

## WOTUS Rule Finalized: What Does it Mean?



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Following decades of regulatory actions and lawsuits concerning the definition of “waters of the United States” under the Clean Water Act, on December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps, together with EPA, the “Agencies”) announced the final “[Revised Definition of ‘Waters of the United States’](#)” rule (Final WOTUS Rule). The Final WOTUS Rule comes more than a year after the Biden Administration committed to re-establish the definition of WOTUS, with the goal of creating a “durable” definition that takes into account “[Supreme Court decisions, the science, and the \[A\]gencies’ technical expertise](#) .” The Final WOTUS Rule will become effective sixty (60) days after it is published in the Federal Register.

The Final WOTUS Rule construes the term “waters of the United States” to include the following:

1. Traditional navigable waters, the territorial seas, and interstate waters (“paragraph (a)(1) waters” under the Clean Water Act);
2. Impoundments of other jurisdictional WOTUS;
3. Tributaries to either of the above waters, or when the tributaries meet the “relatively permanent” standard or the “significant nexus” standard, (collectively, “jurisdictional tributaries”);
4. Wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent and with a continuous surface connection to relatively permanent tributaries and impoundments; and wetlands adjacent to other jurisdictional tributaries when

- such wetlands meet the “significant nexus” standard; and
- i. Intrastate lakes and ponds, streams or wetlands as defined in #1-4 above, that meet either the “relatively permanent” standard, or the “significant nexus” standard.

This definition expands upon the definitions of WOTUS in both the Obama Administration’s [Clean Water Rule](#) and the Trump Administration’s [Navigable Waters Protection Rule](#). (The [Navigable Waters Protection Rule](#), which sought to narrow the definition of WOTUS, was subsequently [vacated by the U.S. District Court for the District of Arizona](#).)

This definition of WOTUS in the Agencies’ Final Rule focuses on two separate standards—“relatively permanent” and “significant nexus,” both of which came out of the Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the Supreme Court failed to reach a majority opinion. Justice Scalia wrote a plurality opinion and Justice Kennedy wrote a concurring opinion—each with different frameworks for defining WOTUS. Justice Kennedy’s test, which has typically been applied, looked at whether the wetlands or non-navigable waterbodies at issue bear a “significant nexus” to a traditional navigable waterway. Under Justice Scalia’s “relatively permanent” test, a WOTUS required “relatively permanent, standing or flowing bodies of water,” and for wetlands, a “continuous surface connection” to such permanent waters.

The Final WOTUS Rule expands upon the “significant nexus,” by listing factors to evaluate whether hydrologic features meet the “significant nexus” standard, including whether such hydrologic feature has a “material influence” on connected waters, factoring in: (i) the distance from a paragraph (a)(1) water; (ii) hydrologic aspects, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; (iii) the size, density, or number of waters that have been determined to be similarly situated; (iv) landscape position and geomorphology; and (v) climate variables, such as temperature, precipitation and snowpack. [EPA’s Fact Sheet](#) states that this Final WOTUS Rule “provides a reasonable approach that recognizes regional and geographic differences.”

The Final WOTUS Rule comes only a few months after the U.S. Supreme Court held oral arguments in [Sackett v. EPA, No. 21-454](#), a case challenging the Agencies’ regulatory jurisdiction over remote wetlands based on the “significant nexus” test. It remains to be seen what the Supreme Court holds in this case, and how its holding will affect the Final WOTUS Rule, if at all. [EPA’s regulatory agenda for 2023](#) does, however, indicate that the Agencies plan “to consider further refinements [of the Final WOTUS Rule]...in light of additional stakeholder engagement and implementation considerations, scientific developments, litigation and environmental justice values.” Thus, uncertainty remains and will continue within the regulated community, based upon both the potential for further changes to the WOTUS definition, and the Agencies sorting out and seeking to interpret and implement the new final WOTUS Rule.

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