

ENVIRONMENTAL REGULATION

WATERS OF THE U.S.

ISSUE

- The Biden Administration has repealed and replaced the Navigable Waters Protection Rule with a new final rule that the U.S. Environmental Protection Agency characterizes as a “durable definition” of Waters of the United States.
- The agriculture community supports the goals of the Clean Water Act to protect our nation’s waterways and has long-sought clarity in the definition of what are “jurisdictional” waters under the responsibility of the federal government. The vast majority of those involved in national agriculture policy believe that this clarity had already been achieved through the Navigable Waters Protection Rule and are deeply concerned with the newly finalized rule.
- State and tribal governments share responsibility for the protection of waterways and have advocated for a definition of waters of the United States that reflects consideration of the statute as a whole, including section 101(b), which states that “it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. 1251(b).



BACKGROUND

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers’ “[Navigable Waters Protection Rule](#)” went into effect in most parts of the country on June 22, 2020. The NWPR was the culminating step in the Trump Administration’s multi-year effort to repeal and replace Obama Administration regulations defining the term “waters of the United States” and, by extension, the scope of waters subject to federal jurisdiction and regulation under the [Clean Water Act](#). The NWPR codified a new and more narrow definition of these areas “in a manner consistent with” Justice Antonin Scalia’s 2006 plurality opinion in [Rapanos v. United States](#).

The NWPR redefined waters of the United States to categorically regulate four main types of waters:

1. The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters that are subject to the ebb and flow of the tide (collectively, often referred to as “traditional navigable waters”)
2. Tributaries
3. Lakes, ponds, and impoundments of other jurisdictional waters
4. Wetlands adjacent to other waters of the United States



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WATERS OF THE U.S. (CONTINUED)

For categories three and four above, the NWPR restricted jurisdiction to those waters that fall within the “relatively permanent standard” and specifically eliminated adherence to the “significant nexus standard.” The “relatively permanent standard” means waters that are relatively permanent, standing, or continuously flowing and waters with a continuous surface connection to such waters. The “significant nexus standard” means 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, interstate waters, or the territorial seas.



Following a federal district court decision vacating the NWPR on Aug. 30, 2021, the agencies halted implementation of the NWPR and began interpreting waters of the United States consistent with the pre-2015 regulatory regime. On Nov. 18, 2021, the EPA and Army Corps released a pre-publication draft of a proposed rule defining the scope of waters protected under the Clean Water Act. On Dec. 30, 2022, the EPA and U.S. Army Corps of Engineers announced a final rule on waters of the United States.

Complicating the scope of this final rule is a decision by the Supreme Court in the case [Sackett v. EPA](#) which will examine “whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act, 33 U.S.C. §1362(7).” This question sets the court to potentially clarify what test (Justice Scalia’s or Justice Kennedy’s) should govern the definition of WOTUS. The [petitioners are arguing that Justice Kennedy’s significant nexus test should be abandoned](#). They urge the court to apply a two-step test similar to the plurality in *Rapanos* but which would place further emphasis on potential constitutional questions by specifically looking for if the water is under Congress’s commerce clause authority. The case was heard on Oct. 3, 2022. A decision is expected in spring 2023.

NASDA POLICY

The Clean Water Act clearly established a cooperative approach between the federal government and state governments to restore and maintain the chemical, physical and biological integrity of the nation’s waters. It is imperative the federal government respects that the primary responsibility for planning the development and use of water resources rests with the states. Federal policies must ensure state laws regarding water rights and allocations are honored and that states are given maximum flexibility in the management of both their water resources and their water quality programs.

January 2023



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