Updates
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The Biden Rule: Redetermining Where Water Ends and Land Begins

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Corps) jointly announced on December 30, 2022, the latest final rule (Rule) that attempts to define "waters of the United States" (WOTUS) under the Clean Water Act (CWA). The Rule will take effect 60 days after its publication in the *Federal Register*.

How the agencies define WOTUS is important because this definition determines the scope of two of the CWA's major permitting programs. The first is the Section 402 permitting program, which regulates the discharge of pollutants from point sources (e.g., pipes, ditches, or channels) into navigable waters. Large industrial operations that discharge wastewater into waterbodies usually must obtain a permit under this program. The second is the Section 404 permitting program, which regulates the discharge of dredged or fill material into navigable waters. Permits are often required under this program for construction projects (e.g., highways, airports, or pipelines) that involve placing fill material in waters, including wetlands.

Changes to the definition of WOTUS can significantly impact permitting and project development by regulated entities. For example, under the definition of WOTUS that was used during the Trump administration, if a river were surrounded by wetlands, a regulated entity building a road or levee in that area could remove the wetlands from the CWA's reach. Under the Biden Rule, this would no longer be true.

As another example, the previous rule excluded "diffuse stormwater run-off and directional sheet flow over upland; ditches that are not traditional navigable waters, the territorial seas, or tributaries" and "those portions of ditches constructed in adjacent wetlands" that were not jurisdictional.[1] The new Rule eschews broad categories in favor of a much more context-specific approach, increasing litigation risks for regulated entities.

The agencies assert that the Rule is intended to restore the pre-2015 definition of WOTUS, accounting for various subsequent court decisions.[2] According to the agencies, changes to the Rule were informed by the CWA's text, the scientific record, and the agencies' "experience and technical expertise."[3] The agencies also

promulgated the Rule to provide additional guidance regarding their views on which wetlands should be considered WOTUS.[4]

**Background**

The CWA generally prohibits persons from discharging "pollutants" or "dredged or fill material" into "navigable waters" without first obtaining a permit.[5] The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." However, the U.S. Congress did not further define the term "waters of the United States" in the CWA.[6] Therefore, the EPA and the Corps defined that term in the statute's implementing regulations. It is generally acknowledged that Congress intended the CWA to regulate at least some waterbodies and wetlands that are not "navigable" in the traditional sense. However, the line between navigable and non-navigable waters has been a constant point of debate within both the courts and the executive branch.

Since 2015, there have been three different rules defining WOTUS.[7] The 2015 Rule, enacted by the Obama administration, sought to resolve uncertainties surrounding U.S. Supreme Court Justice Kennedy's "significant nexus" test, as defined in *Rapanos v. United States*, 547 U.S. 715 (2006). To qualify as a "water of the United States" under that test, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact; this means the water or wetland must significantly affect the chemical, physical, and biological integrity of a traditional navigable water. Due to a nationwide stay resulting from litigation, the 2015 Rule did not take effect until 2018. And when it did take effect, it only did so in 22 states. The result was a confusing patchwork of WOTUS rules, and under the Trump administration, the EPA and Corps eventually repealed the 2015 Rule in December 2019.

One month after the repeal of the 2015 Rule, the agencies announced the 2020 Rule, or the Navigable Waters Protection Rule (NWPR). Unlike the 2015 Rule, the NWPR defined WOTUS using the "relatively permanent" test from U.S. Supreme Court Justice Scalia's plurality opinion in *Rapanos*. This test adopts a narrower view of federal jurisdiction under the CWA: Waters only qualify as "navigable" if they are relatively permanent, standing, or flowing bodies of water, and wetlands are only considered "navigable" if they bear a continuous surface connection to such a water. The 2020 Rule faced numerous legal and political challenges.

On June 9, 2021, the EPA and Corps announced that they would replace the 2020 Rule. Then, on December 7, 2021, the agencies announced that they would return to the approach used in the pre-2015 regulations, informed by intervening U.S. Supreme Court precedent.[8]

This final Rule and the over 500-page pre-publication notice document represent the latest attempt to define WOTUS.

