

UPDATED: Biden Administration Redefines "Waters of the United States," Expanding Regulation Under Clean Water Act

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On January 18, 2023, the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (the “Corps”) (collectively the “Agencies”) published a final rule re-defining the term “waters of the United States” (“WOTUS”) under the Clean Water Act (“**Final Rule**”).

The Final Rule modifies the scope of waterbodies subject to regulation under the Clean Water Act (“CWA”), and it reverses many of the regulatory changes made during the Trump Administration that had narrowed the scope of waters subject to regulation. As explained in previous Van Ness Feldman **alerts**, the Trump Administration’s efforts were largely a response to changes made during the Obama Administration to expand the scope of waters regulated as WOTUS. The Trump-era rule also eliminated the case-specific application of Justice Kennedy’s “significant nexus” test from the *Rapanos v. U.S.* case, and it replaced that case-specific test with “categorically jurisdictional and categorically excluded waters.”

In an effort to reach a “durable” definition for WOTUS, the Final Rule adopted under the Biden Administration attempts to blend the fundamental approach

taken in pre-2015 regulations first adopted during the Reagan-era with concepts from recent Supreme Court case law interpreting the CWA. In particular, the Final Rule adopts both Justice Scalia’s “relatively permanent” test and Justice Kennedy’s “significant nexus” test from the *Rapanos v. U.S.* case, which are described below. By adopting both tests, the Final Rule gives the Agencies discretion to “consider defining waters as jurisdictional on a categorical basis where scientifically and legally justified . . . or on a case-specific, fact-based approach.”

Background

The WOTUS definition establishes the geographic scope for jurisdiction under the CWA, which impacts a myriad of regulatory issues, including: the applicability of water quality standards; impaired waters and total maximum daily loads; oil spill prevention, preparedness, and response programs; state and tribal water quality certification programs; National Pollutant Discharge Elimination System permit requirements; and dredge and fill permit requirements.

The CWA does not define WOTUS, and as a result, the definition has been open to extensive agency rulemaking and litigation. The rulemaking history and associated legal challenges, which are detailed in previous alerts, can be summarized as follows:

- **1986 Regulations (“1986 Regulations”)** – The Corps published regulatory provisions defining WOTUS to implement the CWA’s Section 404 program.
- **2015 Clean Water Rule (“2015 Clean Water Rule”)** – The Agencies published revised regulations to establish three categories of WOTUS: (1) waters that are categorically “jurisdictional by rule” (without the need for additional analysis); (2) waters that are subject to case-specific analysis to determine whether they are jurisdictional; and (3) waters that are categorically excluded from jurisdiction.
- **2019 Repeal of Clean Water Rule** – President Trump issued Executive Order 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule,” (“Executive Order 13778”), which directed the Agencies to review the 2015 Clean Water Rule for consistency with the policy outlined in Executive Order

13778 and issue a proposed rule rescinding or revising the 2015 Clean Water Rule. In October 2019, the Agencies repealed the 2015 Clean Water Rule and recodified the 1986 Regulations to be implemented “consistent with Supreme Court decisions and longstanding practice,” while also announcing a forthcoming rule that would replace the 1986 Regulations.

- **2020 Navigable Waters Protection Rule (“2020 NWPR”)** – The Agencies published the “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” which provided a definition of WOTUS based primarily on the Justice Scalia’s “relatively permanent” test from *Rapanos*. As noted above, the 2020 NWPR was intended to replace the 2015 Clean Water Rule’s case-by-case application of the “significant nexus” rule with “categorically jurisdictional and categorically excluded waters.”
- **2021 Review and Vacation of 2020 NWPR** – In **January 2021**, President Biden signed Executive Order 13990, “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” (“Executive Order 13990”), which directed the Agencies to review the 2020 NWPR to determine its alignment with the principles of Executive Order 13990: science, climate change, and environmental justice. In June 2021, the Agencies announced their intent to revise definition of WOTUS after its review of the 2020 NWPR pursuant to Executive Order 13990. In **August 2021**, the U.S. District Court for the District of Arizona vacated and remanded the 2020 NWPR in *Pascua Yaqui Tribe v. EPA*, 557 F. Supp.3d 949 (D. Ariz. 2021). In **November 2021**, the Agencies issued a proposed rule that rejected many of the changes in the 2020 NWPR.

