



# Information Alert

*State-Federal Relations Division*

## **Environmental Protection Agency and Army Corps of Engineers Issues Proposed Rule Redefining “Waters of the United States”**

Dec. 12, 2018

On Dec. 11, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) [released a new proposed](#) “Waters of the United States” definitional rule, more commonly referred to as WOTUS. The proposal is consistent with the February 2017 [executive order \(EO\) 13778](#), “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” This action, is the second step in a two-step process to repeal and replace the 2015 WOTUS final rule promulgated by the previous administration’s [Clean Water Rule](#) to clarify federal authority under the Clean Water Act (CWA).

The process began in February 2017, when the president issued EO 13778 directing EPA and the Corps to begin the process of reviewing, and potentially rescinding the rule, which had faced significant legal challenges since its inception. In September 2017, the agencies proposed a rule to repeal the Clean Water Rule and recodify regulatory text existing prior to 2015. In June 2018, the agencies issued a supplemental notice to the proposal, which clarified the agencies intent to repeal the rule in its entirety, although the agencies have yet to formally repeal the 2015 rule.

The new proposal outlines [six clear categories](#) of waters that would be considered WOTUS such as:

- Traditional navigable waters.
- Tributaries to those waters.
- Certain ditches.
- Certain lakes and ponds.
- Impoundments of jurisdictional waters.
- Wetlands adjacent to jurisdictional waters.

The rule states that waters [not regulated as WOTUS](#) are:

- Ephemeral features that contain water only during or in response to rainfall.
- Groundwater.
- Many ditches including most roadside or farm ditches.
- Prior converted cropland.

- Stormwater control features.
- Waste treatment systems.

EPA Acting Administrator Andrew Wheeler stated the proposed revisions “respects the limits of the Clean Water Act and provides states and landowners the certainty they need to manage their natural resources and grow local economies.” Further, the rule notes the important role of states in protecting their waters, and states that in accordance with Section 101(b) of the CWA, the proposal “recognizes and respects” the primary responsibilities and rights of states and tribes to regulate and manage their land and water resources, while protecting the nation’s navigable waters.

One of the rule’s most significant changes focuses on waterways that cross state borders, which would no longer automatically receive federal protection and would instead have to qualify for jurisdiction under one of the other six categories listed above. Additionally, a groundwater connection would not suffice to make a wetland ‘jurisdictional,’ and those whose surface connection has been broken would no longer be protected. The rule states that only those wetlands that are directly adjacent to a WOTUS or have a direct hydrologic connection would be jurisdictional. Slides prepared with data from the U.S. Geological Survey’s National Hydrography Dataset and [obtained by E&E News](#) via a Freedom of Information Act request show that at least 18 percent of streams, and 51 percent of wetlands nationwide would not be federally regulated under the proposed definition as compared to the 2015 rule.

Although finalized in 2015, the rule currently suffers from a patchwork of enforcement due to ongoing litigation. The 2015 rule is currently in effect in [22 states, the District of Columbia and U.S. territories](#), while previous regulations, issued in the 1980s are in effect in the remaining 28 states. If finalized, the agencies’ proposed rule would apply nationwide, eliminating the patchwork that has resulted from challenges to the 2015 rule. A 60-day comment period will start once the announcement is printed in the Federal Register. For a full legal and regulatory timeline of the rule, see NCSL’s timeline [here](#).

For additional information on the rule and its regulatory and legal history, please read NCSL’s [Info Alerts](#), and relevant agency [fact sheets](#). If you have any questions please don’t hesitate to contact NCSL staff members [Kristen Hildreth](#) or [Ben Husch](#).