



EPA and Corps Navigate New Regulatory Definition of Waters of the United States

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By [Jenna Mandell-Rice](#), [Tyson Kade](#), [Molly Lawrence](#), and [James Garlant](#).

On November 20, 2025, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) published a Notice of Proposed Rulemaking (Proposed Rule) in the Federal Register to update several regulatory definitions defining “Waters of the United States” (WOTUS) under the Clean Water Act (CWA).

The Proposed Rule is a culmination of decades of agency and judicial process that at times narrowed and expanded the scope of federal jurisdiction over our nation’s waters. Driven by the Supreme Court’s 2023 ruling in [Sackett v. Environmental Protection Agency](#) (Sackett), the Trump Administration is poised to change the definition of WOTUS to limit federal jurisdiction. These changes are intended to respect State and Tribal authority and promote regulatory certainty and clarity.

As further explained below, the Proposed Rule would clarify the definition of WOTUS by defining “continuous surface connection,” “relatively permanent,” and “tributaries,” and would clarify several exemptions under the CWA. Additionally, the Proposed Rule would add a new exemption for groundwater and would eliminate interstate waters that don’t themselves independently qualify as WOTUS from federal jurisdiction.

EPA and the Corps are also inviting comments on alternative approaches and additional revisions to the WOTUS definition and its implementation. Comments must be received on or before January 5, 2026.

BACKGROUND

The CWA applies to “navigable waters,” which is defined as “the waters of the United States, including the territorial seas,” but the CWA does not further define WOTUS. This lack of statutory definition has resulted in ambiguity, protracted rulemaking, and decades of litigation over the breadth of WOTUS.

Most recently, the U.S. Supreme Court addressed the definition of WOTUS in *Sackett*. The Court adopted a narrow interpretation of WOTUS, holding that the CWA’s use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographical features,’” such as streams, oceans, rivers and lakes. Similarly, *Sackett* concluded that the Agencies’ definition of “adjacent,” used to determine whether a wetland constituted a jurisdictional water under the CWA, was too broad, and affirmed that the “continuous surface connection” test is the appropriate standard. Shortly thereafter, the Corps and EPA under the Biden Administration promulgated regulations conforming the regulatory definition of WOTUS to the *Sackett* decision.

(Amended 2023 Rule). EPA and the Corps are now proposing to revise the definition again to address concerns raised by stakeholders about the Amended 2023 Rule, including assertions that the Amended 2023 Rule does not adequately comply with the Supreme Court's interpretation in *Sackett* of the scope of Federal jurisdiction and implementation-related issues.

For additional background and history of the WOTUS saga, refer to Van Ness Feldman's past alerts and notices.¹

KEY CHANGES

Definitions:

The most significant proposed changes would revise the definitions of two terms that guide whether a water is a WOTUS or not: "relatively permanent" and "continuous surface connection." The rule also clarifies the definition of "tributaries." Each term plays an important role in determining whether a particular water qualifies as a WOTUS.

WOTUS includes (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., 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.

Relatively Permanent. The Proposed Rule would define "relatively permanent" 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." The relatively permanent definition applies to tributaries, lakes and ponds, and adjacent wetlands.

With the addition of "at least during the wet season," the Agencies propose to add a temporal element to the test. "**Wet season**" would be defined using existing agency tools, and quantitatively as the point at which "precipitation exceeds evapotranspiration," and would vary by geographic region and ecotype. Significantly, water must stand or flow for the entirety of the wet season to qualify as "relatively permanent;" intermittent flow, or longer flow not occurring during the wet season do not qualify as relatively permanent waters. The Agencies are

¹ <https://www.vnf.com/trump-administration-launches-comprehensive-review-of-clean-water-act-definition-for-waters-of-the-united-states-wotus>; <https://www.vnf.com/us-supreme-courts-sackett-decision-prompts-conforming-wotus-rule>; <https://www.vnf.com/us-supreme-court-narrows-wotus-limiting-scope-of-clean-water-act>; <https://www.vnf.com/navigable-waters-protection-rule-substantially-narrows-the-scope-of-waterbodies-subject-to-regulation-under-the-clean-water-act>

soliciting comments on alternative methods that could better define the wet season given site and region-specific factors.

Continuous surface connection. The Proposed Rule would define a continuous surface connection as one “having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.”

EPA and the Corps would apply a two-prong test requiring both: (1) abutment of a jurisdictional water; and (2) having surface water at least during the wet season. The Agencies explain that this is meant to limit the scope of jurisdictional wetlands by suggesting that even if a wetland is more broadly delineated, only those portions of the wetland that have surface water that abuts or touches a jurisdictional water during the wet season are under federal jurisdiction.

