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Redefining *Waters of the United States* (WOTUS): Recent Developments

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SUMMARY

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Laura Gatz
Analyst in Environmental Policy

Kate R. Bowers
Legislative Attorney

Redefining *Waters of the United States* (WOTUS): Recent Developments

Congress established the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to restore and protect the quality of the nation's surface waters. The CWA protects "navigable waters," defined in the statute as "waters of the United States, including the territorial seas." The CWA does not further define the term *waters of the United States* (WOTUS), which determines which waters are federally regulated. Thus, in implementing the CWA, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA)—the two agencies that administer the statute—have defined the term in regulations. However, Congress's intent as to the meaning of WOTUS has been debated and litigated for more than four decades.

For much of the past several decades, regulations promulgated by the Corps and EPA in the 1980s have been in effect. The agencies supplemented these regulations with guidance developed in 2003 and 2008 in response to two Supreme Court rulings—*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, in 2001, and *Rapanos v. United States*, in 2006—which interpreted the CWA's scope more narrowly than the Corps and EPA had done previously in regulations and guidance, but also created uncertainty about the intended scope of waters protected by the CWA. The Corps and EPA acknowledged that their guidance did not provide the public or agency staff with the information needed to ensure timely, predictable, and consistent jurisdictional determinations. Diverse stakeholders requested a formal rulemaking to revise existing regulations.

In 2015, the Corps and EPA issued the Clean Water Rule, which redefined WOTUS in the agencies' regulations for the first time since the 1980s. While the Corps and EPA contended that the primary intent of the 2015 Clean Water Rule was to clarify its regulatory jurisdiction, some stakeholders and observers viewed it as an expansion instead. Other stakeholders argued that it excluded too many waters from federal jurisdiction. Industry groups, more than half the states, and several environmental groups filed lawsuits challenging the Clean Water Rule in federal courts across the country.

The Trump Administration described the 2015 Clean Water Rule as an example of federal "overreach" and took steps to rescind and revise it. On October 22, 2019, the Corps and EPA published a final rule to rescind the 2015 Clean Water Rule and recodify the pre-2015 regulations (i.e., the 1980s regulations). On April 21, 2020, the agencies published a second final rule to redefine WOTUS, the Navigable Waters Protection Rule, which went into effect on June 22, 2020. Overall, the Navigable Waters Protection Rule narrowed the scope of waters that fell under federal jurisdiction. The Navigable Waters Protection Rule prompted strong reactions from a variety of stakeholders, and numerous groups filed lawsuits challenging it.

The Biden Administration has taken steps to reconsider the Navigable Waters Protection Rule. President Biden issued an executive order which revoked a Trump Administration executive order related to WOTUS and directed agencies to review certain Trump Administration agency actions, including the Navigable Waters Protection Rule. On June 9, 2021, the Corps and EPA announced their intent to initiate a new rulemaking process that would both restore the protections in place prior to the 2015 Clean Water Rule and develop a new rule to establish a "durable" WOTUS definition. On July 30, 2021, the agencies signed a notice of public meeting dates and solicitation of pre-proposal feedback from stakeholders regarding their perspectives on defining WOTUS. On September 3, 2021, following a court order vacating the Navigable Waters Protection Rule, the agencies announced that they had halted implementation of the rule and would interpret WOTUS consistent with the pre-2015 regulatory regime.

Congress has shown continued interest in the scope of WOTUS. In the 116th and 117th Congresses, committees have held hearings that discussed WOTUS, and some Members have introduced legislation regarding the definition of WOTUS.

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Introduction

Congress established the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), to restore and protect the quality of the nation's surface waters.[1] The CWA protects "navigable waters," defined in the statute as "waters of the United States, including the territorial seas."[2] The scope of this term—*waters of the United States*, or WOTUS—determines which waters are federally regulated and has been the subject of debate for decades.[3] The CWA does not define the term. Thus, in implementing the CWA, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA)—the two agencies that administer the statute—have defined the term in regulations.

