



## WOTUS

As of 04 September 19

### **Current Narrative:**

On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and Department of the Army signed a proposal for an understandable and implementable definition of **"Waters of the United States"** that clarifies federal authority under the Clean Water Act. The agencies' proposal is the second step in a two-step process to review and revise the definition of "waters of the United States" consistent with the February 2017 Presidential Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." The proposed definition would replace the approach in the 2015 Rule and the pre-2015 regulations.

The EPA and Army signed a final rule to repeal the 2015 Clean Water Rule and to restore the regulatory regime that existed prior to the 2015 Rule on [likely to be September 12, 2019]. This final rule provides regulatory certainty while the agencies engage in the second step of rulemaking to revise the definition of "waters of the U.S." If a state, tribe, or an entity has specific questions about a pending jurisdictional determination or permit, please contact a **local U.S. Army Corps of Engineers District office** or the **EPA**.

### **Queries:**

None within last two weeks.

### **Step 1 Final Rule Talking Points:**

- On July 27, 2017, the agencies proposed a rule to repeal the 2015 Rule and re-codify the regulatory text defining **"waters of the United States"** that existed prior to the 2015 Rule. On June 29, 2018, the agencies issued a supplemental proposal to clarify, supplement and seek additional comment on the original Step 1 proposal. The public comment period on the supplemental proposal closed on August 23, 2018.
- The agencies received approximately 770,000 public comments on the initial proposed rule and the supplemental notice and carefully reviewed those comments in deciding whether to finalize this rule.
- The agencies moved as expeditiously as practicable to provide regulatory certainty to states, tribes, the regulated community and the public.
- The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.
- The 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act as intended by Congress and reflected by Supreme Court cases.
- This final rule is intended to accord due weight to the policy of Congress under the Clean Water Act to recognize the authority of States and Tribes over their waters.
- This final rule returns the relationship between the Federal government, States, and Tribes to the longstanding and familiar distribution of authority and responsibilities that existed under the CWA for many years prior to the 2015 Rule.



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- Before the Step 1 rule was finalized, a patchwork of regulations existed across the country as a result of various judicial decisions enjoining the 2015 Rule. This final rule reestablishes national consistency across the country by returning all jurisdictions to the longstanding regulatory framework that existed prior to the 2015 Rule, which is more familiar to the agencies, States, Tribes, local governments, regulated entities, and the public.

### **Step 2 Proposed Rule Talking Points:**

- On December 11, 2018, the agencies signed the proposed rule for a revised definition of “waters of the United States.” The proposed rule was published in the Federal Register on February 14, 2019, and the public comment period closed on April 15, 2019.
- The proposal respects the limited powers that the executive branch has been given under the Constitution and the Clean Water Act to regulate navigable waters. The proposal limits where federal regulations apply and gives states and tribes more flexibility to determine how best to manage waters within their borders. Together, the agencies’ proposal and existing state and tribal regulations and programs would provide a network of coverage for the nation’s water resources in accordance with the objectives and policies of the Clean Water Act.
- The EPA and the Army reviewed and considered the extensive feedback and recommendations the agencies received from states, tribes, local governments, and stakeholders throughout consultations and pre-proposal meetings and webinars. This input helped highlight the issues that are most important to state and tribal co-regulators and stakeholders, including those directly affected by the scope of Clean Water Act jurisdiction.
- The proposed rule would provide clarity, predictability, and consistency so that regulators and the public can understand where the Clean Water Act applies—and where it does not. Such straightforward regulations would continue to protect the nation’s navigable waters, help sustain economic growth, and reduce barriers to business development.
- The agencies’ proposal is consistent with the statutory authority granted by Congress, the legal precedent set by key Supreme Court cases, and the February 2017 Executive Order entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
- The proposal identifies six categories of waters that would be waters of the United States:
  - Traditional navigable waters
  - Tributaries
  - Certain ditches
  - Certain lakes and ponds
  - Impoundments of waters of the United States
  - Wetlands adjacent to waters of the United States
- The proposal also details what would not be waters of the United States, including (among others):
  - Waters that would not be included in the six proposed categories of “waters of the United States” listed above
  - Ephemeral features that contain water only during or in response to rainfall
  - Groundwater



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- Ditches that do not meet the proposed conditions necessary to be considered jurisdictional, including most farm and roadside ditches
  - Prior converted cropland
  - Stormwater control features
  - Waste treatment systems
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- During the public comment period, the agencies held a public hearing in Kansas City, Kansas, and listening sessions with states and tribes in Kansas City, Kansas, Atlanta, Georgia, Albuquerque, New Mexico, and Seattle, Washington. The agencies also participated in meetings with a wide range of stakeholders, including states and tribes, throughout the public comment period.
  - The agencies will review the over 600,000 public comments received on the proposed rule before taking final action. The agencies are striving to finalize Step 2 in winter 2019.

### **Senior Leader quotes:**

None within last two weeks.