



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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February 3, 2023

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Subcommittee Hearing on “*Stakeholder Perspectives on the Impacts of the Biden Administration’s Waters of the United States (WOTUS) Rule*”

I. PURPOSE

The Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure will meet on Wednesday, February 8, 2023, at 10:00 a.m. ET in Room 2167 of the Rayburn House Office Building to receive testimony on “*Stakeholder Perspectives on the Impacts of the Biden Administration’s Waters of the United States (WOTUS) Rule*.” At the hearing Members will receive testimony from representatives from Earth & Water Law LLC, the Missouri Farm Bureau, National Stone, Sand & Gravel Association, National Association of Home Builders, and the UC College of the Law, San Francisco. The hearing will examine the rule from the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) redefining of the term “waters of the United States,” under the *Clean Water Act*, and the regulatory impact the rule may have on interested stakeholders.

II. BACKGROUND

“Waters of the United States” In the Clean Water Act

Congress enacted the 1972 amendments to the *Federal Water Pollution Control Act*, commonly referred to as the *Clean Water Act (CWA)*, with the goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹ The *CWA* protects “navigable waters,” which is defined in the *CWA* as the “waters of the United States, including the territorial seas.”²

However, the *CWA* does not further define the term “waters of the United States” (WOTUS), leaving it up to EPA and the Corps to define which waters are subject to Federal

¹ *CWA*, Pub. L. 92-500, 86 Stat. 816.

² *Id.* at §502(7).

regulation under the *CWA*. Since the *CWA* grants authority to EPA and the Corps to implement the Act, EPA and the Corps have promulgated several sets of rules interpreting the agencies' jurisdiction over WOTUS and the corresponding scope of *CWA* authority.

The definition of WOTUS governs the application of *CWA* programs — including tribal and state water quality certification programs, pollutant discharge permits, and oil spill prevention and planning programs. For example, Section 303, which requires states to develop water quality standards for their waters such as Total Maximum Daily Load (TMDL), Section 311, which prohibits the discharge and mandates reporting of oil and other hazardous substances into WOTUS, and Section 401, which outlines state approval for Federal permits that would affect a WOTUS, are all dependent on the definition of WOTUS.³

In addition, the *CWA* prohibits the discharge of any pollutant by any person, unless in compliance with one of the enumerated permitting provisions in the Act. The two permitting authorities in the *CWA* are Section 402 (the National Pollutant Discharge Elimination System, or “NPDES”) for discharges of pollutants from point sources, and Section 404, for discharges of dredged or fill material.⁴ Both Sections 402 and 404 govern discharges into “navigable waters,” and thus are directly dependent on the definition of WOTUS.

Supreme Court Cases

There has been a substantial amount of litigation in the Federal courts on the scope of *CWA* jurisdiction over the years, including multiple United States Supreme Court cases.

In 1985, the Supreme Court took up *United States v. Riverside Bayview Homes, Inc.* (*Riverside Bayview*).⁵ The Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to jurisdictional waters and held that such wetlands were “waters of the United States” under the *CWA*.⁶ Following *Riverside Bayview*, EPA and the Corps promulgated regulations in 1986 and 1988, which remained in effect for much of the past several decades.⁷

In 2001, the Court ruled in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (“*SWANCC*”), evaluating whether *CWA* jurisdiction included an abandoned sand and gravel pit which had become a habitat for migratory birds.⁸ A 5-4 decision rejected the Corps' claim that *CWA* jurisdiction extended over isolated waters purely based on their usage by migratory birds, but did not affect the agencies' underlying regulations defining WOTUS.⁹

³ *Id.* at §§ 303, 311, 401.

⁴ *Id.* at §§402(b) and 404.

⁵ *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

⁶ *See id.*

⁷ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206 (November 13, 1986); Clean Water Act Section 404 Program Definitions and Permit Exemptions, Section 404 State Regulation Programs, 53 Fed. Reg. 20764 (June 6, 1988).

⁸ *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁹ *See generally* Stephen P. Mulligan, *Evolution of the meaning of “waters of the United States” in the Clean Water Act*, CONG. RESEARCH SERVICE (R44585), updated March 5, 2019 [Hereinafter CRS REPORT R44585] available at <https://www.crs.gov/reports/pdf/R44585/R44585.pdf>.

