



## **Summary of 2021 WOTUS Proposed Rule**

On December 7, 2021, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published a proposed rule to revise the definition of “waters of the United States” (WOTUS) applicable to all Clean Water Act (CWA) programs by repealing the Navigable Waters Protection Rule (NWPR) and codifying a definition that reflects the pre-2015 regulatory regime that they are currently implementing.

### **Summary of the Agencies’ Approach**

The starting point for the proposed rule is the 1986 regulatory text, which is essentially the same regulatory text that the Agencies re-codified in December 2019 when they repealed the 2015 Clean Water Rule. From there, the Agencies propose “amendments” to the text that reflect “their interpretation of the statutory limits on the scope of the ‘waters of the United States’ and informed by Supreme Court case law.” According to the Agencies, the proposal merely codifies the “pre-2015 regulatory regime” that they are now implementing, and they characterize that regime as the 1986 regulations, as modified by the 2003 *SWANCC* Guidance<sup>1</sup> and the 2008 *Rapanos* Guidance. Based on that characterization, they claim the proposed rule would have “zero impact,” *i.e.*, it “imposes no costs and generates no benefits.”

As explained in the sections below, the Agencies’ claim that they are merely codifying the status quo in a way that would have “zero impact” is incredible. In reality, the Agencies are proposing to codify a definition that goes well beyond the 2008 *Rapanos* Guidance. In particular, the preamble clearly signals that the Agencies intend to change the way they “implement” the significant nexus standard by substituting the 2008 Guidance’s approach to “significant nexus” with the 2015 Clean Water Rule’s approach, which would allow for the aggregation of waters that perform similar functions across entire watersheds. As a result, the proposed rule will lead to the assertion of jurisdiction over many features that are remote from and/or carry only minor volumes of water to downstream navigable waters. Contrary to the Agencies’ claim of zero impact, the potential impacts on regulated entities, regulators, and ordinary Americans are likely to be substantial.

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<sup>1</sup> The 2003 *SWANCC* Guidance *narrowed* the scope of the 1986 regulations by stating that (i) the Agencies would no longer assert jurisdiction over isolated, intrastate, non-navigable waters based on the Migratory Bird Rule; and (ii) Corps staff should seek Headquarters approval before asserting jurisdiction over *any* waters using the “other waters” provision (*i.e.*, the “(a)(3) category” in the 1986 rule). The current proposal states that, as a result of this guidance, “the agencies have not asserted jurisdiction over waters based on the ‘other waters’ provision of the 1986 regulations since then,” though the agencies do state elsewhere that they sometimes assert jurisdiction over lakes and ponds using the tributary definition.

## **Categories of Jurisdictional Waters**

Under the proposed rule, the following waters are jurisdictional:

- (1) Traditional navigable waters (TNWs) – all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters and interstate wetlands;
- (3) “Other waters” such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds
  - i. Are relatively permanent, standing or continuously flowing and have a continuous surface connection to waters identified (1), (2), (5)(i), or (6); or
  - ii. Meet the significant nexus standard;
- (4) Impoundments of waters identified in paragraphs (1), (2), and (5) through (7);
- (5) Tributaries of waters identified in (1), (2), (4), or (6) that:
  - i. Are relatively permanent, standing, or continuously flowing bodies of water; or
  - ii. Meet the significant nexus standard;
- (6) Territorial seas;
- (7) Wetlands adjacent to:
  - i. Waters identified in (1), (2), or (6);
  - ii. Relatively permanent, standing, or continuously flowing bodies of water identified in (4) or (5)(i) and with a continuous surface connection to such waters;
  - iii. Waters identified in (4) or (5)(ii) when the wetlands meet the significant nexus test.

Like the 1986 regulations, the proposal codifies only two exclusions in the regulatory text, and the proposal removes the NWPR’s definitions of these exclusions. None of the other exclusions set forth in either the 2015 Rule or the NWPR appear in the regulatory text.

