



# ***Environmental Law Institute – Summer School Series – Clean Water Act 101 and Beyond***

**Presented by :**

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# What is WOTUS?



- The Clean Water Act (CWA) prohibits the discharge of pollutants from a point source into “navigable waters” unless otherwise authorized under the CWA.
- Navigable waters are further defined in the CWA as “the waters of the United States [WOTUS], including the territorial seas.” However, Congress did not further define WOTUS and left it to U.S. EPA and the U.S. Army Corps of Engineers (Corps) to further define it through regulations and guidance in Title 33 (Corps) and Title 40 (U.S. EPA) of the Code of Federal Regulations.
- Fundamentally, WOTUS is a term used to define the geographic scope of federal jurisdiction under the CWA. It is a threshold concept: if a waterbody is a WOTUS, federal permitting requirements, compliance obligations, and enforcement risks apply.
- The definition is relevant to the scope of most Federal programs protecting water quality under the CWA – e.g., National Pollutant Discharge Elimination Systems (NPDES) permitting under CWA section 402 implemented by the U.S. EPA and the Dredge and Fill CWA section 404 program implemented by the Corps.
- The regulatory definitions of WOTUS have undergone more than five decades of continual reinterpretation by Congress, agencies, and the courts.

# What is WOTUS?



- In the mid-1980's, the federal agencies promulgated the following definition of WOTUS:
  - *All waters which are 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;*
  - *All interstate waters including interstate wetlands;*
  - *All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:*
    - *Which are or could be used by interstate or foreign travelers for recreational or other purposes; or*
    - *From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or*
    - *Which are used or could be used for industrial purposes by industries in interstate commerce;*
    - *All interstate waters including interstate wetlands;*
  - *All impoundments of waters otherwise defined as waters of the United States under this definition;*
  - *Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;*
  - *The territorial sea;*
  - *Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section*

# What is WOTUS?



- In 1985, in ***United States v. Riverside Bayview Homes, Inc.***, the U.S. Supreme Court deferred to the Corps' assertion of jurisdiction over wetlands adjacent to a traditional navigable water, stating that adjacent wetlands may be regulated as WOTUS because they are “inseparably bound up” with navigable waters and “in the majority of cases” have “significant effects on water quality and the aquatic ecosystem” in those waters.
- Beginning in 2001, the U.S. Supreme Court began to narrow the Agencies' authority.
  - ***Solid Waste Agency of Northern Cook County v. U.S. Army Corps (“SWANCC”) (2001)*** – no federal jurisdiction over isolated, intrastate, non-navigable ponds based solely on their use by migratory birds.
  - ***Rapanos v. United States (2006)***, a fractured Court produced no majority rule. Justice Scalia's plurality required a “relatively permanent” waterbody with a continuous surface connection to jurisdictional waters. Justice Kennedy's concurring opinion articulated the “significant nexus” test—federal jurisdiction exists where wetlands or waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters. For over a decade, agencies and courts applied *both* tests, creating substantial uncertainty and regional variation.
  - In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over “wetlands adjacent to traditional navigable waters.” (USEPA and Corps, Memorandum on Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in *Rapanos v. U.S.* (2008).)

# What is WOTUS?



- In 2015, the Obama Administration issued the Clean Water Rule (“2015 Rule”), adopting the “significant nexus” framework and reinstating broader protections for tributaries, adjacent waters, and certain isolated wetlands. Numerous states challenged the rule, resulting in a patchwork of injunctions and jurisdictional inconsistencies.
- In 2020, the Trump Administration replaced the 2015 Rule with the Navigable Waters Protection Rule (“NWPR”), significantly narrowing WOTUS by (1) removing ephemeral streams, (2) limiting tributaries to those with perennial or intermittent flow, and (3) excluding wetlands lacking a direct surface connection.
- In 2021, the U.S. District Court for the District of Arizona vacated the NWPR in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, and in response, the Agencies halted implementation of the NWPR and interpreted WOTUS consistent with the pre-2015 regime.
- In early 2023, the Biden Administration issued a new rule seeking to harmonize the 2015 framework with *Rapanos*, expressly incorporating both the “relatively permanent” and “significant nexus” standards.

# What is WOTUS?

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- In *Sackett v. EPA* (2023), the Supreme Court rejected the “significant nexus” test and adopted a unified, substantially narrower definition of WOTUS. (***Sackett v. Environmental Protection Agency***, 598 U.S. 651 (U.S. 2023).)
- In its May 25, 2023 ruling, the Supreme Court held that the CWA extends only to waters or wetlands with a continuous surface connection with WOTUS – *i.e.*, **relatively permanent, standing or continuously flowing** bodies of water connected to a traditional interstate navigable water – such that it is difficult to determine where the traditionally navigable water ends and the adjacent wetland begins.

