

Final WOTUS Rule is Published

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On December 30, 2022, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) (collectively, the Agencies) released a prepublication version of the final rule for “waters of the United States” or WOTUS, which will become effective 60 days after publication on March 19, 2023.¹ Under the final rule, waterbodies subject to the Clean Water Act jurisdiction, will include traditional navigable waters, territorial seas, interstate waters, impoundments, tributaries, adjacent wetlands, and additional waters. The final rule adopted the relatively permanent waters and the significant nexus tests. Relatively permanent waters “do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.”² Thus, ephemeral streams would not be relatively permanent waters, but may qualify as WOTUS under the significant nexus test.

According to the guidance of the Agencies, if either chemical, physical, or biological integrity are significantly affected, either alone or in combination with similarly situated waters in the region, the waters will be deemed jurisdictional. “Similarly situated will be interpreted as it was under the pre-2015 practice as “whether waters are providing common, or similar functions for paragraph (a) (1) waters such that it is reasonable to consider their effects together.” “In the region” is to be defined as the catchment of tributary, with the catchment being the area of land surface that drains to a specific location for a specific hydrologic feature, in this case the tributary. With respect to the high tide line, ordinary high water mark, and wetlands, the final rule keeps the same definitions, but edits the definition of adjacent wetlands to include the relatively permanent waters and the significant nexus tests. Additionally, the rule removes certain waters that previously were listed explicitly as not waters of the United States such as groundwater, diffuse storm water run-off and directional sheet flow over uplands, certain storm water control features, and all waters listed as “waters of United States” in the rule. Furthermore, the Agencies state groundwater does not need to be excluded from WOTUS as it cannot be navigable, which ignores that waters can be WOTUS and not be navigable as the “significant nexus” test establishes. In our opinion, these changes signal the Agencies’ desire for future flexibility and ability in expanding jurisdictional waters. Private landowners represented by several organizations such as the American Farm Bureau Federation, Texas Farm Bureau and the National Association of Home Builders have filed a complaint challenging the new WOTUS rule. The first hearing is scheduled for April 5, 2023.

¹ 88 Fed. Reg. 3004 (January 18, 2023), available at: <https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states>.

² 88 Fed. Reg. 3080.