The Final Rule

The Agencies describe the Final Rule as “consistent with the general framework of the 1986 regulations,” and the Final Rule directs the Agencies to interpret “waters of the United States” to include:

- ***Traditional navigable waters, the territorial seas, and interstate waters***, defined to include waters which are currently, have been, or may

be, used in interstate or foreign commerce, territorial seas, or interstate waters, including interstate wetlands. The Agencies concluded that, to increase clarity, the Final Rule will not make changes to the text or substance of the 1986 regulations regarding traditional navigable waters, territorial seas, and interstate waters. The Agencies have consolidated these three categories of waters into one provision. However, the Agencies explained that each category will remain separate and distinct. These jurisdictional categories are similar to those in the 2020 NWPR, although the 2020 NWPR had called into question whether “interstate waters” were jurisdictional WOTUS.

- ***Impoundments of “waters of the United States,”*** defined to include (1) waters created by impounding a WOTUS that was jurisdictional under the WOTUS definition at the time it was created; and (2) impoundments of waters that at the time of assessment meet the definition of a traditional navigable water, territorial sea, interstate water, jurisdictional tributary, or jurisdictional adjacent wetland. The Agencies note that this provision is consistent with pre-2015 practice because impounding a water that meets the definition of WOTUS generally does not affect such water’s jurisdictional status. The 2020 NWPR had excluded impoundments that are connected downstream to jurisdictional waters only by: diffuse stormwater runoff or directional sheet flow over upland areas; impoundments with no surface water connection to a jurisdictional water; and impoundments that lose water only through evaporation, underground seepage, or consumptive use. The Final Rule does not categorically exclude such impoundments.
- ***“Jurisdictional tributaries,”*** defined to include 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. The Agencies concluded that it will not include a definition of “tributary” in the Final Rule, but stated that through implementation, a tributary for the purposes of the Final Rule will include rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a traditional navigable water, territorial sea, interstate water, or an impoundment. The 2020 NWPR limited jurisdictional “tributaries” to those that are perennial or intermittent “in a typical year,” categorically excluding so-called “ephemeral” streams

that flow only in direct response to precipitation (and their adjacent wetlands). The Final Rule includes no such exclusion.

- **“Jurisdictional adjacent wetlands,”** defined to include: wetlands adjacent to traditional navigable waters, territorial seas, or interstate waters; wetlands adjacent to, and with a continuous surface connection to, a relatively permanent impoundment; wetlands adjacent to tributaries that meet the relatively permanent standards; and wetlands adjacent to impoundments or jurisdictional tributaries that meet the significant nexus standard. The Final Rule retained the 1986 definition of “wetlands,” which generally includes swamps, marshes, bogs, and similar areas, defined specifically as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” The Final Rule also revived the longstanding definition of “adjacent,” which focuses on the distance between the wetland and jurisdictional water, defined specifically as “bordering, contiguous, or neighboring.” The Agencies concluded that “adjacent wetlands” will include “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like[.]” By contrast, the 2020 NWPR defined adjacent wetlands more narrowly, including only those that: (i) abut a territorial sea, traditional navigable water, or regulated lake, pond, or impoundment; (ii) are inundated by flooding from one of these jurisdictional waters; (iii) are physically separated from one of these waters by a natural berm, bank, dune or similar natural feature; or (iv) are physically separated from one of these waters by an artificial dike, barrier or other structure, including a road that allows for a direct hydrologic surface connection with the regulated water in a typical year (such as through a culvert, flood or tide gate, pump or similar feature).
- ***Intrastate lakes and ponds, streams, or wetlands not identified as traditional navigable waters, territorial seas, interstate waters, impoundments, jurisdictional tributaries, or jurisdictional adjacent wetlands that meet either the relatively permanent standard or the significant nexus standard.*** This is a new provision under the Final Rule, which allows for case-specific analysis of waters not addressed by any other provision. This will allow the Agencies to determine whether the

water should be classified as a WOTUS under either the relatively permanent or significant nexus standards. The Agencies described this provision as “substantially narrower than the 1986 regulations” and determined this provision should be included because such waters can provide functions that restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, territorial seas, and interstate waters. The 2020 NWPR did not include this category of jurisdictional waters.