# What is WOTUS?



- In August 2023, U.S. EPA and the Corps issued a conforming amendment to the January 2023 Biden WOTUS Rule to bring the regulation into alignment with the Supreme Court's decision in ***Sackett v. EPA***. The agencies removed all regulatory provisions reliant on the “significant nexus” standard and revised several definitions to reflect the Court’s “continuous surface connection” and “relatively permanent” requirements.
- Key elements of the 2023 Conforming Rule include:
  - **Elimination of the Significant Nexus Standard** – The agencies removed the significant nexus test from all categories of jurisdictional waters, including tributaries, adjacent wetlands, and “other waters.” This change effectively eliminated federal jurisdiction for a wide range of ephemeral channels, disconnected wetlands, and isolated or geographically remote waters that had previously been analyzed under a nexus-based framework.
  - **Revisions to the “Adjacent Wetlands” Definition** – Wetlands are now jurisdictional only when they are directly abutting traditional navigable waters, relatively permanent tributaries, or jurisdictional impoundments, and possess a continuous surface connection such that they are “as a practical matter indistinguishable” from those waters.

# What is WOTUS?



- In November 2025, a new WOTUS rule was proposed. Public comments closed on January 5, 2026, and we expect the new rule to be finalized later this year. Some of the changes in the proposed 2025 WOTUS Rule include:
  - **Elimination of Interstate Waters as a Standalone Category:** Only interstate waters that meet other jurisdictional criteria (e.g., are relatively permanent and connected) would be considered WOTUS.
  - **Clarification of “Relatively Permanent” Waters:** Defined as standing or continuously flowing bodies of water that are present year-round or at least during the wet season. Ephemeral features (those flowing only in direct response to precipitation) are excluded.
    - The phrase “at least during the wet season” 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.
    - Whether a feature has predictable, continuous surface hydrology “year after year” may not be known for many drainage features or other waters that do not immediately identify as a classic river, creek, or stream, but nonetheless must be delineated for permitting or CWA program purposes. This could cause significant delay in the ability to assess jurisdiction, beyond the complexity of regulating an otherwise ephemeral surface water body.
  - **Continuous Surface Connection:** Wetlands must abut (touch) a jurisdictional water and have surface water at least during the wet season to be considered adjacent and thus jurisdictional.

# Federal – State Permitting Program

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- WOTUS are also considered waters of the State; discharges thereto are regulated by a combined permit:

- Clean Water Act NPDES Permits

ARE ALSO

- California Porter-Cologne Water Quality Control Act Waste Discharge Requirements(WDRs)
- NPDES Permits/WDRs impose requirements derived from the federal Clean Water Act and State law.
- NPDES Permits are enforceable in federal court via third party citizen suits under the Clean Water Act. State law requirements imposed in WDRs are not, only enforceable by the state regulatory agency. When combined, both may be enforceable in a citizen suit **(this becomes important**



# Recent Developments

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## ❖ *City and County of San Francisco v. EPA* (U.S. Supreme Court, March 2025)

- “End Result” requirements – “permit provisions that do not spell out what a permittee must do or refrain from doing but instead assess compliance based on the quality of receiving waters” - invalidated for use in discharge permits (NPDES) under the Clean Water Act
- This affects Receiving Water Limitations (RWLs) in **ALL** NPDES permits (prohibition on “causing or contributing” to exceedance of water quality standards) and prohibitions on “pollution,” “contamination” or “nuisance.”



# Recent Developments

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- ❖ Why does the *City and County of San Francisco* case matter?
  - Enforcement Cases (RWL primary liability)
  - Current/future modification of NPDES permits
    - **Pros:**
      - Compliance certainty
      - Reduced leverage in third party citizen suits
    - **Cons:**
      - Potential increase in “end of pipe” discharge limitations in lieu of RWLs
      - Imposition of the same requirements under state law (Porter-Cologne) but in NPDES Permit, which makes federally enforceable again...



# Recent Developments

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- ❖ *Puget Soundkeeper Alliance v. Port of Tacoma, et al.* (9<sup>th</sup> Cir. 2024; cert denied June 2025)
  - Third parties can sue in federal court to enforce state law-only conditions in an NPDES permit that go beyond federal Clean Water Act.
  - U.S. Supreme Court denied review, so the 9<sup>th</sup> Circuit case stands, a major hurdle for accepting RWLs as a “state law only” requirement in an NPDES permit.
  - Creates split in authority with 2<sup>nd</sup> Circuit in *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.* (1993); discharger cannot be sued in federal court via a citizen suit for violations of state law provisions included in NPDES Permit that exceed the CWA's requirements.

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