

## Summary of 2023 WOTUS Final Rule

On December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) released the pre-publication version of a final rule revising the definition of “waters of the United States” (WOTUS) applicable to all Clean Water Act (CWA) programs. The final rule repeals the Navigable Waters Protection Rule (NWPR) and codifies a definition that the Agencies claim is “generally consistent with the pre-2015 regulatory regime.” Unlike the proposed rule, the Agencies no longer claim that they are merely re-codifying the definitions that they are currently implementing such that the rule would have “zero impact,” *i.e.*, no new costs or benefits. Nonetheless, they insist that the final rule will have *de minimis* impacts compared to the status quo.

I am still reviewing the final rule and supporting materials, and will follow up with additional analysis as necessary. In the meantime, the following summarizes the categories of jurisdictional waters and exclusions, as well as key definitions in the Final Rule.

### Categories of Jurisdictional Waters

Under the final rule, the following waters are jurisdictional:

- (1) Waters which are: (i) **traditional navigable waters** (TNWs), *i.e.*, all waters 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; (ii) **territorial seas**; or (iii) **interstate waters**, including interstate wetlands.
- (2) **Impoundments** of waters otherwise defined as WOTUS under this definition, other than impoundments of waters identified under paragraph (5).
- (3) **Tributaries** of waters identified in (1) or (2) of this section that:
  - i. Are relatively permanent, standing or continuously flowing; or
  - ii. Either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (1).
    - *Tributary is not defined in the regulatory text, but the preamble clarifies that this category includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a TNW, territorial sea, or interstate water.*
    - *Tributaries can be natural, modified, or constructed waters and thus, can include ditches and canals.*
- (4) **Wetlands adjacent** to:
  - i. Waters identified in (1); or Relatively permanent, standing, or continuously flowing bodies of water identified in (2) or (3)(i) and with a continuous surface connection to those waters;

- ii. Waters identified in (2) or (3) when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (1).
  - *Adjacent is defined as “bordering, contiguous, or neighboring.” Wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent wetlands. Shallow subsurface hydrologic connections can establish adjacency.*
  - *The preamble says that in a substantial number of cases, adjacent wetlands abut other WOTUS and that, on the whole, nationwide, adjacent wetlands are within a few hundred feet from other WOTUS. In arid areas, adjacent wetlands are likely to be much closer than a few hundred feet, but in larger floodplains and riparian areas where rainfall is higher, wetlands can be a few hundred feet away and still be “adjacent.”*

(5) **Intrastate lakes and ponds, streams, or wetlands** not identified in paragraphs (1) through (4) that:

- i. Are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (1) or (3)(i) of this section; or
- ii. That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (1).
  - *This is the former (a)(3) “other waters” category. As in the proposed rule, the preamble to the final rule again acknowledges that the agencies have not asserted jurisdiction over (a)(3) waters since 2003. And because this category was not discussed in the 2008 Rapanos Guidance, the application of the relatively permanent and significant nexus tests to this category represents a clear expansion of the pre-2015 regulatory regime.*
  - *The preamble commits both EPA and Corps headquarters to review all draft AJDs for waters assessed under (a)(5) based on the significant nexus standard.*

**Relatively permanent standard**

- The final rule does not define or quantify what constitutes “relatively permanent” flow. The preamble merely says relatively permanent includes features that have flowing or standing water year-round or continuously during certain times of the year.
- The Agencies are no longer using the term “seasonal” and appear to be backing away from the “typically three months” language in the 2008 *Rapanos* Guidance. Moreover, the preamble could be interpreted to say that “relatively permanent” means flow for more than a short duration in direct response to precipitation, *i.e.*, anything more than ephemeral flow. And the preamble suggests that multiple storm events in succession could be enough to create relatively permanent flow.

- The Agencies interpret “continuous surface connection” to be a physical connection requirement, which does not require a continuous surface water connection. Even linear features (e.g., pipes, swales, ditches) can satisfy the physical connection requirement regardless of how often they carry flow. The preamble does not make it clear whether jurisdiction is dependent on the length/distance of a linear physical connection between an adjacent wetland and a relatively permanent WOTUS.

