

2015 Revisions to “Waters of the United States” Impacts on Local Governments

In 2015 EPA and the USACE finalized a rule updating the definitions of what constitutes “Waters of the United States” or those waters that are subject to the provisions of the federal Clean Water Act and related regulatory policies. This paper provides a sort summary of the rule and its impacts on local governments.

The 2015 WOTUS rule was intended to clarify confusion created by conflicting court cases. But it did so by broadly expanding definitions of jurisdictional waters. Numerous additional waterbodies were subjected to the provisions of the CWA and therefore NPDES permitting requirements for discharges to surface waters. The rule also expanded the basis for the jurisdiction of the USACE’s wetlands permitting program and evaluations under the Endangered Species Act.

SESWA’s concerns with the 2015 rule are that it is so expansive it will force the diversion of scarce resources to a significantly broadened number of waters at the expense of those where there is a realistic chance of seeing improvements from targeted water quality improvement programs for human and/or environmental benefit.

The best approach for understanding the impact of the 2015 definitions is to think of it as a series of criteria, moving from large to smaller waterbodies:

1. First, the rule identifies a group of waters that can be used in **interstate commerce**, including interstate waters and wetlands, those subject to the ebb and flow of tide, etc.
2. Next the rule includes all **“tributaries”** to those Interstate Commerce Waters as identified above.
3. Next the rule includes waters that are **“adjacent”** to Interstate Commerce Waters or Tributaries, including:
 - ✓ All wetlands within, abutting or connecting the Ordinary High Water Mark of an Interstate Commerce Water or Tributary
 - ✓ All waters within 100 feet of Interstate Commerce Waters or Tributaries
 - ✓ All waters within 1,500 feet of the high tide line of an Interstate Commerce Water
4. Finally, the rule includes waters for which a **“significant nexus”** test applies, primarily to waters within the 100-year floodplain of an Interstate Commerce Water or within 4,000 feet of a high tide mark or Ordinary High Water Mark, if the water has a significant nexus to an Interstate Commerce Water. A significant nexus exists when a water “significantly affects” the biological, chemical or physical integrity of an Interstate Commerce Water.

Adjacency and Significant Nexus are the most expansive policies of the 2015 Rule.

5. There are a number of **exceptions** to the 2015 WOTUS rule, including prior converted crop lands, erosional features that don’t form tributaries, puddles, certain stormwater control features, ditches with ephemeral flow, ditches with intermittent flow that don’t drain wetlands or ditches that don’t contribute flow into an Interstate Commerce Water, and a series of wastewater exclusions.