

Clean Water Act Jurisdiction Change

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The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (together, the “Agencies”) jointly published a final rule changing the definition of “waters of the United States” (WOTUS) on April 21, 2020. The *Navigable Waters Protection Rule* will reduce the number and type of water bodies subject to jurisdiction of the federal Clean Water Act (Act). The rule will take effect on June 22, 2020 unless legal challenges halt or delay it.

Under three Administrations and for over a decade, the Agencies have attempted to change the definition of WOTUS. Due to legal challenges and changes in Administrations, the proposals have never taken effect throughout the entire United States. Longstanding uncertainty in determining which wetlands and streams are subject to permitting and regulatory programs of the Act has motivated efforts to change the definition. Since its passage in 1972, the application of the WOTUS definition has been inconsistent by the Agencies resulting in a series of decisions by the U.S. Supreme Court. Those decisions have resulted in a jurisdictional determination process that is confusing and frustrating, partly due to a “significant nexus” test. This test attempts to evaluate certain marginal wetlands or streams to determine if they have a nexus to navigable waters and, if so, whether that nexus is significant to water quality of those waters.

The final rule attempts to clarify the definition by establishing four categories of jurisdictional waters:

1. Territorial seas and traditional navigable waters;
2. Tributaries of such waters;

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Michael J. Linder

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3. Certain lakes, ponds, and impoundments of jurisdictional waters; and
4. Wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands).

Use of the “significant nexus” test created by the Court in the 2006 *Rapanos* case is eliminated. Instead, these four categories are meant to “increase the predictability and consistency of Clean Water Act programs” (85 FR 22250). Major differences in the new rule include the following:

- Ephemeral (precipitation-only) water bodies are excluded (except in certain situations).
- Intermittent tributaries will only be jurisdictional if they carry water during certain times in a “typical year” (determined by a rolling 30-year precipitation average).
- Lakes, ponds, and impoundments are jurisdictional where they contribute to surface water of a traditional navigable water or territorial sea in a typical year.
- In order to be adjacent wetlands covered by the Act, the wetland must either abut (i.e. touch) a territorial sea, navigable water, or other jurisdictional water or become inundated with flood water during a typical year. Physical separation of a wetland can only be via a natural berm, dune, or similar feature in order to remain jurisdictional. This departs from the current “significant nexus” test and will eliminate most wetlands not connected to a covered water body.

Although part of the Agencies’ goal is to make the definition more certain, there are many new terms which will require further guidance and, undoubtedly, will result in litigation.

Most states have enacted their own versions of the Act, including definitions of state jurisdictional waters, which may be more inclusive, less inclusive, or match the federal definition. These inconsistencies will need to be examined when evaluating whether federal or state regulations apply to projects or activities which may impact water quality.

Legal challenges have been filed attempting to block the final rule before going into effect. Challenges have come from both sides with some saying it doesn’t go far enough and others claiming it covers too many water bodies - beyond the authority of the Act. Given the history of this rule being delayed due to legal challenges, it will be important to watch those developments as the June 22nd effective date approaches. Because of the way in which the Act’s rules are appealed at the District Court level, it is possible that the rule will take effect in some areas of the country but not in others.