



## U.S. EPA issues proposed revised WOTUS definition

November 22, 2021

UPDATE: On December 7, 2021, the proposed rule to revise the definition of “waters of the United States” was published in the [Federal Register \(86 FR 69372\)](#). The public comment period is now open and will close on February 7, 2022.

On November 18, 2021, the U.S. Environmental Protection Agency (EPA) and the Department of the Army announced a proposed rule to revise the definition of Waters of the United States (WOTUS). According to the agencies, the proposed rule puts back into place the pre-2015 definition of WOTUS, with updates to reflect recent U.S. Supreme Court decisions. Following the U.S. District Court for the District of Arizona’s vacatur of the Trump-era Navigable Waters Protection Rule (NWPR) on August 30, 2021, (for more detail, see [prior Bricker article](#)), the agencies have been implementing the pre-2015 WOTUS definition. The proposed rule states that because further litigation over the NWPR could bring it back into effect, prompt replacement of the NWPR through the administrative rulemaking process is vital.

The agencies propose to interpret WOTUS to include:

- Traditional navigable waters, interstate waters and the territorial seas, and their adjacent wetlands
- Most impoundments of WOTUS
- Tributaries to traditional navigable waters, interstate waters, the territorial seas and impoundments that meet either the relatively permanent standard or the significant nexus standard
- Wetlands adjacent to impoundments and tributaries that meet either the relatively permanent standard or the significant nexus standard

- “Other waters” that meet either the relatively permanent standard or the significant nexus standard

The agencies further define the “relatively permanent standard” as “waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.” The “significant nexus standard” is defined as “waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the “foundational waters”).”

Consequently, while updates to the rule appear to be generally consistent with the pre-2015 definition of WOTUS (and are therefore narrower in scope than the rule proposed under the Obama administration), the pre-2015 regulatory regime would be expanded to include “relatively permanent” waters, in addition to those that have a “significant nexus” to waters of the United States. According to the proposed rule, with these amendments to the 1986 regulations, the proposed rule is within the proper scope of the agencies’ statutory authority and would restore and maintain the chemical, physical and biological integrity of the nation’s waters. However, litigation over the “relatively permanent” and “significant nexus” standards is sure to commence.

The public comment period on the proposed rule will be open for 60 days, beginning on the date the proposed rule is published in the Federal Register.

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