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EPA and Corps Issue WOTUS Definition Rule

On December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (referred to collectively as “the agencies”) announced a [final rule](#) establishing their version of a more “durable” definition of “waters of the United States” (WOTUS) in an attempt to reduce regulatory uncertainty regarding the agencies’ jurisdiction over waterbodies protected under the Clean Water Act (CWA). The final rule outlines the agencies’ intentions to apply both the “relatively permanent” or “significant nexus” tests derived from the Supreme Court’s 4-1-4 decision in *Rapanos* to be used in determining the agencies’ jurisdiction over waterbodies and codifies eight exclusions from the definition of WOTUS. The final rule will likely face legal challenges and a pending Supreme Court opinion in *Sackett v. EPA* is expected to impact the jurisdictional reach of the CWA on the country’s waters and wetlands.

Background

The 1972 amendments to the Clean Water Act (CWA) established federal jurisdiction over “navigable waters,” defined in the CWA as the “waters of the United States,” or WOTUS. The CWA prohibits discharging certain pollutants into navigable waters without a permit. Congress did not define WOTUS in the CWA, requiring the agencies to define WOTUS. Since the 1970s, Congress, the courts, and the agencies have debated which waters should be federally regulated as “waters of the United States.”

On June 9, 2021, the agencies announced their intent to initiate a new rulemaking process that would both restore the protections in place prior to the Obama Administration’s 2015 Clean Water Rule and develop a new rule to establish a “durable” WOTUS definition. The Trump Administration repealed the 2015 Rule and replaced it with the Navigable Waters Protection Rule (NWPR) in 2020, which narrowed the number of waterways that could be federally regulated. In August 2021, the U.S. District Court for the District of Arizona vacated the 2020 NWPR concluding that it could harm the environment if left in place.

On December 7, 2021, the agencies issued a [proposed rule](#) that would codify the pre-2015 regulatory framework, consisting of regulations from the 1980s with amendments to reflect the agencies’ interpretation of intervening case law.

Final Rule Overview

The 514-page final rule establishes a definition of WOTUS that provides the agencies with jurisdiction over waterbodies protected under the CWA that includes the following:

- **Traditional navigable waters, the territorial seas, and interstate waters** (e.g., large rivers or lakes used for interstate or foreign commerce; territorial seas that extend three miles out from the coast; streams, lakes or wetlands that cross or form part of state boundaries);
- **Impoundments of “waters of the United States”** (e.g., reservoirs and beaver ponds);

- **Tributaries to traditional navigable waters, the territorial seas, interstate waters,** or impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”) (e.g., branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that ultimately flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters);
- **Wetlands adjacent to traditional navigable waters,** wetlands adjacent to and with a continuous surface connection to relatively permanent impoundments, wetlands adjacent to tributaries that meet the relatively permanent standard, and wetlands adjacent to impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”); and
- **Intrastate lakes and ponds, streams, or wetlands not identified above** (“additional waters”) that meet either the relatively permanent standard or the significant nexus standard.

The final rule describes two standards for determining jurisdiction for tributaries, adjacent wetlands, and additional waters. A waterbody that meets either the ‘relatively permanent standard’ or ‘significant nexus standard’ is likely to be treated as a WOTUS, and subject to the agencies’ permitting jurisdiction under the final Rule.

The ‘**relatively permanent standard**’ refers to the test to identify relatively permanent, standing or continuously flowing waters connected to traditional navigable waters, the territorial seas, or interstate waters. It also includes waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters.

The ‘**significant nexus standard**’ refers to the test to identify 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, the territorial seas, or interstate waters.

The final rule also codifies a number of explicit exclusions from the definition of WOTUS:

- Prior converted cropland
- Waste treatment systems
- Ditches (excavated exclusively in the uplands without permanent flow, including roadside ditches)
- Artificially irrigated areas that would revert to dry ground if irrigation were to cease
- Artificial lakes or ponds
- Artificial reflecting pools or swimming pools
- Water-filled depressions
- Swales and erosional features

Next Steps

The final rule will become effective 60 days after its publication in the *Federal Register*. Legal challenges to the final rule are expected. In addition, the Supreme Court will likely issue an opinion early in 2023 in *Sackett v. EPA*, a long-running dispute regarding whether certain wetlands are “waters of the United States” subject to protection under the CWA.

In *Sackett*, the U.S. Court of Appeals for the Ninth Circuit upheld the EPA’s assertion of jurisdiction over certain wetlands because the wetlands are WOTUS under the “significant nexus” standard described in the prior

Supreme Court decision in *Rapanos*. The court ruling could force the agencies to make some adjustments in the final rule.

Impacts

The final rule as written has elicited concerns from certain groups, as well as provides some protections for certain features in the form of exemptions.

The protections include explicit exemptions for roadside ditches and other ditches excavated wholly in the uplands and that do not carry a permanent flow (seasonal use). Also, waste treatment systems, prior-converted cropland, artificial features, and irrigation are all exempt from WOTUS determinations.

But one of the concerns with the final rule is the continued use of the “significant nexus” test from the Supreme Court’s *Rapanos* decision in determining WOTUS. This test, which could be under scrutiny by the Supreme Court in the *Sackett* case, allows significant jurisdictional discretion by the agencies in determining a covered waterbody, and could even allow agency jurisdiction over some of the specifically exempted features provided for in the rule as a WOTUS.

Many in Congress and industry called for the agencies to wait until the *Sackett* case is settled before issuing a final rule, arguing that any rule promulgated in advance of a decision in that case would be impacted by the outcome. But others in the environmental community and some states wanted the Administration to finalize the rule to show the Supreme Court how an administrative rule could offer a more nuanced and “durable” solution to WOTUS determinations under the Clean Water Act. In fact, the Biden Administration has communicated the final rule to the Court for their consideration in *Sackett*.

Additional Resources

[WOTUS Final Rule Press Release](#)

[Pre-Publication Final Rule](#)

[Public Fact Sheet 2022](#)

[Agricultural Community Fact Sheet 2022](#)

[Landowners Guide Fact Sheet 2022](#)

[EPA WOTUS Website](#)