Tributaries. The Proposed Rule would redefine tributaries as “bod[ies] 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.”

This definition expressly excludes “a body of water that contributes surface water flow to a downstream jurisdictional water through [natural or artificial] feature[s]... if such feature does not convey relatively permanent flow.” However, tributaries do include natural, man-altered, and man-made waterbodies, such as rivers, streams, ditches, canals, lakes, ponds, and impoundments,” as long as they connect to a downstream traditionally navigable water. Tributaries may connect through non-jurisdictional features, so long as those features convey relatively permanent flow.

Exclusions

The Proposed Rule would modify three existing jurisdictional exclusions for waste treatment systems, prior converted cropland, and ditches, and adds a new exclusion related to groundwater.

Waste water systems. The Proposed Rule would continue an existing exclusion for waste treatment systems, and define “**waste treatment systems**” as “including all components of a waste treatment system designed to meet the requirements of the [CWA], 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).”

By adding this definition, the Proposed Rule appears to expand the scope of the exclusion to include all components of a waste treatment system. The Preamble of the Proposed Rule acknowledges that a cooling pond constructed within a WOTUS

would be excluded from WOTUS jurisdiction provided it complies with CWA requirements.

Prior Converted Cropland. The Proposed Rule continues the long-standing exclusion of prior converted cropland, but clarifies that the exclusion does not apply to abandoned cropland. The Agencies propose that prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. The Proposed Rule also explains that agricultural uses can include myriad conservation and non-extractive uses, providing that the Agencies' new list of agricultural uses "may not be obvious to Corps field staff," such that the Corps can rely on public or private documentation that the land is being used in accordance with the agricultural uses set forth in the rule.

Ditches. The Proposed Rule would clarify the types of ditches that are excluded from WOTUS jurisdiction, explaining that non navigable ditches that are constructed or excavated "entirely in dry land" are not WOTUS. The Proposed Rule explains that ditches that channel or relocate jurisdictional tributaries maintain their jurisdictional status if the tributary continues to meet the regulatory definition of a tributary.

New exception for groundwater. The Proposed Rule explains that groundwater has never been interpreted as WOTUS, explaining that groundwater is by nature not navigable. However, "surface expressions of groundwater," like groundwater that emerges from the ground and becomes baseflow in a relatively permanent stream, are not subject to the exclusion and would continue to be subject to federal jurisdiction if they otherwise meet the requirements of a WOTUS.

Eliminations

The Proposed Rule would eliminate jurisdictional triggers for interstate waters that are disconnected from traditionally navigable waters. Eliminating these triggers would remove lakes and streams that straddle state borders, that do not themselves independently meet the regulatory definition of a WOTUS. The Agencies reason that this has been a consistent source of litigation, reads out "navigable" from the statute, and is ultimately not supported by *Sackett* or *Rapanos v. United States* (*Rapanos*). The Proposed Rule provides that nonjurisdictional interstate waters are appropriately regulated by the "States and Tribes under their sovereign authorities."

Additionally, the Proposed Rule would restrict mosaic wetlands to the individual wetland segments, which previously together constituted a single wetland comprising the hydrologically connected segments. In particular, this has significant implications for jurisdictional determinations in Alaska, where permafrost wetlands have long been regulated under the mosaic wetland interpretation.

Additionally, the Agencies are seeking comment regarding whether to adopt a USDA definition of wetland under the Food Security Act that expressly excludes certain permafrost wetlands in lands with high agricultural potential in Alaska.

Implications

The Proposed Rule would limit the scope of federal jurisdiction over the nation's waters and correspondingly reduce the federal regulatory burden and compliance issues for work done in and near waters that are no longer considered jurisdictional. We would anticipate a significant reduction in the number of Section 404 permits and associated CWA 401 water quality certifications. However, the Proposed Rule is unexpectedly vague and deferential on many details for Agencies to define the limits of the rule.

Once finalized, additional litigation on the final rule is almost certain to occur.

Furthermore, irrespective of this rulemaking, states and Tribes will likely use their own regulatory authority to fill the gap left by *Sackett* and the finalized rule. States, including Washington, have ongoing rulemaking processes to further develop their regulatory authority over state waters.

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about implementation of the Clean Water Act, please contact [Duncan Greene](#), [Jenna Mandell-Rice](#), [Molly Lawrence](#), [Tyson Kade](#), [James Garlant](#), or any member of our Land Use, Water, or Natural Resources practices in Seattle, WA at (206) 623-9372 or Washington, D.C. at (202) 298-1800.

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