New WOTUS Rule Restores Protections for Many Waters, but Uncertainty Persists Due to Continuing Litigation

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On December 30, 2022, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (collectively Agencies) announced the issuance of a final rule defining "waters of the United States" (WOTUS), a key term in the Clean Water Act (CWA). That phrase, which serves as the definition for "navigable waters" in the statute, effectively establishes the boundaries of the Agencies' regulatory authority under the CWA.[1] The rule was published in the Federal Register on January 18, 2023, and will take effect 60 days thereafter.[2]

As previously discussed, during the Trump administration, the Agencies promulgated a rule that defined WOTUS more narrowly than previous iterations of the rule, substantially reducing the waters subject to CWA protections and EPA authority under that statute. The new rule establishes a broader definition of WOTUS, although seeking to reflect certain Supreme Court decisions, the new rule is not as broad as the earlier (pre-2015) WOTUS rules. However, with the Supreme Court's decision still pending in *Sackett v. Environmental Protection Agency*, a case in which the Court will decide the types of wetlands that are within the statute's scope, and the litigation already filed in the Southern District of Texas challenging the new rule, uncertainty remains regarding the new rule's applicability.

The Definition of WOTUS in the New Rule

The rule defines WOTUS in the context of five sometimes overlapping categories, as follows:

1. the most straightforward of the categories, it consists of waters that are used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; the territorial seas; and interstate waters, including interstate wetlands.[3]
2. impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under the fifth category.[4]
3. a subset of tributaries of those waters that are in the first two categories: those tributaries that are (a) relatively permanent, standing or continuously flowing bodies of

[1] 33 USC 1311(a).

[2] https://www.epa.gov/wotus/revising-definition-waters-united-states.

[3] Final Rule Notice, available at https://www.epa.gov/system/files/documents/2022-12/Pre-Publication%20Final%20Rule%20Notice.pdf, 505.

[4] Id.

water or (b) either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters in the first category.[5] In other words, tributaries can be classified as WOTUS under either of two tests, the "relatively permanent" standard or the "significant nexus" standard.[6] The latter standard reflects Supreme Court precedent attempting to clarify the distinction between WOTUS and non-WOTUS "adjacent" wetlands. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) and *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring).

4. applies the significant nexus test to wetlands adjacent to other WOTUS: (a) wetlands adjacent to waters in the first category; (b) wetlands adjacent to relatively permanent waters in the second or third categories and with a continuous surface connection to those waters; and (c) wetlands adjacent to waters in the second or third category when the wetlands have a significant nexus to waters in the first category.[7]
5. intrastate lakes and ponds, streams, or wetlands that (a) either are relatively permanent, with a continuous surface connection to waters in the first category or to relatively permanent tributaries in the third category; or (b) have a significant nexus to waters in the first category.

Under the new rule, several categories of waters are explicitly excluded from WOTUS, although each of these categories are narrowly drawn:

- prior converted cropland designated by the Secretary of Agriculture;
- waste treatment systems;
- ditches, (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- artificially irrigated areas;
- artificial lakes or ponds, and artificial reflecting pools or swimming pools;
- waterfilled depressions; and
- swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow."[8]

[5] Id.

[6] https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf.

[7] Final Rule Notice at 505-06.

[8] Id.

Comparison to Previous Rules

In explaining the underlying basis for the new rule, the Agencies stated they "used the familiar, pre-2015 [WOTUS] definition as a foundation because it has supported decades of clean water progress[.]"[9] It was further stated that "[c]hanging regulatory definitions due to court decisions and final rules issued by the agencies in 2015, 2019, and 2020 have caused uncertainty that harmed communities and our nation's waters." Hence the need for a new rule that would restore "fundamental protections so that the nation will be closer to achieving Congress' direction in the Clean Water Act that our waters be fishable and swimmable."[10]

Nonetheless, the pre-2015 WOTUS definition was broader than in the new rule. It included, for example, more expansive counterparts of the new rule's fifth and second categories:

- "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce;" as well as
- "[a]ll impoundments of waters otherwise defined as waters of the United States under this definition;"[11] and
- "[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified" in the rest of the definition,[12] but did not provide a definition of adjacency in this context.[13]

The pre-2015 rule also only explicitly excluded two categories from WOTUS: prior converted cropland and waste treatment systems.[14]

In 2015, the Agencies promulgated a new rule defining WOTUS, after attempting to implement new Supreme Court case law via guidance document. That rule applied the significant nexus standard, although it was defined in technical terms that were not included in the new rule.[15] The 2015 rule also added further categories of explicitly excluded waters, similar to those found in the new rule, in addition to prior converted cropland and waste treatment systems.[16]

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[9] https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf.

[10] Id.

[11] 40 CFR 230.3(s) (2014).

[12] Id.

[13] Id.

[14] Id.

[15] 80 Fed. Reg. 37053, 37123.

[16] Id. at 37118.

The most drastic changes from the pre-2015 WOTUS definition occurred in the Navigable Waters Protection Rule, promulgated in 2020. It applied a narrower definition of "adjacent wetlands," and also introduced further explicitly excluded categories, while also broadening the exclusion of bodies of water deemed insufficiently permanent.[17] It was these 2020 rule changes that the Agencies sought to reverse when they used the pre-2015 WOTUS definition as the foundation for the new rule.

Application of the New WOTUS Definition Remains Uncertain

Despite the Agencies' issuance of the new rule, the application of the new WOTUS definition remains uncertain. The Supreme Court still has not issued its decision in *Sackett v. Environmental Protection Agency*, in which the Sacketts argue for a definition of "adjacent wetlands" even narrower than in the Trump Administration's 2020 rule.

Moreover, the new rule already faces two challenges in the Southern District of Texas, one from the state Attorney General and one from various industry groups.[18] The industry complaint alleges that the rule "effectively reads the term 'navigable waters' out of the CWA," that it "asserts improperly vague and malleable jurisdiction," violates principles of federalism, "exceeds the Agencies' delegated authority under the Commerce Clause," and violates other constitutional principles.[19] Texas claims that by promulgating the new rule, "the Federal Agencies unconstitutionally and impermissibly expand their own authority beyond Congress's delegation in the CWA—intruding into state sovereignty and the liberties of the states and their citizens," and that the new rule "also lacks clarity."[20] Other lawsuits are expected that may attack the new rule's validity on similar bases.

Undoubtedly, in promulgating the final rule, the Agencies sought to craft a rule that would survive legal challenge; some of the language of the new rule, particularly regarding the significant nexus test, appears to have been drafted with the views of Supreme Court justices in mind.[21] Given the lengthy and complicated rulemaking and judicial history in this area, the survival of the new rule as promulgated by the Agencies is far from guaranteed.

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[17] 85 Fed. Reg. 22250, 22340.

[18] https://www.law360.com/articles/1566962/texas-groups-sue-to-take-down-new-wotus-definition.

[19] https://www.law360.com/articles/1566962/attachments/1, 3-4

[20] https://www.law360.com/articles/1566962/attachments/0, 2.

[21] https://www.eenews.net/articles/can-epas-clean-water-act-rule-survive-the-courts/.