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## Back to the Future, or Forward to the Past? EPA and Army Corps of Engineers Release New Clean Water Act New Rule Revising Definition of “Waters of the United States”

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Ever since the enactment in 1972 of the modern Clean Water Act (a comprehensive amendment of the 1948 Federal Water Pollution Control Act), 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.” Landowners often confront this issue because 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,” which includes some, but not all, areas that scientists would deem to be wetlands. In December, the U.S. Environmental Protection (EPA) and the U.S. Army Corps of Engineers (Corps) released the latest chapter in this five-decade-long saga, in the form of a new 514-page rule defining “waters of the United States” (WOTUS). The rule was officially promulgated [via publication in the Federal Register on January 18](#), and will become effective 60 days later.

The new WOTUS rule is the product of a rulemaking process spurred by a January 2021 executive order signed by President Biden that directed all agencies to review regulations and take appropriate action to address those that might conflict with policies of science-based decision-making. (86 Fed. Reg. 7037 (Jan. 25, 2021)). It 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” and was seen by many as substantially expanding the reach of the statute. All three

recent rules are the subject of pending legal challenges, all of which are administratively closed, inactive, or being held in abeyance.

The agencies' new WOTUS rule returns to the general framework of regulations promulgated in 1986. (Those regulations were largely put in place in 1977 and were amended to add an exclusion in 1993.) The 1986 regulations were the subject of three Supreme Court decisions, the most recent of which was *Rapanos v. United States*, which resulted in a 4–1–4 decision featuring multiple tests for determining whether a particular wetland could be considered as falling within the statutory category of “waters of the United States.” A four–Justice plurality opinion authored by Justice Scalia interpreted the term as covering wetlands with a “continuous surface connection” to any “relatively permanent, standing or continuously flowing” body of water that is connected to traditional navigable waters. Justice Kennedy’s concurring opinion, by contrast, posited that a water or wetland came within the statute’s scope if it possessed 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.” Circuit courts applying *Rapanos* have uniformly held that a wetland qualifies as a “water of the United States” if it satisfies Justice Kennedy’s “significant nexus” requirement, but no appellate court has held that Justice Scalia’s “relatively permanent” standard is the sole acceptable criterion, and some courts have held that the government may establish jurisdiction under either standard. The new WOTUS rule aims to create a single, nationwide rule consistent with *Rapanos*.

The new WOTUS rule generally follows the contours of the 1986 regulations (as limited by *Rapanos*), with some adjustments. Of greatest significance, it 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”)

Perhaps tired of incessant litigation, the agencies, in promulgating the new WOTUS rule, note that they are seeking to establish a “durable” standard for Clean Water Act jurisdiction. The new rule is based on the familiar 1986 framework, as well as *Rapanos*, post-*Rapanos* agency guidance, and advances in wetlands science. But the story of wetlands regulation under the Clean Water Act is far from over. Currently pending before the Supreme Court is [\*Sackett v. EPA\*](#), where the petitioners are challenging the EPA’s determination that the Clean Water Act applies to a wetland on their property that, while just 300 feet from a navigable lake and just 30 feet from a tributary to that lake, is separated from both features by a road and is 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*, which requires a “continuous surface connection” to a covered water. EPA argues that it can assert jurisdiction if the wetland satisfies *either* Justice Scalia’s test or Justice Kennedy’s “significant nexus” requirement. While not a direct challenge to any agency rule, *Sackett* invites 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. Depending on the Court's decision, specific grounds for judicial challenges to the new WOTUS rule may be created or foreclosed. Stay tuned.

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