In 2006, the Court issued a 4-1-4 opinion in *Rapanos v. United States (Rapanos)* that did not produce a clear, legal standard on determining jurisdiction under the *CWA*.¹⁰ The *Rapanos* decision produced three distinct opinions on the appropriate scope of Federal authorities under the *CWA*. Justice Scalia’s plurality opinion provided a “relatively permanent/flowing waters” test with “continuous surface connection.”¹¹ Writing alone, Justice Kennedy proposed a “significant nexus” test for WOTUS, concluding that a case-by-case basis for determining navigable waters was appropriate.¹² Justice Stevens’ dissenting opinion advocated for maintenance of existing EPA and Corps authority over waters and wetlands.¹³

Following the *SWANCC* and *Rapanos* decisions, EPA and the Corps issued several guidance documents interpreting how the agencies would implement the Supreme Court decisions. Under 2008 guidance, *CWA* jurisdiction over navigable waters would be asserted if such waters meet either the Scalia (“relatively permanent water”) or Kennedy (“significant nexus”) tests.¹⁴

In January 2022, the Supreme Court announced it would hear arguments in a case that could also affect the definition of WOTUS: *Sackett v. EPA (Sackett)*.¹⁵ The *Sackett* case raises the question of whether certain wetlands are WOTUS, and thus subject to *CWA* jurisdiction, and could be resolved with a narrow ruling based solely on the facts of the case.¹⁶ However, *Sackett* may also be an opportunity for the Supreme Court to rule broadly on what the proper test is for determining WOTUS.¹⁷

The petitioners in the *Sackett* case own a parcel of land in Idaho which sits across the street from an area of wetlands that drains into an unnamed tributary of a creek, which in turn flows into Priest Lake.¹⁸ The Sacketts’ efforts to build on their parcel of land, around thirty feet from the area of wetlands, has been the subject of a now decades-long dispute with EPA and the Corps regarding *CWA* jurisdiction and regulatory process.¹⁹ The petitioners in the case have urged the Supreme Court to review the *Rapanos* case and adopt Justice Scalia’s plurality opinion.²⁰

¹⁰ *Rapanos v. United States*, 547 U.S. 715 (2006).

¹¹ *Id.* at 739 and 742.

¹² *Id.* at 782 (Kennedy, J., concurring).

¹³ *See id.* at 788 (Stevens, J., dissenting).

¹⁴ EPA & DEP’T OF THE ARMY, REVISED MEM. CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES* AND *CARABELL V. UNITED STATES* (Dec. 2, 2008) available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

¹⁵ *Sackett v. EPA*, cert. granted, (21-454) 142 S. Ct. 896 (Jan. 24, 2022).

¹⁶ Ariel Wittenberg & Hannah Northey, *Can EPA’s Clean Water Rule survive the courts*, E&E NEWS, Jan. 3, 2023, available at <https://www.eenews.net/articles/can-epas-clean-water-act-rule-survive-the-courts> [Hereinafter Wittenberg & Northey].

¹⁷ *Id.*

¹⁸ Kate R. Bowers, *Supreme Court revisits scope of “waters of the United States” (WOTUS) under the Clean Water Act*, CONG. RESEARCH SERVICE LEGAL SIDEBAR (LSB10707), March 11, 2022, available at <https://www.crs.gov/reports/pdf/LSB10707/LSB10707.pdf>.

¹⁹ *Id.*

²⁰ Transcript of Oral Argument, *Sackett v. EPA* (21-454), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_g31h.pdf.

The Supreme Court heard oral arguments in the *Sackett* case on October 3, 2022.²¹ It is currently unclear when a decision in the case could be released. The implications of the *Sackett* decision on the current WOTUS definition and the *CWA* will likely depend on the scope of the Supreme Court’s ruling.²² For example, if the majority of the Court rules against the “significant nexus” test laid out by Justice Kennedy in *Rapanos*, it could require a significant alteration of the Biden Administration’s most recent WOTUS definition.²³ Similarly, the Court could leave the Biden WOTUS definition in place and issue a narrow opinion based on the EPA’s application of adjacency and the specific facts of the *Sackett* case.²⁴

Obama-Era WOTUS Rule

In 2015, the Obama Administration published in the Federal Register regulatory changes to the definition of WOTUS that allowed the Corps and EPA to utilize both the “relatively permanent waters” or “significant nexus” concepts.²⁵ This rule, known as the Clean Water Rule, redefined WOTUS in the agencies’ regulations for the first time since the 1980s.

