



2023 Is Shaping Up to Be a Big Year for the Clean Water Act and Its “Waters of the United States”

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In January, the Biden Administration promulgated the federal government’s latest rule defining “waters of the United States” ([WOTUS Rule](#)). The WOTUS Rule, which defines the waters that are subject to federal permitting and oversight under the Clean Water Act (CWA) by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE), went into effect on March 20, 2023. As with past attempts to define “waters of the United States,” the new WOTUS Rule is already triggering legal challenges.

Since the enactment of the CWA in 1972, courts, agencies, and landowners have struggled to define the statute’s geographic scope, especially with respect to wetlands, which do not fit neatly within familiar notions of “water” or “land.” The statute prohibits unpermitted discharges of pollutants (including fill material) into “navigable waters” but defines that term broadly as “the waters of the United States, including the territorial seas.” The Biden Administration’s WOTUS Rule replaces the Trump Administration’s Navigable Waters Protection Rule (NWPR), which was promulgated in 2020 but subsequently vacated by two federal district courts. The NWPR followed the Trump Administration’s 2019 repeal of a 2015 Obama Administration rule (the 2015 Clean Water Rule) that had taken a categorical approach to defining “waters of the United States.”

The Biden Administration’s WOTUS Rule seeks to return to the general framework of Clean Water Act regulations promulgated in 1986. The 1986 regulations were the subject of three Supreme Court decisions, the most recent of which was [Rapanos v. United States](#). *Rapanos* resulted in a 4–1–4 decision featuring multiple tests for determining whether a particular wetland could be considered to fall within the CWA category of “waters of the United States.” Circuit courts have uniformly held that a wetland qualifies as a “water of the United States” if it satisfies the “significant nexus” test proffered by Justice Kennedy. Under that test, Kennedy held that a wetland

may be regulated if it had a “significant nexus” to waters that were navigable in fact or could reasonably be made navigable. Importantly, under Justice Kennedy’s test, the “significant nexus” requirement could be met if the wetlands, “either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

The new WOTUS Rule specifically sets forth a multipart definition of “waters of the United States,” which consist of:

- traditional navigable waters, the territorial seas, and interstate waters (“paragraph (a)(1) waters”)
- impoundments of “waters of the United States” (“paragraph (a)(2) impoundments”)
- tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”)
- 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, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”)
- intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard (“paragraph (a)(5) waters”)

On Wednesday, April 12, 2023, the WOTUS Rule faced its first obstacle after taking effect when District of North Dakota U.S. District Judge Daniel L. Hovland blocked the WOTUS Rule from going into effect in the 24 states that have challenged the legality of the Rule in [West Virginia et al. v. U.S. Environmental Protection Agency et al.](#) The 24 states in which the order applies include: West Virginia, North Dakota, Georgia, Iowa, Alabama, Alaska, Arkansas, Florida,

Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming.

In his order, Judge Hovland claimed that the new WOTUS Rule was “unlimited” in scope and found it suffers from “a litany of other statutory and constitutional concerns.” Noteworthy is the fact that the decision follows that of Texas U.S. District Judge Jeffrey V. Brown, who also [granted a preliminary injunction](#), in March, to block the rule from being implemented in two other states, Texas and Idaho.

After Hovland’s ruling on Wednesday, the EPA indicated that the agency and USACE are reviewing the decision and their options. “The agencies continue to believe the rule, which is informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, as well as the scientific record, relevant Supreme Court case law, input from public comment, and the agencies’ experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining waters of the United States, is the best interpretation of the Clean Water Act,” EPA said in a [statement](#).

In light of the preliminary injunctions in North Dakota and Texas, EPA said that both agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime in the 26 states where the WOTUS Rule is blocked “until further notice.”

Another case to keep an eye on is [Sackett v. EPA](#), which is currently pending before the United States Supreme Court. That case is a challenge to EPA’s determination that the Clean Water Act applies to a wetland on property that, while just 300 feet from a navigable lake and just 30 feet from a tributary to that lake, is separated from both by a road and connected to the tributary by shallow subsurface flow. The petitioners argue that the only jurisdictional test for such wetlands is Justice Scalia’s test in *Rapanos*, rather than Justice Kennedy’s, which requires a “continuous surface connection” to a covered water. EPA argues that it may assert jurisdiction if the wetland satisfies either Justice Scalia’s test or Justice Kennedy’s “significant nexus” requirement. *Sackett* allows

the Court to revisit *Rapanos* and resolve any remaining uncertainty over the appropriate jurisdictional test(s) that the agencies may use consistent with the statute and the Constitution. Gibbons is here to be your source for updates on each of these WOTUS matters.

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