

# Clean Water Act Regulatory Definitions Updates and Implications with State Wetland Regulations

## WOTUS BACKGROUND

The definition of Waters of the United States (WOTUS) has been a consistent topic of debate since the inception of the Clean Water Act, which initially covered traditional waterways. Recently, wetlands have been covered under this definition through various United States Environmental Protection Agency (USEPA) and United States Army Corps of Engineers (USACE) rulemaking as well as Supreme Court of the United States (SCOTUS) Decisions on cases challenging those rules and the Clean Water Act. The most recent definition change was published and made effective on September 8, 2023, in conformance with the SCOTUS ruling in *Sackett v. EPA*. This ruling significantly scaled back the definition of a WOTUS regulated under Section 404 of the Clean Water Act, creating significant differences in wetlands and waters that are federal and/or state-regulated, introducing uncertainty in project siting and ultimately permitting.

## CURRENT DEFINITION

The new Rule, effective September 8, 2023, amended 33 CFR 328.3 to include seven (7) types of waters as WOTUS:

1. Traditional Navigable Water
2. Territorial Seas
3. Interstate Waters
4. Impoundments of WOTUS
5. Tributaries to Items 1 through 4
6. Adjacent Wetlands
7. Other Waters

It is important to note that wetlands and similarly situated (Significant Nexus Standard) was removed from the definition in Items 3, 4, 6, and 7.

## WOTUS EXCLUSIONS

Consistent with the 2023 Definition of WOTUS, the following are not considered WOTUS:

1. Waste treatment systems.
2. Prior converted cropland.
3. Ditches (including roadside ditches).
4. Artificially irrigated areas.
5. Artificial lakes or ponds.
6. Artificial reflecting or swimming pools.
7. Waterfilled depressions.
8. Swales and erosional features.

These categories provide some certainty in determining federal jurisdiction for siting purposes; however, states rules and definitions can differ.

## COMPARISON OF WOTUS WITH PENNSYLVANIA AND NEW YORK

State regulatory programs can vary significantly in how wetlands and streams are regulated when compared to the federal WOTUS definition. Potentially in response to the SCOTUS decision on federal protections, some states have increased the protections under their programs or are proposing to do so in the future. Pennsylvania and New York are used as comparison examples with federal regulations. Pennsylvania has not made or proposed any changes while New York has made and is proposing future changes in what is considered jurisdictional under Article 15 and Article 24 of the Environmental Conservation Law (ECL). Each state jurisdiction is summarized as part of this presentation for comparison and how this can make the siting process of a large-scale project challenging.

### Pennsylvania

Pennsylvania Department of Environmental Protection (PADEP) Stream and Wetland Regulatory Program (Water Obstruction and Encroachment Program) Chapter 105 Program regulates any water obstructions and encroachments in streams, wetlands, the floodways of streams, and other bodies of water.

Any wetland that meets the criteria under the *Corps of Engineers Wetland Delineation Manual* (1987) and the applicable Regional Supplement is regulated under the Chapter 105 Program (including those features that are a result of anthropogenic activities [i.e., stormwater basins]). Additionally, any defined feature (bed and bank) draining greater than 100 acres of land is also jurisdictional under Chapter 105 as a stream. Wetlands in Pennsylvania do not carry an upland buffer as in other states; however, depending on the surface water classification, riparian buffers of up to 150 feet from a stream bank can be established and regulated.

Figure 1 provides a Pennsylvania example of wetland extent, location, and federal/state jurisdiction.

### New York

New York State has two entities regulating wetlands: New York State Department of Environmental Conservation (NYSDEC) and Office of Renewable Energy Siting (ORES). Each regulate wetlands and streams under Article 15 and Article 24, respectively, but implement those regulations differently. Additionally, New York State has recently proposed significant changes to what is considered jurisdictional under Article 24 which will expand New York's regulatory reach of these resources.