The 2015 Clean Water Rule maintained some aspects of the 2008 guidance, including the three-tiered jurisdictional analysis of waters being categorically jurisdictional, jurisdictional on a case-by-case basis subject to the “significant nexus” test, or categorically excluded from being a WOTUS.²⁶

The Clean Water Rule also incorporated new features not found in the 2008 guidance, including definitions and criteria which established when waters fell into each of the three tiers, such as “adjacent,” “neighboring,” “floodplain,” “tributary,” “wetlands” and “significant nexus.”²⁷ Some of these changes from the 2008 guidance expanded waters that could be classified as categorically WOTUS (rather than demonstrating *CWA* jurisdiction under a significant nexus analysis), and subject to *CWA* jurisdiction and regulation.²⁸

While the Corps and EPA contended that their primary intent in the 2015 Clean Water Rule was simply to clarify regulatory jurisdiction, stakeholder reaction to the rule was mixed. Some viewed the rule as an expansion of *CWA* jurisdiction, while others argued that it excluded too many waters from Federal jurisdiction.²⁹ Following the Clean Water Rule’s publishing, many states, industry stakeholders, and several environmental groups challenged the legality of the rule

²¹ *Id.*

²² See Wittenberg & Northey, *supra* note 16.

²³ *Id.*

²⁴ *Id.*

²⁵ Clean Water Rule: Definition of “waters of the United States,” Final Rule, 80 Fed. Reg. 37054 (June 29, 2015).

²⁶ See *id.*

²⁷ *Id.*

²⁸ Laura Gatz & Kate R. Bowers, *Redefining waters of the United States (WOTUS): Recent developments*, CONG. RESEARCH SERVICE (R46927), updated July 8, 2022 [Hereinafter CRS REPORT R46927], available at <https://www.crs.gov/reports/pdf/R46927/R46927.pdf>.

²⁹ See e.g., Carolina Bolado, *Fla., others sue EPA, Corps, over Clean Water Act expansion*, LAW360 (June 30, 2015) available at <https://www.law360.com/articles/674120/fla-others-sue-epa-corps-over-clean-water-act-expansion>; Press Release, CENTER FOR BIOLOGICAL DIVERSITY, *EPA and Army Corps release weak Clean Water Rule* (May 27, 2015) available at https://www.biologicaldiversity.org/news/press_releases/2015/clean-water-rule_05-272015.html.

in courts across the country, continuing the mire of litigation that plagued the definition of WOTUS over the last two decades.³⁰

Trump-Era WOTUS Rule

Following the 2015 Clean Water Rule taking effect, the Trump Administration, favoring a WOTUS definition more consistent with the Scalia opinion in *Rapanos*, took steps to amend and rescind the Obama-Era rule.³¹ In 2017, President Trump signed Executive Order 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule,” which directed EPA and the Corps to review the 2015 Clean Water Rule and consider proposing a new rule to rescind or revise that rule.³²

EPA and the Corps responded to the Executive Order in two steps. First, the agencies rescinded the Clean Water Rule, and recodified the 2008 guidance (and its use of either *Rapanos*-based test for WOTUS) in effect prior to the 2015 Rule.³³ Second, in 2020, EPA and the Corps published in the Federal Register the Navigable Waters Protection Rule, which redefined WOTUS.³⁴

Overall, the Navigable Waters Protection Rule narrowed the scope of waters and wetlands that were considered WOTUS and therefore fell under Federal jurisdiction compared to both the 2015 Clean Water Rule and the pre-2015 rules.³⁵ The Navigable Waters Protection Rule was structured to focus the WOTUS definition primarily on relatively permanent bodies of water that provide surface flow to navigable waters or the territorial seas in a typical year.³⁶ The 2020 Rule also moved away from the “significant nexus” test. The Trump-Era Rule maintained wetlands and adjacent waters as WOTUS but focused the definitions of “wetlands” and “adjacent waters” as compared to prior regulations.³⁷

As with the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule was met with mixed reactions. While some praised the Navigable Waters Protection Rule as limiting government overreach and clarifying uncertainty of WOTUS under the *CWA*, others criticized the Rule for potential negative effects on water quality and resulting in regulatory inconsistency

³⁰ CRS REPORT R46927, *supra* note 28.

³¹ See e.g., Press Release, EPA, *U.S. Army repeal 2015 Rule defining “waters of the United States” ending regulatory patchwork* (Sept. 12, 2019) available at <https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork>.

³² Exec. Order No. 13778, (February 28, 2017), available at <https://www.govinfo.gov/content/pkg/DCPD-201700147/pdf/DCPD-201700147.pdf>.

³³ Definition of “waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).

³⁴ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (April 21, 2020) [Hereinafter Navigable Waters Protection Rule].