For several decades, successive presidential administrations have struggled to interpret the term *waters of the United States* for the purpose of implementing various requirements of the CWA, and courts have been asked repeatedly to review the regulations and policy expressing those interpretations. Stakeholders have asked the various administrations and the courts to resolve issues involving scope, clarity, consistency, and predictability. Some stakeholders argue against any definition that would result in a broad scope of waters under federal jurisdiction and affect the interests of property owners, farmers, and others.[4] Other stakeholders argue that a definition that results in too narrow of a scope of waters under federal jurisdiction would leave some hydrologically connected waters and aquatic habitats unprotected.[5]

The agencies' efforts to define WOTUS in regulation during both the Obama and Trump Administrations have been mired in controversy and litigation. Many observers viewed the Obama Administration's 2015 Clean Water Rule as defining WOTUS too broadly, while many viewed the Trump Administration's 2020 Navigable Waters Protection Rule as defining WOTUS too narrowly. A federal district court vacated the Navigable Waters Protection Rule in September 2021, after which the Corps and EPA announced that they had halted implementation of the rule.[6] The Biden Administration has signaled its intent to pursue an "enduring definition" that considers the implementation challenges presented by both of those rules. In light of these challenges, some observers argue that the statutory terms *navigable waters* and *waters of the United States* are too vague and should be more specifically defined by Congress or the courts. Others argue that the Corps and EPA, with their specific knowledge and expertise, are in the best position to determine the scope of the term.

Actions by the courts, the Biden Administration, and Congress all have the potential to continue to alter the scope of federal jurisdiction under the CWA. This report examines the actions taken

[1] 33 U.S.C. §1251 *et seq.*

[2] CWA §502(7); 33 U.S.C. §1362(7).

[3] For a more in-depth discussion of the federal regulations, legislation, agency guidance, and case law that have shaped the meaning of *waters of the United States* over time, as well as an overview of associated key terminology, see CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by Stephen P. Mulligan.

[4] For example, see stakeholder support for the narrower definition under the Navigable Waters Protection Rule. EPA, "More Widespread Support for EPA and Army's Navigable Waters Protection Rule—A New Definition of WOTUS," press release, January 24, 2020, https://www.epa.gov/newsreleases/more-widespread-support-epa-and-armys-navigable-waters-protection-rule-new-definition.

[5] For example, see S. Mazeika Patricio Sullivan, Mark C. Rains, and Amanda D. Rodewald, et al., "Distorting science, putting water at risk," *Science*, vol. 369, no. 6505 (August 14, 2020), pp. 766-768. See also "Coalition of 17 state AGs joins challenges to 2020 WOTUS rule," *InsideEPA.com*, May 1, 2020.

[6] Order, Pasqua Yaqui Tribe v. EPA, No. 4:20-cv-00266, Doc. No. 99 (D. Ariz. Aug. 30, 2021).

by the Obama, Trump, and Biden Administrations to define *waters of the United States*, along with related legislation and case law.

Recent History of WOTUS Regulations

Pre-2015 Rules and Guidance

For much of the past several decades, regulations promulgated by the Corps and EPA in 1986 and 1988, respectively, have been in effect.[7] (These 1986 and 1988 regulations, as further interpreted by the courts and agencies, are hereinafter referred to as *pre-2015 rules*.) The agencies supplemented these regulations with interpretive guidance developed in response to two Supreme Court rulings. Specifically, in 2001 and 2006, the Supreme Court issued rulings pivotal to the definition of WOTUS—*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* and *Rapanos v. United States*.[8] Both rulings interpreted the scope of the CWA more narrowly than the Corps and EPA had done previously in regulations and guidance, but *Rapanos* in particular created uncertainty about the intended scope of waters that are protected by the CWA. The Court's decision in *Rapanos* yielded three different opinions, none of which garnered a controlling majority for a single standard to govern future jurisdictional disputes. Instead, writing for a plurality of four Justices, Justice Scalia adopted a rule that "waters" in "waters of the United States" means only "relatively permanent, standing, or continuously flowing bodies of water" (i.e., streams, rivers, and lakes), and wetlands with a "continuous surface connection" to such waters.[9] Justice Kennedy, writing alone, concluded that a case-by-case test that considers ecological connection and requires a "significant nexus" between the water in question and traditional navigable waters was appropriate.[10] Justice Stevens, for the four dissenters, would have upheld the existing reach of Corps/EPA regulations.[11] Because the 4-1-4 split in *Rapanos* did not produce a controlling majority opinion for a single jurisdictional test, lower courts have had to parse the various opinions to decide which definition to apply.[12]

In response to the rulings, the agencies developed guidance in 2003[13] and 2008[14] to help clarify how EPA regions and Corps districts should implement the Court's decisions. In the 2008 guidance issued by the Corps and EPA following *Rapanos*, the agencies organized CWA jurisdictional analysis into three categories:

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[7] U.S. Army Corps of Engineers, "Final Rule for Regulatory Programs of the Corps of Engineers," 51 *Federal Register* 41206, November 13, 1986 (hereinafter "1986 Corps Rule"); EPA, "Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations," 53 *Federal Register* 20764, June 6, 1988 (1988 EPA Rule).