**The Biden Rule**

# The Latest WOTUS Rule

The agencies determined that the following should be considered WOTUS:

- Traditional navigable waters, the territorial seas, and interstate waters (paragraph (a)(1) waters).
- Impoundments (created by discrete structures like dams and levees that are often human-built) of WOTUS (paragraph (a)(2) impoundments).
- Tributaries to traditional navigable waters, the territorial seas, interstate waters,[9] or paragraph (a)(2) impoundments, where such tributaries meet either the "relatively permanent standard" or the "significant nexus standard," which standards are explained in greater detail below (jurisdictional tributaries).
- Several categories of wetlands, including:
    - Wetlands adjacent to paragraph (a)(1) waters.
    - Wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments.
    - Wetlands adjacent to tributaries that meet the relatively permanent standard.
    - Wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries, where the wetlands meet the significant nexus standard (jurisdictional adjacent wetlands).
- Other intrastate lakes and ponds, streams, or wetlands that meet either the relatively permanent standard or the significant nexus standard (paragraph (a)(5) waters).[10]

The Rule retains exclusions for prior converted cropland, waste treatment systems, and features that were "generally considered non-jurisdictional under the pre-2015 regulatory regime."[11] However, the exclusion for prior converted cropland would cease upon a change of use.[12] Moreover, the exclusions do not apply to traditional navigable waters, territorial seas, and interstate waters.

## The "Relatively Permanent" and "Significant Nexus" Standards

Historically, there has not been much controversy about whether traditional navigable waters—such as large rivers or lakes—qualify as WOTUS under the CWA. The debate has focused on whether smaller or more ephemeral waters—including wetlands—connected or adjacent to these traditional navigable waters can be considered WOTUS. Compared to the 2020 Rule, the new Rule effectively expands federal jurisdiction over these "non-traditional" waters and wetlands.

Like the 2020 Rule, the latest Rule considers "relatively permanent, standing, or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters" to be WOTUS.[13] Such waters are included within the WOTUS definition because these relatively permanent waters will almost always significantly affect traditionally navigable waters, territorial seas, and interstate waters.[14]

However, the agencies concluded that the relatively permanent test is "insufficient as the sole test" for defining WOTUS under the CWA.[15] Consequently, the Rule also adopts the significant nexus standard, which encompasses "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."[16]

The application of both the "relatively permanent" and "significant nexus" tests to determine whether a water is a WOTUS has significant implications. For example, the new Rule allows adjacent wetlands to be considered WOTUS when they either (i) have a continuous surface connection to the "relatively permanent, standing, or continuously flowing water" that is connected to a paragraph (a)(1) water, or (ii) have a "significant [e]ffect [on] the chemical, physical, or biological integrity of a paragraph (a)(1) water."[17] The ability of the agencies to use either test to determine whether a water is a WOTUS effectively authorizes more expansive federal jurisdiction over ephemeral and intermittent waters, including over "waters" that remain dry for much of the year.

***Sackett v. EPA***

On October 3, 2022, the Supreme Court heard oral arguments in *Sackett v. EPA*, No. 21-454 (U.S.). For the Sacketts, the issue is whether their second trip to the Supreme Court will finally provide an answer to the question of whether they can build their home on a somewhat soggy 2/3-acre residential lot that has been in dispute for more than 15 years. For the Supreme Court, the issue is whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under the CWA. During the oral arguments, U.S. Supreme Court Justice Kagan asked about the Biden administration rulemaking and its attempt to redefine WOTUS and provide guidance on which wetlands should be considered WOTUS; the acting solicitor general informed the Supreme Court that the Rule provides additional guidance about which adjacent wetlands should qualify.[18] The agencies have indicated that, under this Biden Rule, the Sacketts' property would be considered jurisdictional; it would be a "wetland" that is "adjacent to a jurisdictional tributary" that, "together with other similarly situated adjacent wetlands," has "a significant nexus" to "a traditional navigable water."[19]

**Takeaways**

The Rule represents the federal government's latest attempt to define WOTUS under the CWA and, as such, will have significant impacts on both the environment and regulated entities. A couple of key points are worth considering.