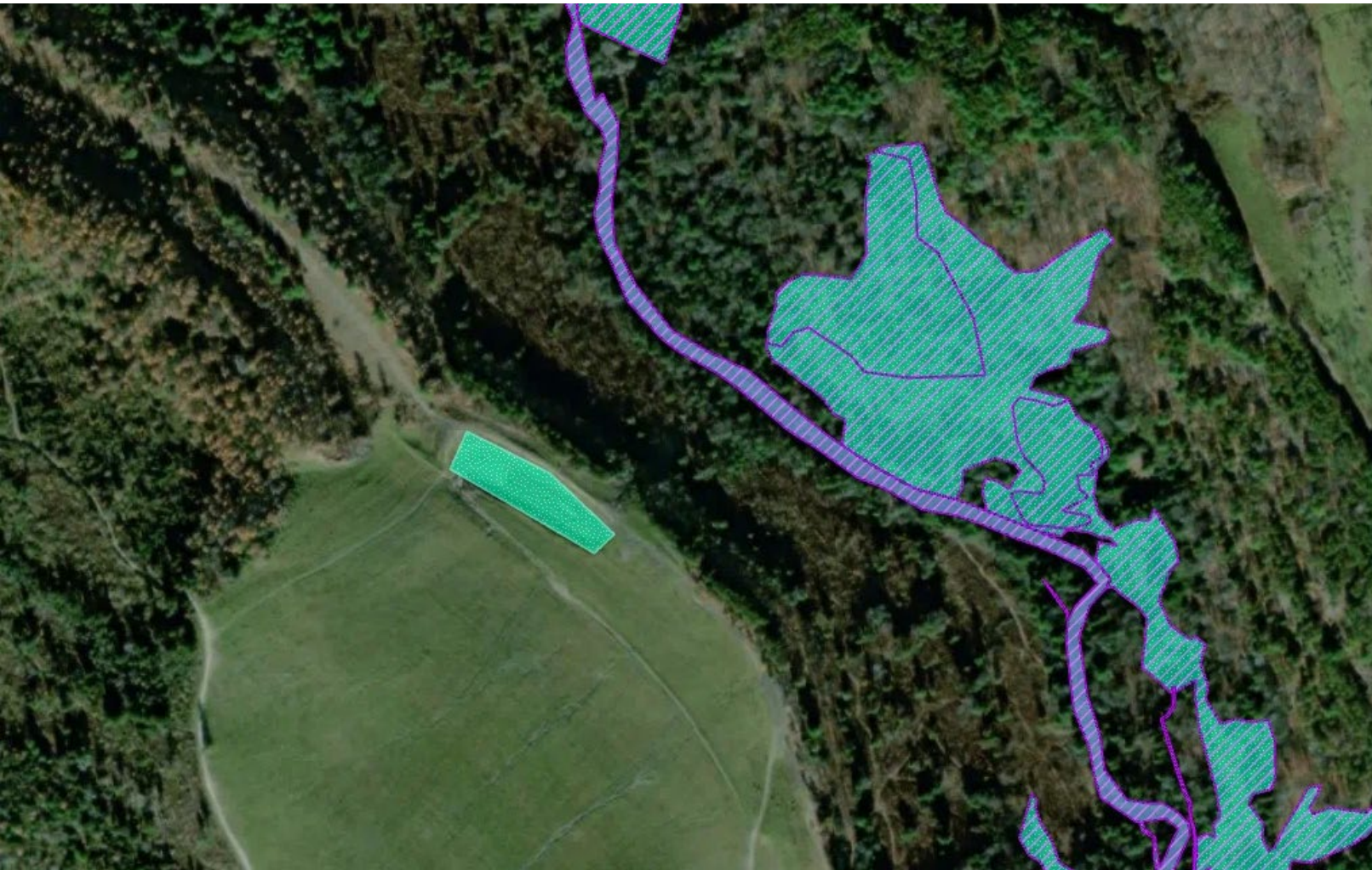
**Current:** Use of state maps to determine jurisdiction with specific cases that do not rely solely on these mapped areas, particularly ORES. ORES is largely using state freshwater wetland mapping only as reference and instead relying on the 12.4-acre threshold and wetland of unusual local importance to determine state jurisdiction.

**Future:** Starting in 2025 NYSDEC will regulate any wetland 12.4 acres in size or larger irrespective of maps and smaller if of unusual or local importance. In 2028 the threshold is lowered to 7.4 acres.

**Proposed for Future:** Advanced Notice of Proposed Rule Making for Potential to Revisions to Freshwater Wetlands Regulations under 6 NYCRR Part 664. This proposed rule aims to define Wetlands of Unusual Importance Criteria. Initial analysis of this proposed rulemaking indicates additional wetlands will be regulated by the State.

Streams are jurisdictional under Article 15 if the stream carries a surface water classification of AA, A, B, C(T), or C(TS) or if the steam is considered a state navigable water.

Figure 2 provides a New York State example of current wetland jurisdiction under Article 24 and WOTUS definition.



Pennsylvania Example: Green polygons are Chapter 105 Jurisdictional the purple hatch are both Chapter 105 jurisdictional and WOTUS.



New York Example: Dark green polygons are both Article 24 jurisdictional and WOTUS. The light green shaded polygons are non-jurisdictional for both USACE and NYS.

## CONCLUSIONS

As shown there can be significant differences in how wetland resources are regulated by a given state regulatory program and the federal program. Whether in response to the SCOTUS decision or not, some states, like New York, are broadening the scope of their state wetland protection regulations. Other states, like Pennsylvania already provides broad protection of these natural resources. With the recent WOTUS amended definition resulting from the SCOTUS decision in *Sackett v. EPA*, changes in definition of WOTUS under Section 404 of the Clean Water Act is not anticipated to change unless the United States Congress passes a new law to redefine WOTUS. Even without additional changes in the federal regulations, states will continue to amend their programs as is currently happening in New York. Without any further changes there will continue to be key differences in how wetlands are regulated under federal and state regulations. These differences make siting and even permitting a large-scale project, particularly renewable energy generating facilities, challenging.

There are steps that can be taken through the initial planning and development phases of a project to reduce siting and ultimately permitting challenges such as: obtaining a full understanding of state wetland regulations as appropriate:

- Conducting a critical issues analysis that includes identification of mapped wetland resources (and potential jurisdiction)
- Conducting a desktop wetland assessment to determine approximate location, extent and jurisdiction of wetland resources
- Integrating of the project engineering team with the environmental team to avoid or minimize proposed impacts to wetlands as early in the project design as possible to avoid project development delays during the permitting phase of the project.

## ACKNOWLEDGMENTS

Figures were developed from a GIS Geodatabase based on wetland delineations conducted by EDR and verified by federal/state agencies.

## SOURCES



<https://www.epa.gov/wotus/amended-rules-2023-rule>



<https://www.dep.pa.gov/Business/Water/Waterways/Encroachments/Pages/default.aspx>



[https://extapps.dec.ny.gov/docs/wildlife\\_pdf/wetart24a.pdf](https://extapps.dec.ny.gov/docs/wildlife_pdf/wetart24a.pdf)



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