[8] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

[9] Rapanos, 547 U.S. at 739, 742.

[10] Id. at 782 (Kennedy, J., concurring).

[11] Id. at 788 (Stevens, J., dissenting).

[12] See Mulligan, *supra* note 3, at 22-23.

[13] Army Corps of Engineers and EPA, "Appendix A, Joint Memorandum," 68 *Federal Register* 1995, January 15, 2003.

[14] Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and John Paul Woodley Jr., Assistant Secretary of the Army (Civil Works), Department of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, memorandum, December 2, 2008 (hereinafter "2008 Guidance").

1. waters and wetlands that were categorically WOTUS;
2. waters and wetlands that may be WOTUS on a case-by-case basis upon determining a "significant nexus" with a traditional navigable water; and
3. waters and wetlands that are categorically excluded from WOTUS.

However, the Corps and EPA acknowledged that their written guidance did not provide the public or agency staff with "the information needed to ensure timely, predictable, and consistent jurisdictional determinations."[15] The agencies further acknowledged that case-by-case significant nexus determinations were resource- and time-intensive.[16] Diverse stakeholders—including Members of Congress, states, the regulated community, and nongovernmental organizations—requested a formal rulemaking to revise the existing rules.[17]

2015 Clean Water Rule

In 2015, the Corps and EPA issued the Clean Water Rule, which redefined WOTUS in the agencies' regulations for the first time since the 1980s.[18] In publishing the 2015 Clean Water Rule, the agencies sought to reduce the universe of waters subject to case-by-case jurisdictional determinations.[19] The 2015 Clean Water Rule retained aspects of the agencies' 2008 guidance, including a three-tiered jurisdictional analysis (i.e., categorically jurisdictional, jurisdictional on a case-by-case basis upon determining a "significant nexus," and categorically excluded).[20] It also incorporated new features, such as definitions and criteria which established when certain waters were categorically WOTUS, subject to case-by-case significant nexus analysis, or categorically excluded.[21] Some of these changes expanded the set of waters that were categorically WOTUS.

For example, the 2015 Clean Water Rule newly defined *tributaries*.[22] Under the 2015 Clean Water Rule, tributaries were jurisdictional by rule if they had certain features that indicated flow (e.g., a bed and bank and an ordinary high water mark) and contributed flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.[23] Under the 2015 Clean Water Rule, a tributary could be *perennial* (i.e., flow year-round), *intermittent* (i.e., flow continuously only during certain times of year, such as seasonally), or *ephemeral* (i.e., flow only in response to precipitation events) as long as the criteria in the definition were met.[24] Under pre-2015 rules and guidance, tributaries were jurisdictional by rule if they were perennial or intermittent, while ephemeral tributaries were subject to significant nexus analysis.[25]

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[15] Army Corps of Engineers and EPA, "Clean Water Rule: Definition of 'Waters of the United States'; Final Rule," 80 *Federal Register* 37054, June 29, 2015 (hereinafter "2015 Clean Water Rule").

[16] Ibid.

[17] See EPA Web Archive at https://archive.epa.gov/epa/cleanwaterrule/what-clean-water-rule-does.html, which includes a list of stakeholders requesting a rulemaking (https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

[18] 2015 Clean Water Rule.

[19] 2015 Clean Water Rule, pp. 37056-37057.

[20] 2015 Clean Water Rule, p. 37057.

[21] 2015 Clean Water Rule, pp. 37058-37059.

[22] 2015 Clean Water Rule, pp. 37105-37106.

[23] Ibid.

[24] 2015 Clean Water Rule, p. 37076.

[25] 2008 Guidance, pp. 6-8.

Prior to 2015, waters and wetlands were jurisdictional if they were *adjacent* to certain regulated waters. The 2015 Clean Water Rule confirmed that such adjacent waters are categorically WOTUS and established numerical distance-based criteria to determine adjacency.[26] The rule defined *adjacent* to mean "bordering, contiguous, or neighboring" one of the aforementioned waters, consistent with the 1986 Corps regulations.[27] At the same time, the 2015 Clean Water Rule newly defined *neighboring* by setting limits for the purposes of determining adjacency.[28] *Neighboring* was defined to include waters (1) located within 100 feet of the ordinary high water mark (OHWM)[29] of a traditional navigable water, interstate water, the territorial seas, jurisdictional tributary, or impoundment of these waters; (2) located in the 100-year floodplain and within 1,500 feet of the OHWM of a traditional navigable water, interstate water, the territorial seas, jurisdictional tributary, or impoundment of these waters; or (3) located within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the OHWM of the Great Lakes.[30] (See **Figure 1**.) In addition, while the pre-2015 rules included *adjacent wetlands* as a category of WOTUS, the 2015 Rule created a new, broader category of WOTUS—*adjacent waters*—which included wetlands, ponds, lakes, oxbows, impoundments, and similar features.[31]

[26] 2015 Clean Water Rule, p. 37105.

