

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

MEMORANDUM

TO: Members of the Committee on Small Business

FROM: Committee Majority Staff

DATE: March 8, 2023

RE: Full Committee Hearing Titled: “Small Business Perspectives on the Impacts of the Biden Administration’s Waters of the United States Rule”

On **March 8, 2023, at 2:00 PM**, the Committee on Small Business will hold a hearing titled “**Small Business Perspectives on the Impacts of the Biden Administration’s Waters of the United States (WOTUS) Rule.**” The meeting will convene in room 2360 of the Rayburn House Office Building. The purpose of this hearing is to examine the potential effects of this proposed rule on small businesses.

I. Witnesses

- Ms. Katherine R. English, Owner, English Family Limited Partnership
- Mr. Frank Murphy, Senior Vice President/CFO/COO, Wynne Jackson Inc.
- Mr. Rick Baumann, Founder, Murrells Inlet Seafood

II. Background

Please note that some of this background was sourced from SBA’s Office of Advocacy letter to the EPA and Army Corps of Engineers and can be found [here](#).

In 1972, Congress passed the Clean Water Act (CWA) to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”¹ The CWA protects “navigable waters” defined as “Waters of the United States (WOTUS), “including the territorial seas, and regulates “discharge pollutants into navigable waters.”² The CWA requires a permit to discharge pollutants, dredged, or fill materials into any body of water deemed to be a WOTUS.³ The

¹ 33 U.S.C. § 1251(a) (1987).

² 33 U.S.C. § 1251(a)(1) (1987).

³ 33 U.S.C. § 1341 et. seq. (2019).

Environmental Protection Agency (EPA) administers permits, and the EPA and Army Corps of Engineers (Army Corps) jointly administer and enforce certain permit programs under the act.⁴

However, the CWA failed to specifically define what exactly is considered part of the WOTUS, and in turn what the federal government has jurisdiction to regulate. This has allowed the EPA and the Army Corps of Engineers to attempt to define what exactly is a navigable water via rulemaking. Different rules from different Administrations have led to four-plus decades of litigation on the matter.

The Supreme Court

The definition of a WOTUS has been the subject of much litigation including multiple rulings by the Supreme Court. In 1985, The Supreme Court of the United States (SCOTUS) ruled that “adjacent wetlands” may be included in the definition of WOTUS.⁵ In 2001 the Court determined that migratory birds’ use of isolated “non-navigable” intrastate ponds was not sufficient cause to extend federal jurisdiction under the CWA.⁶ In response to these rulings, agencies issued regulatory guidance to clarify that WOTUS did not include isolated, intrastate, and non-navigable waters where the sole basis for asserting jurisdiction was based upon the use of such waters by migratory birds.⁷

In 2006, in *Rapanos v. United States*, the Court ruled that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ . . . are ‘adjacent to’ such waters and covered by the Act.”⁸ In his concurrence, Justice Kennedy concluded that the Corps must establish the existence of a “significant nexus” when it asserted jurisdiction over wetlands adjacent to non-navigable tributaries.⁹

In response to *Rapanos*, agencies issued regulatory guidance which attempted to define what is considered to be “adjacent to” WOTUS or have a significant nexus” with WOTUS.¹⁰ The guidance included those “tributaries and their adjacent wetlands . . . that have a significant nexus to a traditional navigable water” as well as “similarly situated wetlands” that significantly affect the chemical, physical, and biological integrity of traditional navigable waters.¹¹ The guidance defined similarly situated wetlands as only those that are “adjacent to the same tributary.”¹²

⁴ 33 U.S.C. § 1344 (1987).

⁵ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985).

⁶ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001).

⁷ 68 Fed. Reg. 1991 (Jan. 15, 2003).

⁸ *Rapanos v. United States*, 547 U.S. 715, 742 (2006).

⁹ *Id.* at 779 (Kennedy, J., concurring).

¹⁰ U.S. Env. Protection Agency & U.S. Dept. of Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States*, https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (last visited Jan. 31, 2022).

¹¹ *Id.*

¹² *Id.*

Currently, SCOTUS is considering once again how to define WOTUS in the case *Sackett v. Environmental Protection Agency*.¹³ This case involves Michael and Chantall Sackett who own a residential lot near Priest Lake, Idaho, and want to build a home there. However, shortly after they began placing sand and gravel, the EPA told them that they could not build on their lot because construction on the land violated the Clean Water Act.¹⁴

According to the EPA, the Sacketts' lot contained wetlands that qualify as “navigable waters” regulated by the Act, so they needed to remove the sand and gravel and restore the property to its natural state. Litigation ensued, and in 2012, the Supreme Court permitted the Sacketts to litigate their challenge to the EPA’s order in federal court. This case brings into question what is the proper test for determining a navigable water?¹⁵ SCOTUS is expected to issue a decision on the case in 2023.

Rulemakings By Agencies

In 1986 the Army Corps promulgated the first rule attempting to define WOTUS. It defined WOTUS as:

waters which are currently used, were used in the past, or may be susceptible to us[e] in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide...interstate waters including interstate wetlands...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 would or could affect interstate or foreign commerce including any such waters: [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or [w]hich are used or could be used for industrial purposes by industries in interstate commerce...impoundments of waters otherwise defined as waters of the United States...[t]ributaries of waters identified [elsewhere in this section]...territorial sea,” and “[w]etlands adjacent to waters (other than those waters that are themselves wetlands).”¹⁶

In 1988 the EPA filed a similar rule mirroring the Army Corps’ rule.¹⁷ Both regulations were in effects until 2015.

