

WOTUS

WATERS OF THE UNITED STATES

- The Biden Administration has initiated a process of repealing and replacing the Navigable Waters Protection Rule with what they characterize as a “durable definition” of Waters of the United States.
- The entire agriculture community fully supports the goals of the Clean Water Act to protect our nations waterways and has long-sought clarity in the definition of what are “jurisdictional” waters under the responsibility of the federal government. The vast majority of those involved in national agriculture policy believe that this clarity had been achieved by the federal government in recent years and is concerned with what this new effort might bring.
- State and tribal governments share responsibility for protection of waterways and have advocated for a definition of WOTUS that reflects consideration of the statute as a whole, including section 101(b), which states “it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. 1251(b).



BACKGROUND

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers’ [Navigable Waters Protection Rule](#) went into effect in most parts of the country on June 22, 2020. The NWPR was the culminating step in the Trump Administration’s multi-year effort to repeal and replace Obama Administration regulations defining the term “waters of the United States” and, by extension, the scope of waters subject to federal jurisdiction and regulation under the [Clean Water Act](#). The NWPR codifies a new and more narrow definition of these areas “in a manner consistent with” Justice Antonin Scalia’s 2006 plurality opinion in [Rapanos v. United States](#).

The NWPR redefined WOTUS to categorically regulate four main types of waters:

- (1) the territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters that are subject to the ebb and flow of the tide (collectively, often referred to as “traditional navigable waters”)
- (2) tributaries
- (3) lakes, ponds, and impoundments of other jurisdictional waters
- (4) wetlands adjacent to other waters of the United States.

For categories (3) and (4), the NWPR restricted jurisdiction to those waters that fall within the “relatively permanent standard” and specifically eliminated adherence to the “significant nexus standard.” The “relatively permanent standard” means waters that are relatively permanent,



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standing or continuously flowing and waters with a continuous surface connection to such waters. The “significant nexus standard” means waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

Following a federal district court decision vacating the NWPR on Aug. 30, 2021, the agencies halted implementation of the NWPR and began interpreting waters of the United States consistent with the pre-2015 regulatory regime. On Nov. 18, the EPA and Army Corps released a pre-publication draft of a proposed rule defining the scope of waters protected under the Clean Water Act. In this proposal, the agencies declare their intent to reintroduce the significant nexus standard, thus greatly expanding federal jurisdiction. Because the agencies have opted to interpret the order of the district court to apply nationwide (a departure from precedent), the agencies’ primary economic estimate of costs and benefits of the proposed rule is that the proposed rule would have zero impact.

REGULATORY ACTIONS

- On June 9, 2021, the EPA and the Army Corps announced their intent to revise the definition of WOTUS. This process includes two rulemakings: a foundational rule to restore longstanding protections, and an anticipated second rule that builds on that regulatory foundation.
- On July 30, 2021, the agencies announced stakeholder engagement opportunities, including the agencies’ intent to host 10 regionally focused roundtables.
- On Aug. 5, 2021, EPA and the Army Corps held a federalism consultation pursuant to Executive Order 13132 during which NASDA provided comments emphasizing the role of states in regulating non-jurisdictional waters.
- On Oct. 1, 2021, NASDA submitted written comments to EPA and the Army Corps as part of the federalism consultation. NASDA is a member of the Waters Advocacy Coalition that submitted comments endorsed by NASDA as part of the public comment period. The WAC comments asserted that the agencies must recognize the explicit policy in the Clean Water Act (§ 101(b)) to preserve the states’ primary authority over non-navigable water resources.
- On Dec. 7, 2021, the EPA and Army Corps published its proposed rule defining the scope of waters protected under the Clean Water Act. Comments are due Feb. 7, 2022.
- The agencies are also hosting virtual public hearings.

NASDA’S ASKS

The Clean Water Act clearly established a cooperative approach between the federal government and state governments to restore and maintain the chemical, physical and biological integrity of the nation’s waters. It is imperative the federal government respect that the primary responsibility for planning the development and use of water resources rests with the states. Federal policies must ensure state laws regarding water rights and allocations are honored and that states are given maximum flexibility in the management of both their water resources and their water quality programs.

January 2022



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