[27] Ibid; 1986 Corps Rule, p. 41251.

[28] 2015 Clean Water Rule, p. 37058.

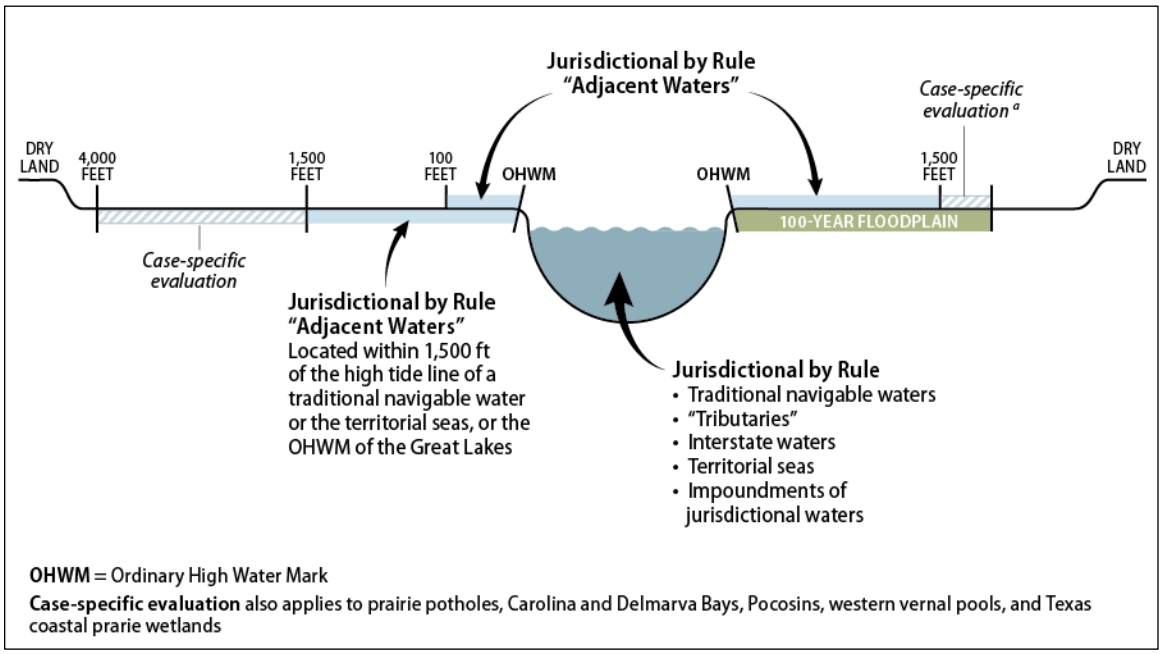
[29] OHWM is defined in Corps and EPA regulations as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."

[30] 2015 Clean Water Rule, p. 37105.

[31] 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774; 2015 Clean Water Rule, p. 37104. For more information on these different water features, see U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, Washington, DC, 2015, https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NCEA&dirEntryId=296414.

Figure 1. Jurisdictional Waters Under the 2015 Clean Water Rule

Not drawn to scale



Source: Prepared by CRS, from Army Corps of Engineers and EPA, "Clean Water Rule: Definition of 'Waters of the United States'; Final Rule," 80 *Federal Register* 37054, June 29, 2015.

Notes: "Jurisdictional by Rule" waters were jurisdictional *per se* without case-specific evaluation. "Tributaries" and "adjacent waters" were jurisdictional by rule if they met the definitions established in the 2015 Clean Water Rule. Waters requiring case-specific evaluation would have been jurisdictional if there was a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.

An OHWM is defined in Corps and EPA regulations as the line on the shore established by the fluctuations of water and indicated by specific physical characteristics listed in those regulations (e.g., the natural line impressed on the bank, the presence of litter and debris).

a. Case-specific evaluation for this subset of waters (waters within the 100-year floodplain, but beyond 1,500 feet from the OHWM) was limited to those waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas.

