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Receding Waters: How the New WOTUS Definition Reduces Clean Water Act Jurisdiction

Insight — November 20, 2025

Key Takeaways:

- Significantly reduced federal jurisdiction: The proposed rule will remove federal protection from many tributaries and wetlands, particularly in arid western states.
- Interstate waters lose automatic protection: Waters will no longer be federally regulated simply because they cross state lines—they must meet other jurisdictional criteria.
- Fewer permitting requirements: Many development projects that previously required Clean Water Act permits will no longer need them, though litigation challenging the rule is expected.

Background

On November 17, 2025, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) (collectively, the Agencies) issued a pre-publication version of a proposed rule (the Proposed Rule) that would yet again revise the Agencies' regulations defining "waters of the United States" (WOTUS) under the Clean Water Act (CWA), available here. The Agencies assert that the Proposed Rule is intended to implement the U.S. Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency*, which narrowed the scope of federal jurisdiction over wetlands. By adding definitions of key terms "continuous surface connection," "relatively permanent," and "tributary," the Proposed Rule will likely significantly reduce federal CWA jurisdiction over tributaries and wetlands, particularly in the arid west. If upheld after anticipated litigation challenging the definition, the Proposed Rule will also result in fewer federal permitting requirements for projects that propose impacting streams and wetlands.

Definitions Remove Protection for Certain Streams and Wetlands

Under the Proposed Rule, "continuous surface connection" means "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water."[1] "Relatively permanent" means "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[2] This definition would apply not only to tributaries, lakes, and ponds, but also to the process of determining when wetlands are adjacent to impoundments and tributaries that are "relatively permanent."[3]

The Proposed Rule does not define "wet season," but the Agencies indicate that this concept is tied to the notion of "relatively permanent," which applies to tributaries, lakes, ponds, and wetlands. Thus, wetlands which lack surface water year-round or during the "wet season" will no longer be jurisdictional, even if they touch another jurisdictional water.

The Proposed Rule would also add a definition of "tributary" back into the regulations. Under the proposal, "tributary" means:

> 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. 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. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status.[4]

The addition of "wetland" in this definition means that a tributary which contributes surface water to a downstream jurisdictional water through a wetland **is not jurisdictional**, unless the wetland conveys relatively permanent flow.

Given these new definitions, the Proposed Rule would remove jurisdictional status from wetlands that:

> (i) exist solely due to a high groundwater table;
>
> (ii) do not touch another jurisdictional water; or
>
> (iii) lack surface water year-round or during the "wet season."

While the true impact of the Proposed Rule will not be realized until the Agencies and the regulated community apply it during the permitting process for future projects, most of the wetlands in the arid west would likely no longer be subject to federal CWA regulation under the Proposed Rule.

No Separate "Indistinguishability Requirement"

The Proposed Rule does not include in the WOTUS definition a separate "indistinguishability requirement" even though the *Sackett v. EPA* decision stated that "'waters' may fairly be read to include only those wetlands that are as a practical matter **indistinguishable** from waters of the United States, such that it is difficult to determine where the 'water' ends and the 'wetland' begins."[5] Since then several lower courts have grappled with precisely how to apply the so-called indistinguishability requirement.[6] The

Agencies explained in the preamble why a separate indistinguishability requirement was not included in the Proposed Rule:

> The agencies acknowledge that during the dry season, when either relatively permanent surface waters or abutting wetlands are dry, or both, wetlands may potentially be more easily distinguishable from abutting waters. However, the agencies view indistinguishability during the wet season as sufficient to satisfy the *Sackett* test.
>
> Requiring permanent indistinguishability based on permanent surface water in both the paragraphs (a)(1) through (3) and (a)(5) water and the adjacent wetland would read the modifier "relatively" out of the interpretation of "relatively permanent" and render the vast majority of wetlands nonjurisdictional, which the agencies propose is not the best reading of the Clean Water Act under *Sackett*.[7]

Interstate Waters No Longer Subject to Federal Jurisdiction

Only two proposed changes would revise the specific definition of "waters of the United States" under 33 CFR 328.3(a) and 40 CFR 120.2(a):

> (1) the removal of interstate waters from the definition under paragraph (a)(1)(iii); and
>
> (2) the removal of the descriptive qualifier "intrastate" from paragraph (a)(5), which previously identified certain "intrastate lakes and ponds" as jurisdictional.

This means that a water feature would need to meet the definition of a traditional navigable water, tributary, or adjacent wetland to be jurisdictional and would not be jurisdictional simply because it spans state lines.

Under the Proposed Rule, WOTUS would still include impoundments of other WOTUS; tributaries of traditional navigable waters or the territorial seas "that are relatively permanent, standing or continuously flowing bodies of water;" and wetlands adjacent to (a) traditional navigable waters or (b) relatively permanent, standing or continuously flowing impoundments of WOTUS or jurisdictional tributaries and with a continuous surface connection to those waters. Still, as discussed above, the Proposed Rule will significantly reduce the scope of jurisdictional waters by adding definitions of "continuous surface connection," "relatively permanent," and "tributary."

Revised Exemptions Add Clarity to Non-WOTUS Waters

The Agencies also propose revising the enumerated exceptions to WOTUS in 33 CFR 328.3(b) and 40 CFR 120.2(b). These bodies of water would not be considered WOTUS even where they would otherwise meet the regulatory definition. Specifically, the Agencies propose simplifying the exclusions for waste treatment systems, prior converted cropland, and

ditches, each of which would now have their own definition.

The Agencies also propose adding language to exclude "[g]roundwater, including groundwater drained through subsurface drainage systems" from the definition of WOTUS.[8] They note that groundwater has never been considered jurisdictional, but that it is being reintroduced as an express exemption to underscore that fact. This does not appear to be an attempt to affect the Supreme Court's holding in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, as the Agencies' Regulatory Impact Analysis recognizes that discharge permits are required for the functional equivalent of a direct discharge under *County of Maui*.[9]

Once the Proposed Rule is published in the Federal Register, a 45-day public comment period will begin. Given the potential for the Proposed Rule to eliminate federal CWA permitting for many projects, we anticipate environmental groups and several states will initiate litigation to challenge the definition, just as we've seen with every definition of WOTUS promulgated since 2015.

[1] 33 CFR 328.3(c)(3); 40 CFR 120.2(c)(3) (proposed).

[2] 33 CFR 328.3(c)(8); 40 CFR 120.2(c)(8) (proposed).

[3] Preamble, pg. 75.

[4] 33 CFR 328.3(c)(10); 40 CFR 120.2(c)(10) (proposed).

[5] *Sackett v. EPA*, 598 U.S. 651, 678 (2023) (emphasis added).

[6] *See, e.g., Lewis v. United States,* 88 F.4th 1073, 1078 (5th Cir. 2023) (holding that there was no 'continuous surface connection' … [because] **it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin**); *The Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, 146 F.4th Cir. 1080, 1088-89 (11th Cir. 2025) ("To establish that a wetland is sufficiently indistinguishable from a neighboring water of the United States, the environmentalists must allege first, that the adjacent body of water constitutes 'waters of the United States' ... ; and second, that the wetland has a **continuous surface connection** with that water, **making it difficult to determine where the 'water' ends and the 'wetland' begins**.").

[7] Preamble, pg. 114-15.

[8] 33 CFR 328.3(b)(9); 40 CFR 120.2(b)(9) (proposed).

[9] Regulatory Impact Analysis for the Proposed *Updated Definition of Waters of the United States* Rule, p. 4-5, n.2 (Nov. 2025).

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