



# Information Alert

*State-Federal Relations Division*

## **Environmental Protection Agency Announces Revised Definition of WOTUS**

January 9, 2023

On Dec. 30, 2022, the Environmental Protection Agency and the Department of the Army [announced the final](#) definition of which wetlands and waterways are protected by the Clean Water Act. The Waters of the United States, or WOTUS, as the rule is known, aims to determine the scope of federal authority to regulate such water, and when states, local governments and others must seek federal permits to develop land because it contains such waters.

The final rule not only codifies the use of pre-2015 regulations, which the agencies were enforcing following the vacatur of the previous rulemaking—the Navigable Water Protection Rule—but also updates those regulations accordingly to be “consistent with relevant Supreme Court decisions.” Several categories of jurisdictional waters that would be defined as WOTUS are identified in the rulemaking, including:

- Traditional navigable waters, territorial seas and interstate waters.
- Impoundments of WOTUS.
- Tributaries to traditional navigable waters, adjacent wetlands and intrastate water features that have a “relatively permanent” flow to traditional navigable waters or have a “significant nexus” with those waters.

Notable excluded waters include ephemeral streams or ditches without relatively permanent flows of water, waste treatment systems and artificial lakes or ponds.

While the Navigable Waters Protection Rule limited the scope of which waters were subject to Clean Water Act provisions based on the *Rapanos v. United States* plurality opinion, the new rulemaking relies on the act’s statutory language to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”

As such, the regulation extends federal jurisdiction to tributaries that “alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical or biological integrity” of other jurisdictional waters, including those which are traditional navigable waters. Wetlands adjacent to such tributaries, or those with a “significant hydraulic or ecological nexus” to such tributaries, are also considered WOTUS, as are certain intrastate waters that have either a continuous surface connection or a significant effect on other waters.

It's important to note that no distance requirements for adjacent wetlands were included in the rulemaking—similar to the previous rulemakings.

The U.S. Supreme Court has heard oral arguments but has not yet released a decision in [\*Sackett v. EPA\*](#), in which the court will decide what test should be used to determine whether the CWA applies to certain lands—specifically for determining when “wetlands” qualify as WOTUS. The court may choose to rely on the “significant nexus” test determined by former Justice Anthony Kennedy’s *Rapanos* plurality opinion; that of the late Justice Antonin Scalia’s dissenting opinion, which defines WOTUS as extending to “relatively permanent, standing or flowing bodies of water” and to wetlands with a “continuous surface connection” to such permanent waters; or another test entirely. During oral arguments, the justices considered whether a new test, or distance measure, would be needed to identify federally protected waters more precisely.

Relatedly, the EPA has [indicated](#) that it may undertake a second rulemaking to further refine and update the regulations—an action that may still be taken following the Supreme Court’s upcoming decision. For more information on WOTUS, see the EPA’s press release [here](#), or contact NCSL staff Kristen Hildreth at [kristen.hildreth@ncsl.org](mailto:kristen.hildreth@ncsl.org). For a rundown of the history of WOTUS, please visit [NCSL’s Legal & Regulatory Timeline of “WOTUS.”](#)