While the Corps and EPA contended that their primary intent in the 2015 Clean Water Rule was to clarify (rather than enlarge) regulatory jurisdiction, some stakeholders and observers viewed it as an expansion of CWA jurisdiction.[32] Other stakeholders argued that it excluded too many waters from federal jurisdiction.[33] Following issuance of the 2015 Clean Water Rule, industry groups, more than half the states, and several environmental groups filed lawsuits challenging the rule in federal courts across the country.[34] Some district courts issued preliminary injunctions temporarily barring the 2015 Clean Water Rule from taking effect in certain states.[35] Other courts

[32] 2015 Clean Water Rule, pp. 37055, 37083-37084. Also see, for example, Carolina Bolado, "Fla., Others Sue EPA, Corps Over Clean Water Act Expansion," *Law360*, June 30, 2015.

[33] See, for example, Center for Biological Diversity, "EPA and Army Corps Issue Weak Clean Water Rule," press release, May 27, 2015, https://www.biologicaldiversity.org/news/press_releases/2015/clean-water-rule_05-27-2015.html.

[34] For a discussion of the legal challenges to the 2015 Rule, see Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 84 *Federal Register* 56626, 56628-30, October 22, 2019.

[35] North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015); Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018);

denied motions for preliminary injunctions.[36] Separately, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule,[37] although the nationwide stay was lifted after the Supreme Court held that the Sixth Circuit lacked jurisdiction to hear challenges to the rule.[38] Two courts later remanded the 2015 Clean Water Rule to EPA and the Corps, concluding that it violated the Administrative Procedure Act (APA) and exceeded the agencies' statutory authority under the CWA.[39]

At the time the Trump Administration rescinded the 2015 Clean Water Rule, as discussed below, the rule was in effect in a patchwork of states that were not subject to a preliminary injunction or one of the remand orders.

2020 Navigable Waters Protection Rule

The Trump Administration described the 2015 Clean Water Rule as an example of federal "overreach" and took steps to rescind and revise it.[40] On February 28, 2017, President Trump issued an executive order directing the Corps and EPA to review and rescind or revise the 2015 Clean Water Rule and to consider interpreting the statutory term "navigable waters" in a manner consistent with Justice Scalia's opinion in *Rapanos*.[41]

The agencies responded to the executive order in a two-step process. In Step One, EPA and the Corps rescinded the 2015 Clean Water Rule and recodified the pre-2015 regulations.[42]

Texas v. EPA, No. 3:15-cv-162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018); Order, Or. Cattlemen's Ass'n v. EPA, No. 19-00564 (D. Or. July 26, 2019).

[36] Ohio v. EPA, No. 2:15-cv-02467, 2019 WL 1368850 (S.D. Ohio Mar. 26, 2019); Oklahoma v. EPA, No. 4:15-cv-00381, slip. op. at 11-12 (N.D. Okla. May 29, 2019). See also Order, Wash. Cattlemen's Ass'n v. EPA, No. 2:19-cv-00569 (W.D. Wash. Dec. 30, 2019) (denying preliminary injunction motion as moot after EPA and the Corps rescinded the 2015 Rule).

[37] In re EPA, 803 F.3d 804, 808 (6th Cir. 2015), vacated sub nom. In re U.S. Dep't of Def., 713 F. App'x 489 (6th Cir. 2018).

[38] Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018); In re U.S. Dep't of Def., 713 F. App'x at 490.

[39] Georgia v. Wheeler, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); Texas v. EPA, 389 F. Supp. 3d 497 (S.D. Tex. 2019). These two district courts struck down the 2015 Rule on a variety of legal grounds, including the inclusion of all interstate waters in the definition of WOTUS, the use of the ordinary high-water mark and bed and banks in defining tributaries that are considered WOTUS, the breadth of the definition of adjacent waters, the inclusion of a category of waters that would be considered jurisdictional on a case-by-case basis if they met certain criteria, the rule's intrusion into traditional state powers, the inclusion of a farming exemption for adjacent waters but not tributaries, its use of the 100-year floodplain based on FEMA flood maps to define adjacent and case-by-case waters, and the 1,500-foot limit for adjacent waters. Georgia v. Wheeler, 418 F. Supp. 3d at 1355-70, 1379-81. Both courts also found that the final 2015 Rule was not a "logical outgrowth" of the proposed rule, and thus violated the APA's notice-and-comment requirements for rulemaking. Id. at 1372-78; Texas v. EPA, 389 F. Supp. 3d at 503-06.

[40] For example, EPA, "EPA, U.S. Army Repeal 2015 Rule Defining 'Waters of the United States' Ending Regulatory Patchwork," Sept. 12, 2019, https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork.

[41] Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," 82 *Federal Register* 12497, March 3, 2017. According to the *Federal Register* notice, the executive order was issued on February 28, 2017.

[42] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 84 *Federal Register* 56626, October 22, 2019. Prior to issuance of the Step One Rule, EPA and the Corps attempted to delay the implementation of the 2015 Rule for two years by adding an applicability date to that rule. Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Addition of an Applicability Date to 2015 Clean Water Rule," 82 *Federal Register* 55542, November 22, 2017. Two courts struck down the suspension of the 2015 Rule on the grounds that the agencies arbitrarily and capriciously failed to provide a meaningful opportunity for public comment. S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 963 (D.S.C. 2018); Puget

Accordingly, the pre-2015 regulations and guidance were in effect beginning on the effective date of the Step One Rule (December 23, 2019), and until the agencies' redefinition of WOTUS went into effect.

On April 21, 2020, the Corps and EPA published a final Step Two Rule to redefine WOTUS, titled the Navigable Waters Protection Rule.[43] The rule went into effect on June 22, 2020, replacing the Step One Rule. Although it was immediately challenged, the Navigable Waters Protection Rule remained in effect in most jurisdictions until September 2021, when it was vacated by a federal district court. This report nonetheless discusses the Navigable Waters Protection Rule in some detail, because litigation is ongoing as of this writing, and because it is important background against which the Biden Administration is expected to take new actions (as described in more detail below).

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. The Navigable Waters Protection Rule was structured to focus on relatively permanent bodies of water that provide surface flow to traditional navigable waters or the territorial seas in a *typical year*.[44] Thus, ephemeral features, including ephemeral tributaries, were categorically excluded from WOTUS, as were features that did not provide surface water flow in a typical year to certain jurisdictional waters.[45] Also, although the Navigable Waters Protection rule maintained *tributaries* and *adjacent wetlands* as categories of WOTUS that were jurisdictional by rule, the rule narrowed the definitions of those two terms in comparison to prior regulations.

Another of the rule's overarching changes was its elimination of case-by-case significant nexus determinations.[46] The rule instead established four categories of waters that were categorically WOTUS and specified which waters were categorically excluded.[47] An overview of these categories, including some of the changes from how such waters were considered under past regulations, is discussed below.

In addition to these changes, the Navigable Waters Protection Rule removed interstate waters, including interstate wetlands, as a separate category of WOTUS.[48] The pre-2015 rules and the 2015 Clean Water Rule had each included interstate waters as a separate category of WOTUS. Under the Navigable Waters Protection Rule, only those interstate waters that otherwise met the criteria for one of the four WOTUS categories under the rule remained jurisdictional.[49]

Soundkeeper All. v. Wheeler, No. C15-1342, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018).

[43] Army Corps of Engineers and EPA, "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 *Federal Register* 22250, April 21, 2020 (hereinafter "Navigable Waters Protection Rule").

[44] Navigable Waters Protection Rule, pp. 22273-22274. The Navigable Waters Protection Rule defines the term *typical year* to mean "when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resources based on a rolling thirty-year period."

[45] Navigable Waters Protection Rule, pp. 22251, 22279.

[46] Navigable Waters Protection Rule, p. 22273.

[47] Navigable Waters Protection Rule, p. 22251.

[48] Navigable Waters Protection Rule, p. 22282.

[49] Navigable Waters Protection Rule, p. 22283.

Jurisdictional Categories and Implementation Challenges

The precise categories the Corps and EPA have used to determine which waters are categorically WOTUS and which are excluded have not always overlapped neatly from one rule to the next. A full analysis of each regulatory framework's scheme for categorizing waters as WOTUS or not WOTUS is beyond the scope of this report. Instead, the following section uses the structure of the Navigable Waters Protection Rule—the most recently promulgated regulation—to discuss how the scope of included and excluded waters has changed, and for identification of selected challenges the Biden Administration could face in developing and implementing a new definition of WOTUS.

Waters That Are Categorically WOTUS

The Navigable Waters Protection Rule defined four categories of waters that were categorically WOTUS.[50]

(1) Territorial Seas and Traditional Navigable Waters

Territorial seas and traditional navigable waters, which were jurisdictional by rule under the pre-2015 rules and guidance as well as the 2015 Clean Water Rule, were included as separate categories in those rules.[51] The Navigable Waters Protection Rule included territorial seas and traditional navigable waters as jurisdictional by rule, and it combined the two into one category rather than separate categories in an effort to streamline and simplify the definition of WOTUS.[52] The rule made no other substantive changes to these long-regulated categories of waters.[53]

(2) Tributaries

Tributaries were included as a category of WOTUS under the pre-2015 rules and guidance as well as the 2015 Clean Water Rule, but the rules defined *tributary* differently. Under pre-2015 regulations, tributaries were jurisdictional by rule, but *tributaries* was not defined in regulation.[54] Under the 2008 guidance, *relatively permanent* tributaries—which the agencies defined as tributaries that flow year-round (i.e., perennial) or have continuous flow at least seasonally (i.e., intermittent)—were categorically WOTUS.[55] Tributaries that were not relatively permanent (i.e., ephemeral) were subject to a case-by-case significant nexus analysis to determine jurisdiction.[56]

The 2015 Clean Water Rule newly provided a regulatory definition for tributaries. Under the 2015 Clean Water Rule, tributaries were jurisdictional by rule if they had certain features that were indicators of flow (e.g., a bed and bank and an ordinary high water mark) and contributed flow

[50] Navigable Waters Protection Rule, p. 22338.

[51] 2015 Clean Water Rule, p. 37104; 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774.

[52] Navigable Waters Protection Rule, pp. 22338, 22281.

[53] Ibid.

[54] 1986 Corps Rule, pp. 41250-41251; 1988 EPA Rule, p. 20774.

[55] 2008 Guidance, pp. 1, 6-7.

[56] 2008 Guidance, p. 8.

directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.[57] The tributary could be perennial, intermittent, or ephemeral as long as the criteria were met.

While the Navigable Waters Protection Rule included *tributaries* among waters that were categorically WOTUS, the rule narrowed the definition of *tributary* in comparison to prior regulations. Under the Navigable Waters Protection Rule, tributaries included rivers, streams, or similar naturally occurring surface water channels that contributed surface water flow to a territorial sea or traditional navigable water in a typical year.[58] To be jurisdictional, the tributary was required to be perennial or intermittent in a typical year.[59] Ephemeral tributaries were categorically not WOTUS.[60] Thus, under the Navigable Waters Protection Rule, fewer tributaries were considered WOTUS when compared to previous regulations and practice, when some ephemeral waters were considered WOTUS.

(3) Lakes, Ponds, and Impoundments of Jurisdictional Waters

Impoundments of jurisdictional waters were jurisdictional by rule and included as a separate category of WOTUS under both the pre-2015 rules and the 2015 Clean Water Rule.[61] Lakes and ponds were captured under other categories (e.g., traditional navigable waters, tributaries, adjacent waters, or impoundments) in prior regulations.[62]

The Navigable Waters Protection Rule combined lakes, ponds, and impoundments of jurisdictional waters into a single category of WOTUS.[63] It also added flow or inundation requirements to this category of WOTUS, which narrowed the scope of jurisdictional waters compared to previous regulations and practice. Under the Navigable Waters Protection Rule, to be considered WOTUS, lakes, ponds, and impoundments of jurisdictional waters were required to either (1) contribute surface water flow in a typical year to a territorial sea or traditional navigable water or (2) be inundated by flooding from a traditional navigable water, territorial sea, jurisdictional tributary, or jurisdictional lake, pond, or impoundment in a typical year.[64] The flow/inundation requirements were a departure from past regulations and practice. The pre-2015 rules did not specify such requirements for impoundments of jurisdictional waters to be deemed WOTUS.[65] The preamble to the 2015 Clean Water Rule specified that impoundments of a jurisdictional water were WOTUS regardless of flow or inundation requirements.[66]

(4) Adjacent Wetlands

Under pre-2015 rules, wetlands adjacent to jurisdictional waters were jurisdictional by rule.[67] EPA regulations did not define adjacent, but Corps regulations defined the term to mean "bordering,

[57] 2015 Clean Water Rule, pp. 37104-37106.

[58] Navigable Waters Protection Rule, p. 22339.

[59] Ibid.

[60] Navigable Waters Protection Rule, p. 22338.

[61] 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774; 2015 Clean Water Rule, p. 37104.

[62] Navigable Waters Protection Rule, pp. 22300-22301.

[63] Navigable Waters Protection Rule, p. 22338.

[64] Navigable Waters Protection Rule, pp. 22338-22339.

[65] 1986 Corps Rule, pp. 41250-21251; 1988 EPA Rule, p. 20774.

[66] 2015 Clean Water Rule, p. 37075.