First, the Rule adopts the "significant nexus" test articulated by Justice Kennedy in *Rapanos*.[20] This test, which by its nature is fact-intensive,[21] will result in more case-by-case determinations of what waters qualify as "navigable," potentially increasing costs and delays for regulated entities and creating additional permitting uncertainties. For example, the agencies assert that a case-specific analysis of the effects of intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of the Rule on downstream waters is "appropriate from both a scientific and policy perspective."[22]

Second, the Rule will expand federal jurisdiction over ephemeral and intermittent waters. The agencies note that, in Arizona, 96% of stream channels (by length) are classified as ephemeral or intermittent.[23] The agencies suggest that many of these streams should be included as WOTUS, stating that the "functions that streams provide to benefit downstream waters occur even when streams do not flow constantly."[24] They also state that "there was a 10-fold increase in non-jurisdictional findings for streams in Arizona and a 36-fold increase in non-jurisdictional findings for streams in New Mexico following implementation" of the 2020 Rule, which had expressly rejected including ephemeral streams as waters of the United States.[25] More generally, the agencies noted that 75% of waterbodies were found to be non-jurisdictional under the 2020 Rule, as opposed to only 45% under the prior regulations.[26] Additionally, the Corps found that the number of projects that no longer needed a Section 404 permit under the 2020 Rule was twice as high as under the previous regulatory regime.[27]

That said, it is unclear how long the Rule will actually last. The Biden administration released the Rule before the Supreme Court's decision in *Sackett*. It appears as if the Supreme Court is primed to use *Sackett* to eliminate or narrow the "significant nexus" test.[28] Thus, a significant portion of the Rule's legal underpinnings may be gone in a few months, which would require the Biden administration to promulgate yet another rule defining WOTUS. The Biden administration has repeatedly stated that its goal with this Rule is to ensure that it will endure. Given this goal, a narrowing of the "significant nexus" test would likely result in a final WOTUS rule that bears a closer resemblance to the pre-2015 WOTUS definition.

**Endnotes**

[1] Prepublication Notice at 44.

[2] These include *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside Bayview*); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*); and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*).

[3] Prepublication Notice at 58.

[4] *Id*. at 9–10.

[5] Federal Water Pollution Control Act, §§ 301(a), 502(12)(A), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 2, 86 Stat. 844, 886, 33 U.S.C. §§ 1311(a), 1362(12)(A).

[6] 33 U.S.C. § 1251 *et seq*.

[7] 80 Fed. Reg. 37054 (June 29, 2015); 84 Fed. Reg. 56626 (Oct. 22, 2019); 85 Fed. Reg. 22250 (Apr. 21, 2020).

[8] 86 Fed Reg. 69372 (Dec. 7, 2021).

[9] The agencies temporarily deferred action "related to considering designating waters that cross a State/Tribal boundary as interstate waters" under the WOTUS definition. Prepublication Notice at 259–260.

[10] *Id.* at 8-9; *see* 33 C.F.R. § 328.3(a).

[11] Prepublication Notice at 228.

[12] *Id*. at 229.

[13] *Id*. at 9.

[14] *Id*. at 12.

[15] *Id*. at 13.

[16] *Id*. at 9 (emphasis added).

[17] *Id*. at 10.

[18] Transcript of Oral Argument at 93-95, *Sackett v. EPA*, No. 21-454 (U.S.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_8m59.pdf.

[19] *Id.* at 107–12.

[20] As Justice Scalia noted, Justice Kennedy's "reading of 'significant nexus' bears no easily recognizable relation to either the case that used it (*SWANCC*) or to the earlier case that case purported to be interpreting ( *Riverside Bayview*)." *Rapanos*, 547 U.S. at 753.

[21] Emboldened by the case-specific factors in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Rule draws an analogy between the "functional equivalent" standard in *County of Maui* and the

significant nexus standard, noting that both "require an analysis focused on the specific facts at issue in a particular instance." Prepublication Notice at 141.

[22] *Id.* at 105–106.

[23] *Id.* at 98.

[24] *Id*. at 98, 128.

[25] *Id*. at 217.

[26] *Id.* at 214-215.

[27] *Id.* at 218.

[28] *Id*. at 1491–92 (Alito, J., dissenting) (quoting *Rapanos*, 547 U.S. at 758). This also seems to foreshadow a potential repeat of the Navigable Waters Protection Rule /*County of Maui* debacle. There, on April 21, 2020, EPA and the Corps released the Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250. Two days later, the Supreme Court ruled in *County of Maui* that the federal government could regulate discharges to groundwater after all, depending upon the application of a host of factors only partially identified in the Court's opinion. 140 S. Ct. 1462.



## Authors

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