

Insights: Alert

Proposed New WOTUS Definitions and Impacts on Tribes

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On November 17, 2025, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers released a proposed rule that would revise the definition of “Waters of the United States” (WOTUS), thereby implicating the jurisdiction of the Clean Water Act (CWA). This proposed rule is a direct response to the Supreme Court’s 2023 decision in *Sackett v. EPA*, 598 U.S. 651 (2023), which significantly narrowed the types of waters eligible for federal protection under the CWA. This new rule may have negative implications for Tribes who must rely upon the CWA for water quality protections of their water resources.

Reflecting the holding in *Sackett*, the proposed rule eliminates the significant nexus test for WOTUS, which considered ecological or hydrological connections to downstream waters. Under the new rule, only “relatively permanent” waters and directly connected adjacent wetlands will be federally regulated as WOTUS.

The rule also provides new regulatory definitions for “relatively permanent” and “continuous surface connection,” and re-establishes definitions for “ditch,” “tributary,” “prior converted cropland,” and “waste treatment system.”

“Relatively permanent” means standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round, or at least during the wet season. [75-76, 181, 184]

This term was not previously defined but appeared in the *Rapanos* plurality opinion and in *Sackett*. The qualifier “at least during the wet season” is a new addition and is intended to include “extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration.” [76] The proposal invites comment on how “wet season” should be determined.

“Continuous surface connection” means having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water. [181, 184] This concept also arises from *Rapanos* and *Sackett*, but under previous rules, this could include neighboring or bordering waters, while the new definition adds a requirement for physical abutment and the presence of water during the wet season.

“Ditch” means a constructed or excavated channel used to convey water. [181, 184]

The proposed rule provides a short, clear definition of this term for the first time, seeking to distinguish jurisdictional ditches (like those in tributaries) from non-jurisdictional ditches constructed entirely in dry land. [154]

“Tributary” means a body of water with relatively permanent flow, and a bed and banks, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow. This definition does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature that does not convey relatively permanent flow. [182, 185]

Under previous definitions of this term, a tributary could include intermittent or ephemeral flows, but the new definition is narrower, requiring “relatively permanent flow” and a “bed and banks.”

“Prior converted cropland” means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(1) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned. [181]

This definition codifies the five-year abandonment principle and recognizes the parallel USDA designations.

“Waste treatment system” means all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

The new definition clarifies the existing exclusion and specifies that only systems designed to meet the Clean Water Act requirements are excluded.

Under the proposed rule, CWA jurisdiction is limited to:

1. Traditional navigable waters and territorial seas
2. Most impoundments of such waters
3. Tributaries that are “relatively permanent,” defined as standing or continuously flowing year-round or at least during the wet season
4. Wetlands that both abut a jurisdictional water and have surface water at least during the wet season
5. Lakes and ponds that are relatively permanent and have a continuous surface connection to a jurisdictional water

Exclusions are clarified for ditches constructed entirely in dry land, ephemeral features, groundwater, prior converted cropland, and certain other features.

“Interstate waters” are no longer an independent basis for CWA jurisdiction. Such waters are only covered if they otherwise meet the new criteria.

Implications for Tribes

Waters that do not meet these narrowed “relatively permanent” or “continuous surface connection” standards will no longer be federally protected under this proposed rule. If waters upstream or adjacent to tribal lands lose federal protection, there may be an increased risk of pollutants affecting the water quality of water that reaches reservations.

Moreover, some Tribes rely on the federal government to implement and enforce the CWA on their lands. The proposed narrowing of jurisdiction may leave regulatory gaps and require Tribes to develop or strengthen their own water quality programs to maintain water quality standards on reservations. This may present a challenge to Tribes that lack the resources or capacity to bear the regulatory burden. In addition, the changes may reduce the authority of Tribes who have obtained “Treatment in a Similar Manner as a State” (TAS) authorization to administer their own water quality programs.

Due to preliminary injunctions of the Amended 2023 Rule in several states, the agencies are implementing two regulatory regimes across the country as of the signature date of this proposed rule. The EPA and the Army are implementing the Amended 2023 Rule in 24 states, the District of Columbia, and the U.S. Territories. In the other 26 states, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime and the Supreme Court’s *Sackett* decision.

The 24 states that will be subject to the new rule upon promulgation are: Alabama, Alaska, Arkansas, Florida, Georgia, Iowa, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. The rule will not go into effect in the other states until injunctions are lifted.

The agencies will hold two in-person public meetings with an option for virtual participation. Public comments are due January 5, 2026, under Docket ID No. EPA-HQ-OW-2025-0322.

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