### **Significantly affect (significant nexus) standard**

- The final rule defines “significantly affect” to mean “a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section,” the Agencies will assess the following functions and factors:
  - **Functions**
    - Contribution of flow
    - Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants)
    - Retention and attenuation of floodwaters and runoff
    - Modulation of temperature in waters identified in paragraph (a)(1) of this section
    - Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section
  - **Factors**
    - The distance from a water identified in paragraph (a)(1) of this section
    - Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow
    - The size, density, or number of waters that have been determined to be similarly situated
    - Landscape position and geomorphology
- Climatological variables such as temperature, rainfall, and snowpack

- *The final rule does not define or shed much light on what constitutes “material influence.” The preamble says that significant nexus determinations should be supported by the factual record, relevant scientific data and information, and available tools and that the record, data and information, and tools must show, either quantitatively or qualitatively based on the five factors, that the water in question provides functions that materially influence the chemical, physical, or biological integrity of a paragraph (a)(1) water. But it remains to be seen whether, in practice, this “material influence” standard is any more rigorous than—or is simply identical to—the “more than speculative or insubstantial effects” standard in the proposal and the 2015 Rule. Notably, like the 2015 Rule, the preamble to the final rule clarifies that the significant nexus standard can be satisfied on the basis of just one of the five functions.*
- *The significant nexus test for tributaries and adjacent wetlands is broader than that in the 2008 Rapanos Guidance (i.e., tributary reach of the same order plus adjacent wetlands), but not as broad as the 2015 Rule or some of the possible tests outlined in the Proposed Rule. The final rule announces a new “tributary catchment” approach. Catchments are delineated from the downstream-most point of a tributary reach of interest and include the area uphill that drains to that point. For instance, if the reach in question is a third order stream, the significant nexus analysis would look at that entire reach plus all first and second order streams that ultimately flow into that reach plus all wetlands adjacent to all of those streams. While this marks an expansion compared to the status quo, it is not as broad as analyzing the combined effect of similarly situated waters within entire watersheds draining to the nearest (a)(1) water, which is the approach in the 2015 Rule and one of the options in the proposed rule.*
- *The plain text of the (a)(5) category in the final rule states that the agencies will analyze whether “other waters” meet the significant nexus standard by analyzing the aggregate effect of similarly situated “other waters” within a given region on an (a)(1) water. By contrast, the preamble suggests that the Agencies intend to analyze (a)(5) waters individually, rather than aggregating such waters. Of course, the text of the rule controls over the preamble. But that begs the question: if the Agencies aggregate (a)(5) waters for purposes of a significant nexus analysis, how they will interpret key terms such as “similarly situated” and “in the region” when conducting their analysis?*

## **Exclusions**

The final rule codifies many more exclusions than the proposed rule (and the 1986 regulations). Most of the exclusions resemble those in the 2015 Rule:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- *The preamble clarifies that Wastewater Treatment Systems (WTS) constructed prior to the enactment of the CWA can still be excluded and that WTS are not limited to manmade bodies of water consistent with longstanding practice*

- Prior converted cropland designated by USDA. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. For CWA purposes, the final authority regarding CWA jurisdiction remains with EPA.
  - *The preamble implies, but does not clearly state, that lands remain excluded as PCC even if they change to a non-agricultural use so long as wetland characteristics do not return.*
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water.
  - *Excluded ditches would not become jurisdictional solely by virtue of connecting to a downstream WOTUS or because wetland characteristics develop within the confines of the ditch.*
- Artificially irrigated areas that would revert to dry land if the irrigation ceased.
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
  - *The preamble says this exclusion applies only to lakes/ponds that satisfy the terms of the exclusion, so apparently other types of ponds (e.g., log cleaning ponds) would not qualify.*
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating 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 waters of the United States.
  - iii. Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow