

# EPA AND CORPS RELEASE UPDATED DEFINITION OF WATERS OF THE UNITED STATES

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## U.S. Policy and Regulatory Alert

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On 18 November 2021, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the "Corps") (together, the Agencies) released the pre-publication version of the proposed rule redefining the scope of waters protected under the Clean Water Act (Proposed Rule).<sup>1</sup> The Proposed Rule repeals the definition adopted by the Agencies in 2019,<sup>2</sup> and adopts the prior 1986<sup>3</sup> regulatory definition of waters of the United States (WOTUS) while incorporating the Supreme Court's jurisdictional tests for WOTUS as described in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*<sup>4</sup> (SWANCC) and *Rapanos v. United States*.<sup>5</sup>

The Proposed Rule interprets WOTUS to mean waters defined by the 1986 regulations, but now with amendments that incorporate jurisdictional tests established in *Rapanos*. Whereas the 1986 regulations relied on the Commerce Clause to set the limits of WOTUS, stating that WOTUS includes any waters "the use, degradation or destruction of which could affect interstate or foreign commerce,"<sup>6</sup> the Proposed Rule relies instead on the "relatively permanent" or "significant nexus" tests articulated in *Rapanos*.<sup>7</sup>

The Agencies propose to interpret WOTUS to include:

- traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands
- most impoundments of "waters of the United States";
- tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard;
- wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and
- "other waters" that meet either the relatively permanent standard or the significant nexus standard.

To implement the significant nexus test, the Proposed Rule also includes a definition of "significantly affect" (i.e., "more than speculative or insubstantial effects on the chemical, physical, or biological integrity" of downstream waters) and site-specific factors the Agencies will consider when assessing whether the water's functions "significantly affect" downstream waters (e.g., distance from a WOTUS, hydrologic factors, and climatological factors).<sup>8</sup>

The Proposed Rule, therefore, explicitly incorporates tests set forward in *SWANCC* and *Rapanos*, consistent with the Agencies' longstanding policy, i.e., the *Rapanos* Guidance.<sup>9</sup> In *Rapanos*, a four-Justice plurality interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water,"<sup>10</sup> that are connected to traditional navigable waters, as well as wetlands with a "continuous surface

connection” to such water bodies.<sup>11</sup> However, Justice Kennedy’s concurring opinion in *Rapanos* took a different approach to the definition of WOTUS, referring back to the definition used in *SWANCC*. Justice Kennedy held that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”<sup>12</sup> Under Justice Kennedy’s formulation, wetlands comprise WOTUS if “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”<sup>13</sup>

The Agencies have now incorporated both of these tests into the definition of WOTUS, anchoring their authority to set the limits for jurisdictional waters firmly in Supreme Court precedent. This approach is consistent with the *Rapanos* Guidance, which held that either of the two standards articulated in *Rapanos* may be used to determine what waters are subject to regulation under the Clean Water Act. The Proposed Rule does not indicate whether the Agencies intend to update the *Rapanos* Guidance and, for now, the Agencies are relying upon this guidance to the same extent as before issuing the Proposed Rule.

## CONCLUSION

This Proposed Rule is a major departure from the standards set forward in the now vacated Navigable Waters Protection Rule (NWPR), issued by the Trump administration, and the 2015 Clean Water Rule, issued by the Obama administration. While the NWPR sought to dramatically scale back waters subject to federal regulation, the Clean Water Rule sought to use categorical significant nexus determinations in order to establish the boundaries of WOTUS. Both prior rules encountered significant opposition in the courts and were subject to injunctions that increased uncertainty for the regulated community. Most recently, a federal district court ordered the remand and vacatur of the NWPR.<sup>14</sup> With the NWPR vacated, the EPA and the Corps are now interpreting WOTUS consistent with the “pre-2015 WOTUS regulatory regime,” including the Agencies’ 2008 *Rapanos* Guidance.

In some respects, the Proposed Rule represents a codification of the status quo. With the Proposed Rule, the Agencies appear to be attempting to increase regulatory certainty by codifying the “pre-2015 regulatory regime,” with specific revisions to the definition of WOTUS to account for Supreme Court precedent and long-established policy governing jurisdictional determinations.

However, while the Proposed Rule formalizes the longstanding practices of the Agencies, it does not advance or simplify the approach to the jurisdictional determination process beyond what the Supreme Court has articulated under *Rapanos*. Underscoring the complexities involved with certain jurisdictional determinations using the “pre-2015 regulatory regime,” the Proposed Rule contains a lengthy discussion of the Agencies’ “Implementation of the Proposed Rule.”<sup>15</sup> Reliance on the “relatively permanent” or “significant nexus” standard has historically led to significant uncertainty when it comes to jurisdictional determinations for ditches, intermittent and ephemeral streams, wetlands and other open waters that may be considered adjacent to those ditches or streams. As such, businesses and project proponents that regularly have to comply with Clean Water Act section 402 and 404 permitting requirements should consider submitting comments on the Proposed Rule.

Finally, it should also be noted that the Clean Water Act does not preclude states from regulating all waters within their borders, regardless of whether those waters meet the definition of WOTUS. States retain a great deal of discretion to regulate wetlands and water quality under state laws, and in some instances, may have regulations

more expansive and stringent than those issued by the Agencies. The K&L Gates national environmental team is well-positioned to assist clients in both navigating state and federal requirements and in facilitating comments on the Proposed Rule.

## FOOTNOTES

<sup>1</sup> [EPA & the Corps, Revised Definition of "Waters of the United States," Pre-Publication Proposed Rule \(18 Nov., 2021\)\(hereinafter Proposed Rule\)](#)

<sup>2</sup> [See our alert describing the history of revisions to the definition of WOTUS, including the Trump administration's 2019 revision](#)

<sup>3</sup> See 51 Fed. Reg. 41216-17 (13 November, 1986)

<sup>4</sup> Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

<sup>5</sup> Rapanos v. United States, 547 U.S. 715 (2006)

<sup>6</sup> [See EPA, 1986/1988 Regulatory Definition of "Waters of the United States"](#)

<sup>7</sup> *Proposed Rule*, at 287-89.

<sup>8</sup> *Proposed Rule*, at 286-90.

<sup>9</sup> [See U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States \(5 June, 2007\), superseded 2 December, 2008 \(the Rapanos Guidance\)](#)

<sup>10</sup> *Rapanos*, at 739.

<sup>11</sup> *Id.* at 742 (Scalia, J., plurality opinion).

<sup>12</sup> *Id.* at 759 (citing SWANCC, 531 U.S. at 167, 172).

<sup>13</sup> *Id.* at 780.

<sup>14</sup> *Pasqua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266-TUC-RM (Aug. 30, 2021). Defendant intervenors in *Pasqua Yaqui Tribe* have appealed the court's order to the Ninth Circuit and have moved the district court to stay the vacatur order pending the appeal. [For more information on the vacatur of the NWPR, see our prior Alert: Ankur K. Tohan et al, Back to the Drawing Board on WOTUS: Federal Court Vacates Trump Administration's Navigable Waters Protection Rule \(20 Sept., 2021\).](#)

<sup>15</sup> *Proposed Rule*, at 233-68.

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