” The agencies intend to rely on the Web-based Water-Budget Interactive Modeling Program (WebWIMP) outputs reported in the Corps’ Antecedent Precipitation Tool (APT), as the primary source for identifying the wet season, which is expected to vary between locations.

The wet season duration is expected to vary based on region. “For example, if a wet season extended for six months, the stream would need to flow for at least six months coincident with the identified wet season to be considered relatively permanent.” In parts of the arid west, the standard would be a shorter duration of flow. The agencies explain that “ephemeral waters” would not be considered “relatively permanent.” However, the line between ephemeral waters that flow only in response to precipitation and waters that flow “at least during the wet season” may be difficult to delineate, and the agencies have solicited public comment on that issue.

With respect to tributaries, the agencies intend to adopt a “reach” approach to assessments, and the presence of a non-relatively permanent reach “would sever jurisdiction of upstream reaches, . . . except where the tributary is part of a water transfer currently in operation.”

c. Definition of “Continuous Surface Connection”

Both “adjacent wetlands” and “relatively permanent lakes and ponds” must have a “continuous surface connection” to a water of the United States to be jurisdictional. The Proposed Rule would add a definition of “continuous surface connection” for the first time to mean “having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.” Therefore, according to the agencies, the new definition of “continuous surface connection” provides a two-prong test that requires both (1) abutment of a jurisdictional water; and (2) having surface water at least during the wet season. The agencies assert that a wetland with a continuous surface connection under this standard is “indistinguishable” from an adjacent jurisdictional water, and therefore, that the definition is consistent with the US Supreme Court’s holding in *Sackett* that “the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States.’” Here, too, the agencies’ proposed approach would “allow for regional variation given the range in hydrology and precipitation throughout the country.”

d. Definition of “Tributaries”

Under the Proposed Rule, the term “tributaries” would mean “a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.” Furthermore, the agencies’ proposed definition of “tributary” would clarify that a “tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel or similar artificial feature, or through a debris pile, boulder field, wetland or similar natural feature, if such feature does not convey relatively permanent flow.”

e. Exclusions from the Definition of “Waters of the United States”

The Proposed Rule would modify three of the existing eight exclusions from the definition of “waters of the United States,” including the exclusion for waste treatment systems; the exclusion for prior converted cropland; and the exclusion for certain ditches. In addition, the agencies are proposing to add an additional exclusion to the definition of “waters of the United States” for groundwater.

- **Waste treatment systems** – The proposal would revise the exclusion for waste treatment systems to include “all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).”
- **Ditches** – The agencies are proposing to revise and simplify the exclusion of certain ditches from the definition of “waters of the United States.” Under the Proposed Rule, “[d]itches (including roadside ditches) constructed or excavated entirely in dry land” would be excluded. However, even if a ditch is excluded from the definition of “waters of the United States,” it may function as a point source such that discharges of pollutants from these features could require a Section 402 Clean Water Act permit.
- **Prior converted cropland** – The Proposed Rule would continue to exclude prior converted cropland. However, the proposal would clarify that the prior converted cropland exclusion would no longer apply for Clean Water Act purposes when the cropland is abandoned (i.e., the cropland has not been used for or in support of agricultural purposes for a period of greater than five years) and the land has reverted to wetlands.
- **Groundwater** – The Proposed Rule expressly excludes groundwater from the definition of “waters of the United States.” The agencies assert that they have never interpreted “waters of the United States” to include groundwater, but that codification of a groundwater exclusion is intended to provide regulatory clarity.

III. Industry Impact and Opportunities for Participation

The Proposed Rule may reduce the number of projects requiring federal permits and increase the role of states and tribes in regulating water resources. Companies operating across multiple jurisdictions may face a more fragmented and uneven regulatory landscape, with states moving at different speeds to adjust their regulatory frameworks. While this shift may complicate national compliance strategies, environmental review timelines and project planning – the transition period creates an opportunity for industry to build stronger relationships with state agencies, streamline compliance strategies and help shape clear and workable state standards. States, in turn, will have an opportunity to further develop workable programs tailored to regional conditions and emerging regulatory mandates under the revised WOTUS framework.

There will be several opportunities for the public to participate in the rulemaking. First, the agencies will hold two in-person public meetings and will allow virtual participation at both. Information about the two meetings, including when and where they will occur, will be posted to once available.

Second, the US EPA and the Corps will accept written comments for 45 days after the Proposed Rule is published in the *Federal Register*, which will likely occur within the next week or two. Comments can be submitted through regulations.gov at Docket ID No. EPA-HQ-OW-2025-0322.

The agencies are requesting comment on the Proposed Rule as a whole and on several specific topics, including: (i) the definitions of “relatively permanent,” which they are also considering limiting to perennial waters only, “wet season,” “wetland,” “tributary,” “reach” and the associated reach approach, “continuous surface connection,” particularly whether a continuous surface water connection should be required to establish adjacency and “waste treatment system,” as well as and the implications thereof; (ii) the concept of a “seasonal” flow duration and what that term may include, such as a defined duration of 90 or 270 days; (iii) approaches for increasing predictability in jurisdictional determinations; and (iv) significant reliance interests that may be impacted by the Proposed Rule.

Affected stakeholders may wish to consider commenting on the Proposed Rule, including those portions of the rule that they support. We are available to assist in preparing your stakeholder comments, and we will continue to track developments with the US EPA and the Corps, as well as the many states in which we practice.

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