

Navigating a New WOTUS Definition: Agencies Redefine the Line

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Over the past decade, the definition of “waters of the United States” (WOTUS) has shifted repeatedly, creating uncertainty for permitting and project planning. Building on the Supreme Court’s *Sackett v. EPA* decision, the EPA and the U.S. Army Corps of Engineers (together, the agencies) announced a proposal this week to *further* refine which water features qualify as WOTUS by narrowing key definitions and codifying — and expanding — exclusions. The proposal would apply across all Clean Water Act (CWA) programs that rely on WOTUS, including permitting under Sections 404 and 402, water quality certifications under Section 401, and Total Maximum Daily Loads (TMDLs) for impaired waters under Section 303. The proposal is directionally deregulatory, meaning fewer waters are likely to be considered federally jurisdictional and therefore regulated. The new definition was published in the *Federal Register* on Thursday, marking the start of a 45-day public comment period through January 5, 2026. The public comment page can be accessed [here](#).

Today’s WOTUS regulatory landscape remains split. The “Amended 2023” WOTUS rule is operative in 24 states, the District of Columbia, and the territories, while the pre-2015 rule (as modified by *Sackett*) governs elsewhere. This new proposal aims to bring greater uniformity by redefining, excluding, and removing several key terms:

| Term | Definition |
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| Relatively permanent waters | Bodies of surface water that are standing or continuously flowing year-round or at least during the wet season. |
| Continuous surface connection (wetlands) | Wetland must (1) abut a relatively permanent water, and (2) have a continuous surface water connection present at least during the wet season; only wet portions are jurisdictional. |
| Tributary | Has a bed and a bank, relatively permanent flow, and connects to a traditionally navigable water or the territorial seas; non-relatively permanent reaches sever upstream jurisdiction. |
| Lakes and ponds | Intrastate and interstate standing/continuously flowing bodies of water that are consistent with “relatively permanent” criteria; connections align with tributary standards. |
| Ditches in dry land (exclusion) | Ditches constructed or excavated entirely in dry land are excluded, even if those ditches have relatively permanent flow and connect to a jurisdictional water; ditches constructed in wetlands are not excluded. |
| Prior converted cropland (exclusion) | Continues to be excluded unless “abandoned” (no agricultural use for a period greater than five years and reversion to wetland); conservation/idling is not abandonment. |

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| Waste treatment systems (exclusion) | Systems designed to meet CWA requirements are excluded; abandonment can remove the exclusion. |
| Groundwater (exclusion) | Explicitly excluded, including subsurface drainage (e.g., tile drains); surface expressions not excluded and remain classified as surface waters. |
| Interstate waters category (removed) | Waters no longer identified as jurisdictional solely for crossing state lines; must fall under another category. |

We expect that the proposal will reduce the number of federally jurisdictional waters, easing some Section 404 permitting, mitigation, cost, and delay challenges. Under Section 401, a reduced federal permitting footprint would yield fewer certifications and potentially less state or tribal conditioning. Under Section 402, some discharges to nonjurisdictional features may not require NPDES permitting; however, discharges that reach WOTUS could still trigger permitting requirements. Under Section 303, fewer waters may be covered under the federal standards, but states and tribes may try to fill regulatory gaps with additional, more localized regulation. The states and tribes may assume a larger role as federal jurisdiction narrows, resulting in program coverage and standards that may vary by jurisdiction.

Natalie Crane also contributed to this article. She is not licensed to practice law in any jurisdiction; bar admission pending.

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