- Prior converted cropland
- Waste treatment systems

## **What is Changing?**

- **Traditional Navigable Waters (TNWs)**
  - No change from NWPR or longstanding practice, other than removing the territorial seas and placing them in a standalone category, which is how they appear in the 1986 regulations.

- **Interstate Waters and Interstate Wetlands**

- Did not exist in the NWPR; the Agencies are adding it back to the regulatory text.
- Follows the 2011 Draft Guidance and 2015 Rule by emphasizing that such waters are on equal footing as TNWs and territorial seas, *regardless of navigability*.
- Lakes, ponds, and similar lentic (or still) water features, as well as wetlands, crossing state boundaries jurisdictional are interstate waters *in their entirety*.
- For streams and rivers, including impoundments, the agencies would determine the upstream and downstream extent of the stream or river crossing a state boundary or serving as a state boundary that should be considered the “interstate water.”

- **Other Waters**

- Did not exist in the NWPR.
- Contains the same non-exclusive list of waterbodies as the 1986 regulation—*i.e.*, intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds—but the proposal *changes the test* for jurisdiction *from* whether use, degradation, or destruction would affect interstate commerce (1986) *to either* the relatively permanent or significant nexus standard (proposed rule).
- Consideration of whether certain “other waters” meet the significant nexus test necessarily expands the 2008 *Rapanos* Guidance’s approach to significant nexus (*i.e.*, tributary reach + adjacent wetlands) by applying the standard to waters other than tributaries and their adjacent wetlands.
- By the Agencies’ own admission, the 2008 Guidance does not address “other waters” in any way. Then how is it plausible that the addition of this new category will have “zero impact”/no costs or benefits?

- **Impoundments**

- NWPR included this in the lakes, ponds, and impoundments category, but the proposal makes this a standalone category similar to the 1986 regulations.
- Restores impoundments as categorically jurisdictional (*i.e.*, they need not meet either the relatively permanent or significant nexus standard) with the exception of impoundments of “other waters” that are deemed WOTUS. Impoundments of “other waters” could themselves be assessed as an “other water” to determine if they meet either the relatively permanent or significant nexus standards.
- Reaffirms that damming or impounding a WOTUS does not remove jurisdiction, though the Corps can legally authorize a change of jurisdictional status under its 404 permitting authority.

- **Tributaries**

- Tributaries of TNWs, interstate waters, impoundments, and territorial seas are jurisdictional if they (i) are relatively permanent, standing, or continuously flowing; or (ii) meet the significant nexus standard.
- The Agencies “are not reaching any conclusions, categorical or otherwise, about which tributaries . . . meet either the relatively permanent or the significant nexus standard.” Instead, such determinations are to be made on a case-specific basis.
- Like the 1986 regulations (and unlike the NWPR), “tributary” is *not* a defined term. The preamble says the term includes natural, man-altered, or man-made water bodies, including rivers, streams, lakes, and ponds that flow directly or indirectly into a TNW, interstate water, or territorial sea, but the Agencies are not further defining what it means to be a tributary.
- Relatively permanent tributaries include perennial streams and intermittent streams that have continuous flow at least seasonally (e.g., typically three months). They do not include ephemeral streams that flow only in response to precipitation or intermittent streams without continuous flow at least seasonally, though ephemerals could be jurisdictional under the significant nexus standard.
- Under the significant nexus approach, the Agencies will first determine the relevant reach of the tributary being assessed in accordance with the 2008 *Rapanos* Guidance. The Agencies will then look at wetlands: If there are *no* adjacent wetlands, the Agencies will evaluate the flow characteristics and functions of just the tributary to determine whether it has a significant effect on the chemical, physical, and biological integrity of downstream waters. If there *are* adjacent wetlands, the significant nexus assessment will consider both the tributary and its adjacent wetlands. If they find a significant nexus, both the tributary *and all* of its adjacent wetlands are WOTUS.