The Final Rule adopts the “relatively permanent” standard, which is used to identify relatively permanent, standing, or continuously flowing waters. Such waters may include “traditional navigable waters, the territorial seas, and interstate waters” and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. The Agencies concluded that adopting the relatively permanent standard would provide “important efficiencies and additional clarity for regulators and the public” by more readily identifying a subset of waters that will “virtually always significantly affect” traditional navigable waters, territorial seas, or interstate waters. The Final Rule provides additional guidance on how the Agencies will implement the relatively permanent standard for tributaries, adjacent wetlands, and other waterbodies. Under the Final Rule, waters that do not meet the “relatively permanent” standard still may be jurisdictional if they meet the “significant nexus” standard. The Final Rule also clarifies the “significant nexus” standard by adopting a definition of “significantly affect.” The “significantly affect” definition assesses the “functions” of waters by evaluating the following factors: contribution of flow; trapping, transformation, filtering, and transport of material (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature; or provision of habitat and food resources for aquatic species located in said waters. The “significantly affect” test also will consider several factors, such as: distance from the navigable waters, territorial sea, or interstate water; hydrological factors (e.g., frequency, duration, magnitude, timing, and rate of hydrological connections including shallow subsurface flow); size, density, or number of waters that have been determined to be similarly situated; landscaping position and geomorphology; and climatological variables (e.g., temperature, rainfall, and snowpack).

Additionally, the Final Rule codifies several exclusions from the WOTUS definition, including the following:

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- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the CWA;
 - Prior converted cropland designated by the Secretary of Agriculture; however, this exclusion will not apply upon a change of use when the area is no longer available for the production of agricultural commodities;
 - Ditches, including roadside ditches, which are wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
 - Artificially irrigated areas that would revert to dry land if the irrigation ended;
 - Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and used exclusively for purposes such as stock watering, irrigation, settling basins, or rice growing;
 - Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
 - Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definitions of WOTUS; and
 - Swales and erosional features, such as gullies and small washes, which are characterized by low volume, infrequent, or short duration flow.

Several of these exclusions, such as the exclusion for certain ditches, are more narrowly-defined than the exclusions in the 2020 NWPR. Notably, the Agencies also declined to expressly exclude groundwater, which the 2020 NWPR had excluded. The Agencies reasoned that “groundwater is not surface water and therefore does not fall within the possible scope of ‘navigable waters.’” Thus, the Agencies concluded that there is no need for a regulatory exclusion. However, the Agencies went on to state that while groundwater is not jurisdictional under the Final Rule, many states include groundwater in their

definitions of “waters of the state,” which may subject groundwater to state regulation.

The Agencies also declined to exclude stormwater control features from the Final Rule’s WOTUS definition, reasoning that the stormwater exclusion would “not achieve the [A]gencies’ goal of maintaining consistency with the pre-2015 regulatory regime while continuing to advance the objective of the [CWA].” However, the Agencies did note that the Final Rule’s case-specific assessment still may exclude certain features that convey stormwater as ditches under the Final Rule.

Implications of the Final Rule

As part of the Final Rule’s preamble, the Agencies have provided guidance on how they intend to implement the Final Rule, including the sequence in which they intend to analyze the various jurisdictional tests. The Agencies first will consider whether a water qualifies as a traditional navigable water, territorial sea, or interstate water. If a water meets any of these definitions, then it is considered a “water of the United States” and will be under the jurisdiction of the CWA with no further evaluation. No exclusions will apply to these waters, even where the water would otherwise meet the criteria for exclusion.

Next, if a water is not a traditional navigable water, territorial sea, or interstate water, then the Agencies generally will consider whether any of the exclusions outlined above apply to the water. If the Agencies determine an exclusion applies, then the water would not be jurisdictional under the CWA.

If an exclusion does not apply, then the agencies will determine whether the water can be assessed as any of the following: an “impoundment”; a tributary meeting either the relatively permanent test or significant nexus test; or a wetland meeting the statutory definition, relatively permanent standard, or the significant nexus standard.

Finally, if a water does not fall under any of these categories, then the Agencies will assess if the water is jurisdictional as an interstate lake, pond, stream, or wetland meeting the relatively permanent or significant nexus standard. If a water does not fall under any of the above criteria, then the water will not meet the definition of “waters of the United States” under the Final Rule.

Next Steps

The Final Rule will become effective on March 20, 2023. As with the Obama-era and Trump-era rulemaking efforts, the Final Rule is likely to be challenged in court. The Supreme Court's decision in the pending *U.S v. Sackett* case, where the Supreme Court once again considered the meaning of WOTUS, will inform the outcome of those challenges and ultimately may control them.

Litigation over the Final Rule likely will result in continuing uncertainty until the Supreme Court rules once again.

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