In 2015, the EPA and the Army Corps attempted to update the rule through the Clean Water Rule.¹⁸ On August 27, 2015, the day before the rule was to take effect, the rule was enjoined by the United States District Court for the District of North Dakota. On October 9, 2015, the Sixth

¹³ *Sackett v. Environmental Protection Agency*, Docket No. 21-454 (2023).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 51 Fed. Reg. 41206 (Nov. 13, 1986).

¹⁷ 53 Fed. Reg. 20764 (Jun. 6, 1988).

¹⁸ 2 80 Fed. Reg. 37054 (Jun. 29, 2015).

Circuit stayed the Clean Water Rule nationwide ruling that procedural and constitutional deficiencies existed.¹⁹

On October 22, 2019 the Clean Water Rule was officially repealed by the EPA and Army Corps. The Trump Administration began working on issuing a new rule that attempted to create a uniform definition of “navigable waters” and “WOTUS” applicable to all sections of the Clean Water Act.²⁰ On April 21, 2020 the rule was finalized (called the Navigable Waters Protection Rule (NWPR)). The final regulation ruled that WOTUS included only “territorial seas and traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters.”²¹

On August 30, 2021, the Navigable Waters Protection Rule was vacated by the United States District Court for the District of Arizona.²² In September 2021, both the EPA and Army Corps stopped implementing the NWPR.²³ EPA and the Army Corps are currently implementing the 1986 and 1988 regulations, the 2001 SCOTUS Guidance, and the *Rapanos* Guidance.²⁴

On December 7, 2021 the EPA and the Department of the Army filed a proposed rule defining WOTUS under the Clean Water Act.²⁵ On December 30, 2022 the agencies finalized the proposed rule.²⁶ The rule would repeal the NWPR and replace it with a rule similar to the 2015 rule. The proposed rule received over 115,055 comments from stakeholders. Small business owners and associations representing small business owners filed many of these comments indicating that the rule would significantly impact their business operations.

The new EPA and Army Corps rule takes effect on March 20, 2023.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act Concerns

The Regulatory Flexibility Act (RFA) requires agencies to consider the economic impact their regulations may have on small entities, conduct regulatory analyses outlining these impacts, consider alternative rules which accomplish the stated objectives of applicable statutes, and minimize any significant economic impact of the proposed rule on small entities. Under the proposed rule for WOTUS, the EPA and the Army Corps certified that the rule would not have a significant impact on a substantial number of small entities. This allowed the agencies to forgo conducting an initial regulatory flexibility analysis (IRFA) that is required under the RFA²⁷.

¹⁹ *Murray Energy Corp. v. United States DOD*, 817 F.3d 261 (6th Cir., Feb. 22, 2016).

²⁰ 84 Fed. Reg. 566626 (Oct. 22, 2019).

²¹ 85 Fed. Reg. 22250 (Apr. 21, 2020).

²² *Pascua Yaqui Tribe v. EPA*, 2021 U.S. Dist. LEXIS 163921 (2021).

²³ See *Current Implementation of Waters of the United States*, U.S. ENV. PROTECTION AGENCY (last visited Jan. 31, 2022), <https://www.epa.gov/wotus/current-implementation-waters-united-states>.

²⁴ *Id.*

²⁵ 40 CFR § 120.

²⁶ 33 CFR § 328.

²⁷ 5 U.S.C. § 603, 605(b).

Since there was no requirement for an IRFA, the EPA did not conduct additional outreach to small businesses pursuant to § 609(b) of the RFA, which states the EPA must convene a small business advocacy review (SBAR) panel before the rule is proposed to receive input from small entities.²⁸

SBA's Office of Advocacy is empowered under the RFA to enforce agency compliance with the acts. SBA's Office of Advocacy found that, "Advocacy...believes that the Agencies have improperly certified this proposed rule."²⁹ Advocacy goes on to say, "(we) believe that the Agencies have failed to state a factual basis for its certification that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes costs directly on small entities, and those costs will be significant for a substantial number of them."³⁰

Small Business Concerns

Small businesses have registered their concern that the new WOTUS rule causes excessive uncertainty. Due to this uncertainty, small entities could unintentionally and unknowingly subject themselves to enforcement actions and fines from the EPA. If a business wants to do even the most basic upgrade to their property, there is uncertainty on what permits they might need to receive from the EPA before they can proceed with any actions. This uncertainty is causing concerns that small businesses will need to retain counsel to remain in compliance with the regulations. For some businesses this is merely an expensive burden that is the cost of doing business, however, many small businesses can't afford to retain counsel to interpret what should be an easy-to-understand regulation. This puts the smallest offenders most at risk for lack of compliance.

III. Conclusion

The Clean Water Act was passed over 50 years ago, however, business owners still lack a basic understanding of what exactly is considered "waters of the United States" and subject to regulation under the Clean Water Act. A new rule will take effect on March 20 shortly before the Supreme Court of the United States is expected to issue a ruling, which will have massive implications for small business owners who own land or rely on water for commerce. The Committee looks forward to hearing testimony from small business owners on how the Biden Administration's interpretation of WOTUS will affect their business operations.

²⁸ *Id.* at § 609(b)-(d).

²⁹ Letter from Major L. Clark, III, Deputy Chief Counsel & Astrika W. Adams, Asst. Chief Counsel, Office of Advocacy, U.S. Small Bus. Admin., to Michael S. Regan, Administrator, U.S. Env't Protection Agency & Michael L. Connor, Asst. Sec'y, Dept. of Army (Feb. 7, 2022), *available at* <https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf>

³⁰ *Id.*