

Client Alert

Environmental, Health and Safety

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Defining Waters of the United States: EPA and Army Corps Seek Public Input on New WOTUS Rule

INTRODUCTION

After more than 50 years, EPA and the Army Corps of Engineers (“the Agencies”) continue to struggle to find a durable definition of “waters of the United States” (“WOTUS”) in the Clean Water Act, leaving the regulated community, once again, uncertain of the enforcement landscape.

On March 24, 2025, the Agencies published a [notice in the Federal Register](#), requesting information to help the Agencies develop a new definition consistent with the priorities of the new Administration. Industry and environmental groups alike will closely watch and participate in the next months as listening sessions, written comments, and proposals emerge that will impact the development and protection of land, wetland, and water across the nation.

The Agencies are likely to further narrow the WOTUS definition, reducing the “waters” subject to CWA regulation. With implications for civil and criminal penalties enforceable by both private and public parties for “dredging or filling” or for discharging “pollutants into” “waters of the United States,” the Clean Water Act WOTUS definition is one of many key actions anticipated from the new Administration.

HISTORY

Since 1972, the Clean Water Act prohibits a discharge of a pollutant to a “navigable water” and defines “navigable water” to mean “the waters of the United States, including the territorial seas.” Criminal enforcement against violations of this provision may be brought by the government; civil enforcement may be brought by either the government or private citizen suits. In both cases, penalties can be significant. Since the CWA

was enacted, and through Supreme Court decisions and changes across Administrations, the definition of WOTUS has ebbed and flowed, at times broadening and at times restricting the extent of WOTUS boundaries.

Major Supreme Court cases, including *United States v. Riverside Bayview Homes* (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001), *Rapanos v. United States* (2006), and, most recently, *Sackett v. Environmental Protection Agency* (2023), put industry and the public in an ever-changing legal landscape, at times with multiple opinions and frameworks. These cases and the changing definitions have considered the various “jurisdictional categories” of waters, specifically traditional navigable waters, territorial seas, interstate waters, impoundments, tributaries, adjacent wetlands, and additional waters.

CURRENT STANDARD AND IMPLEMENTATION

The status of WOTUS is heavily informed by the May 2023 unanimous *Sackett* decision. In *Sackett* the Court narrowed the definition of WOTUS, holding WOTUS refers only to relatively permanent bodies of water like streams, oceans, rivers, and lakes, and to adjacent wetlands that have a “continuous surface connection” with these waters; further, for wetlands to be within the Agencies’ WOTUS jurisdiction, the wetland must be “indistinguishable” from these bodies of water, such that there is no “clear demarcation” between the water and the wetland. The Court officially rejected the “significant nexus” test, which previously extended WOTUS’s jurisdiction to wetlands with the potential to impact water quality and flood control measures.

Codifying the Court’s decision, the Agencies issued a final rule in September 2023 conforming the January 2023 “Revised Definition of ‘Waters of the United States’” with *Sackett*. Those changes included (1) removing the interstate wetlands from the text of the interstate waters provision; (2) removing the significant nexus standard for tributaries, adjacent wetlands, and additional waters; (3) removing “wetlands and streams” from the text of the “additional waters” provision; (4) revising the definition of “adjacent” to mean “having a continuous surface connection”; and (5) deleting the definition of “significantly affect.” After much litigation, the Agencies recently issued additional guidance in March 2025 in step with the *Sackett* decision. Nevertheless, the Agencies’ quest to identify a durable rule continues.

The task of defining WOTUS falls to the Agencies as informed by the courts. Nevertheless, the risk of the uncertainty often falls on the companies, consultants, developers, and citizens who must determine if an action is lawful under the competing case law, prevailing regulations, and specific facts. Without a clear, durable definition, many companies face major criminal and civil risk. The history of WOTUS litigation is characterized by citizen and government suits against real estate developers, corporations, and private landowners for actions ranging from filling ponds on private property to stormwater discharge to public wetland protection to property development. These everchanging regulations implicate fundamental environmental compliance obligations for thousands of developments and facilities throughout the United States, and they are poised to change again.

THE AGENCIES’ NEXT STEPS

The Agencies’ March 24th notice requests information and participation in public listening sessions as the Agencies seek to craft a rule that will “provide realistic durability and consistency” while adhering to the principles outlined in *Sackett*. The Agencies identify “industry and agricultural stakeholders” as key parties that they wish to engage in developing the new definition.

To do so, the Agencies requested comments on the following topics:

1. The meaning of “relatively permanent” waters
 - Which characteristics should inform the meaning (e.g., flow, seasonality)

- How to identify “relatively permanent” tributaries
2. The meaning of “continuous surface connection”
- What it means to “abut” or to be “adjacent” to a jurisdictional water
 - Scope of “connection to” a jurisdictional water
 - Comments on the *Sackett* language that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells”
 - What categories should be used to assess whether a continuous surface connection exists
 - Limiting or distinguishing factors in determining whether a continuous surface connection exists
3. The meaning of “jurisdictional ditches”
- How to distinguish between jurisdictional and non-jurisdictional ditches
 - Whether “ditch” should be defined as “a constructed or excavated channel used to convey water”

A listening session dedicated to *industry and agricultural stakeholders* will be held virtually and in person at EPA headquarters in Washington, D.C., on May 1, 2025, at 9:30 am. Participants may register for the listening session [here](#). Two additional listening sessions that will be open to the general public have yet to be scheduled. Written comments may be submitted [here](#) by April 23, 2025.

Contact King & Spalding if you have any questions about the recent public notice, expected Agencies actions, or potential impacts on your business.

King & Spalding will continue to track developments on the definition and implementation of WOTUS by the Agencies over the coming months.

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