³⁵ CRS Report R46927, *supra* note 28 at 7.

³⁶ *Supra* note 34 at 22273-22274.

³⁷ *Id.* at 22251, 22273.

among state programs.³⁸ Again, the 2020 Rule was met with a myriad of legal challenges and litigation in the courts, similar to the 2015 Rule.³⁹

III. WATERS OF THE UNITED STATES – BIDEN ADMINISTRATION RULE

Continuing the back-and-forth nature of WOTUS definitions under various Presidential Administrations, in 2021, the Biden Administration announced that it would be repealing the Trump Administration’s Navigable Waters Protection Rule.⁴⁰ To begin with, shortly after taking office in January 2021, President Biden signed an Executive Order revoking President Trump’s Executive Order directing EPA and the Corps to revise and rescind the Clean Water Rule.⁴¹ In addition, EPA sent a letter to the U.S. Department of Justice (DOJ) in which EPA requested DOJ seek stays to legal challenges to the Navigable Waters Protection Rule, while EPA reviewed the Rule.⁴²

In June of 2021, EPA and the Corps officially announced their intent to revise the WOTUS definition.⁴³ Following a rulemaking process intended to return the regulatory landscape to pre-2015 Clean Water Rule implementation and gauge stakeholder perspectives, the agencies issued a proposed Rule to change the definition of WOTUS in December 2021.⁴⁴

On December 30, 2022, EPA and the Corps released their final “Revised Definition of the ‘Waters of the United States’” Rule, which is scheduled to go into effect on March 20, 2023.⁴⁵ The 2022 WOTUS definition is based largely upon the pre-2015 regulations, while again authorizing *CWA* jurisdiction under either the “relatively permanent waters” or “significant nexus” test concepts.⁴⁶

Once more, initial public feedback to the latest definition has been mixed. Some stakeholders have lauded it for returning to a WOTUS definition viewed as more consistent with

³⁸ See e.g. Letter from Gregory Ugalde, Chairman of the Board, Nat’l Ass’n of Homebuilders, to EPA Administrator Andrew Wheeler (March 2020) available at <https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/waters-of-the-us/wotus-analysis-2020.pdf>; Press Release, WATERKEEPER ALLIANCE, “*Navigable Water Protection Rule*” guarantees widespread pollution of our Nation’s waters, (Feb. 13, 2020), available at <https://waterkeeper.org/news/navigable-water-protection-rule-guarantees-widespread-pollution-of-our-nations-waters>.

³⁹ See CRS REPORT R44585, *supra* note 9.

⁴⁰ Press Release, WHITE HOUSE, *Fact Sheet: List of Agency Actions for Review*, (Jan. 20, 2021) available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review>.

⁴¹ Exec. Order No. 13990, (Jan. 20, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf>.

⁴² Letter from Melissa Hoffer, Acting General Counsel, EPA, to Jean E. Williams & Bruce S. Gelber, Environmental and Natural Resources Division, DOJ, (Jan. 21, 2021).

⁴³ Press Release, EPA, *EPA, Army announce intent to revise definition of WOTUS*, (June 9, 2021) available at <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>.

⁴⁴ Revised definition of “waters of the United States” Proposed Rule, 86 Fed. Reg. 69372 (Dec. 7, 2021).

⁴⁵ Revised definition of “waters of the United States” Final Rule, 88 Fed. Reg. 3004 (Jan. 18, 2023).

⁴⁶ *Id.*

Congressional intent, as outlined in the goals of the *CWA*.⁴⁷ However, others have been critical of the definition for possibly adding uncertainty to *CWA* regulatory processes and for Federal overreach beyond Congressional intent.⁴⁸

IV. WITNESSES

Mr. Garrett Hawkins

President
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Ms. Alicia Huey

Chairman
National Association of Home Builders

Mr. Mark Williams

Environmental Manager, Luck Companies,
on behalf of National Stone, Sand & Gravel Association

Ms. Susan Parker Bodine

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Mr. Dave Owen

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⁴⁷ See Press Release, EARTHJUSTICE, *EPA Finalizes Rule Protecting ‘Waters of the United States’*, (Dec. 30, 2022) available at <https://earthjustice.org/news/press/2022/epa-finalizes-rule-for-protecting-waters-of-the-united-states>.

⁴⁸ See Press Release, AMERICAN FARM BUREAU FEDERATION, *EPA wrong about New WOTUS Rule*, (Jan. 4, 2023) available at <https://www.fb.org/viewpoints/epa-wrong-about-new-wotus-rule>.