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Waters of the United States (WOTUS) New Rule Effective February 28

Hoping to finalize a stable rule that the regulated community can trust, the Environmental Protection Agency (EPA) and the Corps of Engineers (COE) have promulgated a new rule defining "waters of the United States" (WOTUS). The new rule is the latest episode in a series worthy of an Oscar nomination for best documentary that began in 2015 during the Obama administration. *See* earlier rules at 80 FR 37054 (June 29, 2015); 84 FR 56626 (October 22, 2019); 85 FR 22250 (April 21, 2020). The agencies describe this latest iteration as "a clear and reasonable definition of waters of the United States" that is designed to "reduce the uncertainty from constantly changing regulatory definitions that has harmed communities and our nation's waters."

Court Remand to the Agencies

The Biden administration agencies began the regulatory review process as a result of the August 30, 2021, order [*see* Order here] from the U.S. District Court for the District of Arizona in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency* that vacated and remanded the Trump administration's Navigable Waters Protection Rule (NWPR) back to the EPA and the Corps. In compliance with the court's order, the agencies halted implementation of the NWPR nationwide and issued the new rule in an attempt, in the agencies' words, to interpret WOTUS "in line with the pre-2015 regulatory regime."

The Biden Administration's Attempt to Strike a Balance

At stake is a determination of the limits that properly draw a boundary between "waters" which are subject to federal jurisdiction (thus requiring some level of federal regulatory control) and those that are subject only, if at all, to state, tribal, and local

control.

The preamble to the final rule directs us to the 1986 regulations and states (emphasis added):

> EPA and the Corps have separate regulations defining the statutory term "waters of the United States," but their interpretations were substantially similar and remained largely unchanged between 1977 and 2015. *See*, e.g., 42 FR 37122, 37144 (July 19, 1977); 44 FR 32854, 32901 (June 7, 1979). This rule is founded on that familiar **pre-2015 definition** that has bounded the Clean Water Act's protections for decades, has been codified multiple times, and has been implemented by every administration in the last 45 years. The **pre-2015 regulations are commonly referred to as "the 1986 regulations.**"

Following that 1986 regulatory framework, the agencies in 2023 define "waters of the United States" to include:

1. Traditional navigable waters, the territorial seas, and interstate waters **(paragraph (a)(1) waters**);
2. Impoundments of "waters of the United States" **(paragraph (a)(2) impoundments**);
3. Tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (**jurisdictional tributaries**);
4. Wetlands adjacent to paragraph (a)(1) waters, wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (**jurisdictional adjacent wetlands**); and
5. Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard **(paragraph (a)(5) waters**).

Interestingly, exclusions from the definition of WOTUS have remained consistent during each of the Obama, Trump, and Biden rulemakings. The new rule excludes prior converted cropland, waste treatment systems, ditches, artificially irrigated areas, artificial lakes or ponds, artificial reflecting pools, or swimming pools, water-filled depressions, and swales/erosional features (e.g., gullies or small washes).

While there is relatively consistent agreement on which waters are excluded from the definition and which meet the "permanent standard" that embraces "traditional navigable waters," much of the controversy over the last three-and-a-half decades (since the 1986 rules were promulgated) has been the determination of the "waters" that meet the significant nexus test. And, perhaps the best example of that controversy relates to "adjacent wetlands." The agencies explain their view in the preamble (emphasis added):

> With respect to "adjacent wetlands," the concept of **adjacency** and the **significant nexus** standard create separate, additive limitations that work together to ensure that such wetlands are covered (**i.e., jurisdictional under the Act**) when they have the necessary relationship to other covered waters. The adjacency limitation focuses on the relationship between the wetland and the covered water to which it is adjacent. Consistent with the plain meaning of the term and the agencies' 45-year-old definition of "adjacent," **the rule requires that an "adjacent wetland" be "bordering, contiguous, or neighboring" to another covered water.**
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> Where a wetland is adjacent to a traditional navigable water, the territorial seas, or an interstate water, consistent with longstanding regulations and practice, no further inquiry is required, and the wetland is jurisdictional.
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> But, where a wetland is adjacent to a covered water that is not a traditional navigable water, the territorial seas, or an interstate water – such as a tributary – this rule requires an additional showing for that adjacent wetland to be covered: the wetland must satisfy either the relatively permanent standard or the significant nexus standard. And, that inquiry, under either standard, fundamentally concerns the adjacent wetland's relationship to the relevant paragraph (a)(1) water rather than the relationship between the adjacent wetland and the covered water to which it is adjacent.

In other words, the adjacent wetland must have a continuous surface connection to a relatively permanent, standing, or continuously flowing water connected to a paragraph (a)(1) water or must either alone or in combination with similarly situated waters significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water.

Arguably, the new rule is less expansive than the Obama rule in 2015. For example, the 2015 regulations included isolated wetlands and set measurable distances of wetlands from what were considered traditional waters of the U.S., thus making them "adjacent" and subject to federal control. For example, a wetland would be considered "adjacent" if it were within a 100-year floodplain or within 4,000 feet of a navigable waterway.

And, there is no question that the new Biden rule will cover more wetlands and streams than the Trump administration's NWPR. The agencies go to great lengths in the preamble to explain why:

> [T]he agencies conclude that the 2020 NWPR, which substantially departed from prior rules defining "waters of the United States," is incompatible with the objective of the Clean Water Act and inconsistent with the text of relevant provisions of the statute, the statute as a whole, relevant case law, and the best available science.
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> The 2020 NWPR found jurisdiction primarily under the relatively permanent standard. The agencies have concluded that while the relatively permanent standard is administratively useful by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters, it is insufficient as the sole test for Clean Water Act jurisdiction. … Limiting determinations to that standard alone upends an understanding of the Clean Water Act's coverage that has prevailed for nearly half a century.
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> The relatively permanent standard as the exclusive jurisdictional test would seriously compromise the Clean Water Act's comprehensive scheme by denying any protection to tributaries that are not relatively permanent and adjacent wetlands that do not have a continuous surface connection to other jurisdictional waters. … The agencies have concluded that the relatively permanent standard should still be included in the rule in conjunction with the

significant nexus standard because the subset of waters that meet the relatively permanent standard will virtually always have the requisite connection to traditional navigable waters, the territorial seas, or interstate waters to properly fall within the Clean Water Act's scope.

What specific wetlands and streams will be embraced by the new rule will require site-specific and project-specific analysis.

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