



# "Waters of the U.S." Redefined: Permitting Impacts of the EPA and Army Corps of Engineers' Proposed Revisions

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On November 17, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) [announced](#) long-anticipated revisions to the definition of "waters of the United States" (WOTUS), which defines the scope of federal jurisdiction under the Clean Water Act (CWA). Establishing a regulatory definition of WOTUS is highly consequential and often controversial because the definition delineates the universe of waterbodies and wetlands that are subject to federal permitting and regulatory requirements and those waters that are regulated by states and/or tribes. The precise contours of the WOTUS definition have changed under each presidential administration, and at least four of those interpretations have been reviewed by the U.S. Supreme Court.

This proposal represents the Trump Administration's second attempt to promulgate a regulatory definition of WOTUS. The revisions specifically respond to the Supreme Court's most recent WOTUS decision, *Sackett v. EPA* (2023), which adopted a narrower interpretation of the term "WOTUS" and therefore limited federal jurisdiction to traditionally navigable waters and certain **relatively permanent** waterbodies and wetlands that are connected to traditionally navigable waters through a **continuous surface connection**.

## New WOTUS Definitions

Under the proposed rule, the term "waters of the United States" would include the following:

1. Traditional navigable waters and the territorial seas;
2. Most impoundments of WOTUS;
3. Relatively permanent tributaries of traditional navigable waters, the territorial seas, and impoundments;
4. Wetlands adjacent to and which directly abut (via a continuous surface-level connection) to WOTUS; and
5. Lakes and ponds that are relatively permanent and have a continuous surface connection to a WOTUS.

The agencies' proposal would also remove interstate waters from the WOTUS definition. Interstate waters are currently a standalone category of jurisdictional waters that include waterbodies would

not have otherwise satisfied the Supreme Court's criteria for federal jurisdiction under the CWA. Under the agencies' proposal, interstate waters will not be considered WOTUS simply because they cross or straddle state lines. Instead, interstate waters will only be considered WOTUS if they must fall under one of the other categories of waters encompassed by the WOTUS definition.

The agencies also proposed regulatory definitions for previously undefined or insufficiently defined terms such as "relatively permanent," "continuous surface connection," and "tributary" in an effort to improve clarity and utilize more objective and observable criteria, as opposed to complex case-by-case analyses. According to the agencies, this approach is designed to make agency permitting decisions more consistent and transparent, enabling landowners, developers, and businesses to plan projects with confidence and avoid unexpected compliance obligations.

**"Relatively permanent"** waters will be defined to mean "standing or continuously flowing bodies of surface water" that flow or stand "year-round, or at least during the wet season." Ephemeral waters that only exist in direct response to precipitation will not be included under federal jurisdiction. This revision aims to bring predictability and a "bright line test" to what was a previously ambiguous determination by the agencies in assessing whether a water body was "relatively permanent."

**"Tributaries"** will be defined to include bodies of water with relatively permanent flow, a bed and bank, which connect to downstream navigable waters or territorial seas. Tributaries would not include bodies of water that channel flow through an otherwise non-jurisdictional water feature if there is not relatively permanent flow.

**"Continuous surface connections"** under the proposed rule will be defined to mean "having surface water at least during the wet season and abutting a jurisdictional water." This definition entails a two-part test for determining jurisdiction over wetlands that will require both:

1. Abutment of a jurisdictional water, *and*
2. Having surface water at least during the wet season.

While the regulatory definition and interpretation of "wetlands" is not changing under the proposed rule, the new definition for "continuous surface connection" will impact the extent to which certain wetlands or portions of wetlands fall under federal jurisdiction.

## Revisions to Exclusions

The proposed rule also seeks to further clarify and expand a number of exclusions from the definition of WOTUS.

- **Waste Treatment Systems** – The proposed definition would include "all components of a waste treatment system designed to meet the requirements of the [CWA], including lagoons and treatment ponds [] designed to... remove pollutants... from wastewater prior to discharge (or eliminating any such discharge)."
- **Prior Concerted Cropland** – The proposed revisions to this definition would clarify that this exclusion would no longer apply if the cropland has been abandoned (not used for agricultural purposes for more than 5 years) and the land has reverted to wetlands (pursuant to the new interpretation of this definition).
- **Ditches** – The proposed revisions to this definition would exclude from the definition of WOTUS non-navigable ditches (including roadside ditches) that are constructed entirely in dry land,

even if they have a relatively permanent flow and connect to jurisdictional water. However, other types of ditches, such as tidal ditches, those used for navigation (*e.g.*, canals), and certain ditches constructed in wetlands or which direct or channelize tributaries would fall under the definition of WOTUS.

- **Groundwater** – The agencies also proposed a new exclusion applicable to groundwater, including groundwater drained through subsurface drainage systems. This proposed exclusion reflects the agencies’ longstanding but never codified interpretation that Congress expressly and exclusively conferred states authority over groundwater.

## Impacts of the Proposed Rule

In light of the binding Supreme Court precedent it purports to codify, the proposed rule would significantly narrow the scope of waters subject to federal jurisdiction, and therefore reduce the number of facilities and projects subject to federal permitting requirements under sections 402 and 404 of the CWA. These deregulatory effects of the agencies’ proposed rule may be particularly pronounced in regions where ephemeral, interstate, or otherwise intermittent waters were previously considered jurisdictional.

This does not necessarily mean, however, that fewer waters will be protected or subject to regulation. As Congress intended, states have primary jurisdiction over all waterbodies and wetlands within their states unless those waters fall within the highly circumscribed subset of “waters of the United States” over which the CWA granted jurisdiction to the federal government. As evidenced by the first Trump Administration’s more constrained WOTUS definition, states can and often do expand their clean water and wetland protection programs to assume the jurisdiction ceded by the federal government.

## Next Steps

EPA and USACE plan to host in-person public meetings with an option for virtual participation for stakeholders to provide public remarks. Formal written comments are due on January 5, 2026.

If your company, project, or land may be impacted by these proposed changes, feel free to reach out to us directly with questions or assistance in preparing comments.