



Information Alert

State-Federal Relations Division

Environmental Protection Agency and Army Corps of Engineers Issue Final Rule Redefining “Waters of the United States”

Jan. 27, 2020

On Jan. 23, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) [released the](#) “The Navigable Waters Protection Rule,” which updates the federal definition for a “Waters of the United States,” more commonly referred to as a WOTUS. This final rule comes more than two years after the initial proposal and is the second and final step in a two-step process to repeal and replace the 2015 [Clean Water Rule, which similarly sought](#) to clarify federal authority under the Clean Water Act (CWA).

The two-step process began in February 2017, when the president issued executive order 13778 directing EPA and the Corps to begin the process of reviewing, and potentially rescinding the 2015 rule. In June 2017, the agencies proposed a rule to repeal the Clean Water Rule and recodify regulatory text existing prior to 2015. In February 2019, EPA and the Corps issued their proposed rule to redefine a WOTUS, which today’s announcement finalizes. Finally, in December 2019, EPA completed [Step 1](#), repealing the 2015 Rule and re-codifying the regulatory text that existed prior to 2015 Rule.

The now final rule outlines [four clear categories](#) of jurisdictional waters that would be considered a WOTUS:

- Territorial seas and traditional navigable waters.
- Perennial and intermittent tributaries to those waters.
- Certain lakes, ponds and impoundments.
- Wetlands adjacent to jurisdictional waters.

Further, the final rule provides exclusions for water features that have not traditionally been regulated and defines terms in the regulatory text that have not previously been defined.

The rule also details 12 categories of exclusions, waterbodies that are not included within the four WOTUS categories:

- Ephemeral features that contain water only during or in response to rainfall.
- Groundwater.
- Many ditches, including most roadside or farm ditches.
- Prior converted cropland.
- Farm and stock watering ponds.
- Stormwater run-off and control features.
- Waste treatment systems.

The rule also clarifies several aspects regarding the scope of the CWA including redefining the definition of [“typical year.”](#) and defining “adjacent wetlands” as wetlands that are meaningfully connected to other jurisdictional waters. Notably, the rule recognizes the difference between federally and state protected wetlands. EPA and the Corps put together a [PowerPoint](#) to illustrate what is covered by, and what is not covered by the final rule.

In the release the agency notes that due to existing data and mapping limitations, [it is impossible](#) to accurately determine the full scope of waters that are “in” or “out” under a WOTUS definition despite earlier estimates by outside organizations.

The final rule will become effective 60 days after the announcement is printed in the Federal Register. The agencies are hosting a public webcast to discuss the final rule on Feb. 13. [Register 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](#).