

Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency Proposed Rule



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The United States Environmental Protection Agency and the United States Department of the Army (collectively, "EPA") has published a Pre-Publication Notice proposing a rule that would revise the regulations defining the scope of waters federally covered under the Clean Water Act. See EPA-HQ-OW-2025-0322.

The stated intent of the proposed rule includes:

- Amending the definition of "waters of the United States" ("WOTUS") in light of the United States Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency*.
- Provide greater regulatory certainty/predictability/consistency by clarifying the definition of WOTUS.
- Implement the overall objective of the Clean Water Act to restore and maintain the quality of the Nation's waters while respecting State and Tribal authority over their own land and water resources.

The definition of WOTUS is arguably one of the most critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both National Pollutant Discharge Elimination System ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits.
- Section 311 oil/hazardous substance release requirements.
- Clean Water Act Spill Prevention Control and Countermeasure regulations.

As a result, the definition of WOTUS has been and continues to be the subject of frequent litigation, legislative oversight, rulemakings, and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

The Trump Administration has sought to narrow aspects of the Biden-era rulemaking addressing this definition in regard to a determination of Sackett's outline of when adjacent wetlands are jurisdictional.

The United States Supreme Court in *Sackett* articulated a two-part process for determining a WOTUS:

1. The CWA's use of "waters" in §1362(7) refers only to "geo-graphic[al] 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 sur-face connection. *Rapanos v. United States*, 547 U. S. 715, 755, 742, 739.
2. To assert jurisdiction over an adjacent wetland un-der the CWA, a party must establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); 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.”

EPA states by way of introduction to the proposed rule that in September 2023, the agencies issued a final rule without notice and comment amending the regulations defining WOTUS to conform to the Supreme Court’s Sackett decision. They state that numerous concerns raised by stakeholders about the Amended 2023 Rule, including that the Amended 2023 Rule does not adequately comply with the Supreme Court’s interpretation in Sackett of the scope of Federal jurisdiction under the Act as well as identifying implementation-related issues. The agencies argue that in this proposed rule they are revising the 2023 rule to:

- Implement the Sackett decision.
- Provide greater regulatory certainty.
- Increase Clean Water Act program predictability and consistency.

This is argued to be based on the text, structure, and history of the Clean Water Act and Supreme Court precedent, taking into account other relevant factors.

EPA describes the key revisions in the proposed rule as including:

- Defining key terms like “relatively permanent,” “continuous surface connection,” and “tributary” to appropriately delineate the scope of WOTUS consistent with the Clean Water Act and Supreme Court precedent;
- Establishing that jurisdictional tributaries must connect to traditional navigable waters either directly or through other features that provide predictable and consistent flow;
- Reaffirming that wetlands must be indistinguishable from jurisdictional waters through a continuous surface connection, which means that they must touch a jurisdictional water and hold surface water for a requisite duration year after year;
- Strengthening state and tribal decision-making authority by providing clear regulatory guidelines while recognizing their expertise in local land and water resources;
- Preserving and clarifying exclusions for certain ditches, prior converted cropland, and waste treatment systems; Adding a new exclusion for groundwater; and
- Incorporating locally familiar terminology, such as “wet season,” to help determine whether a water body qualifies as WOTUS;
- In addition, the limitation to wetlands that have surface water at least during the wet season and abut a jurisdictional water will further limit the scope of permafrost wetlands that are considered to have a continuous surface connection under the proposed rule. These proposed changes are intended to provide clarity and consistency to the continuous surface connection definition.

Same-day comment by industrial trade associations and the environmental organizations include predictable responses such as National Association of Manufacturers President and CEO Jay Timmons states in part:

... Manufacturers thank EPA Administrator Lee Zeldin for listening to the concerns of our industry and revising the definition of the Waters of the United States rule to bring certainty and predictability ... For too long, the regulatory structure under the WOTUS rule, which often has included shifting and unclear definitions, has created legal uncertainty for manufacturers in the U.S., undermining our ability to invest and build across the country. Understanding which bodies of water require federal oversight under the Clean Water Act is critical for manufacturers planning new projects.

Water Keeper Alliance states in part that:

... By narrowing the scope of waters protected under the Clean Water Act, this reinterpretation removes federal safeguards from many rivers, streams, lakes, wetlands, and other vital waterways. Without oversight, these waters face increased risks from pollution, threatening clean drinking water, recreation,

fisheries, and aquatic life ... Collectively, these actions threaten to reverse more than five decades of progress to reduce highly toxic and dangerous pollutants from the environment and protect critical water resources from dangerous development projects.

A copy of the proposed rule can be found [here](#).