- **Adjacent Wetlands**

- Wetlands are jurisdictional if they are adjacent to: (i) TNWs, interstate waters, or territorial seas; (ii) relatively permanent, standing, or continuously flowing impoundments or tributaries with a continuous surface connection to such waters; or (iii) impoundments or tributaries that meet the significant nexus standard.
- Wetlands adjacent to “other waters” would need to be assessed as “other waters” to determine if they meet the relatively permanent or significant nexus standard.
- Restores the 1986 regulatory text defining adjacent as bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.
- Under the relatively permanent approach, wetlands are “adjacent” if one of the three is satisfied: (i) there is an unbroken surface or shallow subsurface

connection to jurisdictional waters and at least an intermittent hydrologic connection; (ii) wetlands are physically separated by man-made dikes or barriers or natural breaks; or (iii) proximity to a WOTUS is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.

- Under the significant nexus approach, after the Agencies establish the relevant reach of a tributary (for purposes of assessing whether adjacent wetlands meet the significant nexus test), then they will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to the tributary in evaluating whether a significant nexus exists.

- **Significant Nexus Standard**

- Each of the categories that include the significant nexus standard—waters identified in (3), (5), and (7)—use the same language: whether the water in question “alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of” a TNW, interstate water, or territorial sea.
- The rule further defines “significantly affect” to mean “more than speculative or insubstantial effects on the chemical, physical, *or* biological integrity” of a TNW, interstate water, or territorial sea. In assessing the significance of functions that upstream waters have on the downstream TNW, interstate water, or territorial sea, the Agencies will consider: (i) distance from a WOTUS; (ii) the distance from a TNW, interstate water, or territorial sea; (iii) hydrologic factors, including shallow subsurface flow; (iv) the size, density, and/or number of waters determined to be similarly situated; and (v) climatological variables such as temperature, rainfall, and snowpack.
- The Agencies state that they are currently implementing this standard in accordance with the 2008 *Rapanos* Guidance (namely, the tributary reach + all adjacent wetlands approach). ***They then suggest they can take a broader approach to significant nexus that is virtually indistinguishable from the definition of “significant nexus” in the 2015 Rule!*** For instance:
  - Rather than interpret “similarly situated” to mean a tributary reach and its adjacent wetlands (2008 *Rapanos* Guidance), they could interpret it to mean “waters that are providing common, or similar, functions for downstream waters.”
  - Rather than interpret “in the region” by focusing on the relevant “reach” of a tributary (2008 *Rapanos* Guidance), they could instead focus on entire watersheds or sub-watersheds, ecoregions, hydrologic landscape regions, or other similarly broad areas.
  - They put their thumb on the scale of finding significant nexus analysis for all aggregated waters in a given region by saying, among other things, that the “best available science supports evaluating connectivity and effects of

streams, wetlands, and open waters to downstream waters in a cumulative manner in context with other streams, wetlands, and open waters.”

- **Exclusions in Proposed Rule**

- The only exclusions in the regulatory text are (i) prior converted cropland and (ii) waste treatment systems designed to meet the requirements of the CWA. Unlike the NWPR, neither of these terms is defined in the regulatory text.
- The preamble states the Agencies intend to continue excluding various features as below:
  - Artificially irrigated areas which would revert to upland if the irrigation ceased;
  - Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are exclusively used for such purposes as stock watering, irrigation, settling basins or rice growing;
  - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons;
  - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS; and
  - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow). The Agencies try to distinguish these features from ephemeral streams based on the absence of *any* indicators of an ordinary high water mark.
- There is no standalone ditch exclusion in the regulatory text. In the preamble, the Agencies state that ditches *generally* are not jurisdictional if they are excavated wholly in and draining only uplands *and* if they do not carry a relatively permanent flow of water. Ditches that develop wetland characteristics would *not* become jurisdictional so long as they satisfy the foregoing conditions.