[67] 1986 Corps Rule, p. 41250; 1988 EPA Rule, p. 20774.

contiguous, or neighboring."[68] The Corps regulations also stated that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[69] The 2008 guidance further provided that adjacency was established by (1) an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) physical separation from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, or similar features; or (3) proximity to a jurisdictional water that supports an inference of ecological interconnection.[70] According to the 2008 guidance, wetlands that were adjacent to traditional navigable waters and wetlands that abutted perennial or intermittent tributaries to such waters were categorically WOTUS.[71] Wetlands adjacent to ephemeral tributaries and wetlands adjacent to perennial or intermittent tributaries that did not directly abut them were subject to case-by-case significant nexus analysis to determine jurisdiction.[72]

Under the 2015 Clean Water Rule, as discussed above, the agencies similarly defined *adjacent* to mean "bordering, contiguous, or neighboring" one of the aforementioned waters.[73] However, the 2015 Clean Water Rule newly defined *neighboring,* which set new numeric standards for determining adjacency.[74] In addition, as discussed previously, the 2015 Clean Water Rule broadened the category to *adjacent waters*—including wetlands, ponds, lakes, oxbows, impoundments, and similar features.[75]

The Navigable Waters Protection Rule included *adjacent wetlands* as WOTUS, but it narrowed the definition of what wetlands were considered adjacent compared to previous regulations and practice. Specifically, it limited the definition of adjacent wetlands to include only those wetlands that abutted or otherwise had a direct surface connection to other jurisdictional waters in a typical year, rather than allowing for a shallow subsurface connection or ecological interconnection to such waters. Under the Navigable Waters Protection Rule, adjacent wetlands included wetlands that (1) abutted a territorial sea or traditional navigable water, tributary, or a lake, pond, or impoundment of a jurisdictional water; (2) were inundated by flooding from one of the aforementioned waters in a typical year; (3) were physically separated from one of the aforementioned waters only by a natural berm, bank, dune, or similar natural feature; or (4) were physically separated from one of the aforementioned waters only by an artificial dike, barrier, or similar artificial structure so long as that structure allowed for a direct hydrological surface connection to the water in a typical year.[76]

Waters and Features That Are Not WOTUS

Some waters or water features have been excluded from WOTUS in similar form in pre-2015 practice, the 2015 Clean Water Rule, and the Navigable Waters Protection Rule. While some of these exclusions were not listed in the pre-2015 rules, they were regularly applied in practice and

[68] 1986 Corps Rule, p. 41251.

[69] Ibid.

[70] 2008 Guidance, pp. 5-6.

[71] 2008 Guidance, p. 1.

[72] Ibid.

[73] 2015 Clean Water Rule, p. 37105.

[74] Ibid.

[75] 2015 Clean Water Rule, p. 37104.

[76] Navigable Waters Protection Rule, p. 22338.

then specifically added to the 2015 Clean Water Rule and Navigable Waters Protection Rule for clarity:[77]

- groundwater, including groundwater drained through subsurface drainage systems;
- artificially irrigated areas that would revert to upland, or dry land, if artificial irrigation ceased; [78]
- artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland, or dry land; [79]
- water-filled depressions constructed or excavated in upland, or dry land, incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;[80]
- stormwater control features constructed or excavated in upland, or dry land, to convey, treat, infiltrate, or store stormwater runoff;[81]
- groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland, or dry land;[82] and
- waste treatment systems.[83]

The scope of some other excluded categories has changed over time, however. First, the 2015 Clean Water Rule (and pre-2015 practice) regulated *ditches* that met the definition of tributary and that were constructed in or relocated a tributary, and excluded other ditches.[84] The Navigable Waters Protection Rule considered *ditches* in a manner similar to previous regulations, but with a narrower scope. Ditches that were traditional navigable waters, or ditches that were constructed in or that relocated a tributary, or were constructed in an adjacent wetland as long as the ditch satisfied the flow conditions of the tributary definition, were all considered WOTUS.[85] Any

[77] Some of the precise wording for these exclusions varies from rule to rule. Where there are differences, phrasing from the Navigable Waters Protection Rule was included, as it is the most recently promulgated rule.

[78] The Corps and EPA newly defined *upland* in the Navigable Waters Protection Rule in an aim to improve regulatory predictability and clarity. The rule defined *upland* as any land area above the ordinary high water mark or high tide line that does not satisfy all three wetland factors under normal circumstances, as described in the Corps 1987 Wetlands Delineation Manual. Navigable Waters Protection Rule, pp. 22252, 22341. The 2015 Clean Water Rule used the term *dry land*, while the pre-2015 rules used the term *upland*.

[79] The Navigable Waters Protection Rule also provided that this exclusion applied to artificial lakes and ponds that are constructed or excavated in nonjurisdictional waters. Navigable Waters Protection Rule, p. 22340.

[80] The Navigable Waters Protection Rule also provided that this exclusion applied to water-filled depressions constructed or excavated in nonjurisdictional waters for the purposes listed. Ibid.

[81] The Navigable Waters Protection Rule also provided that this exclusion applied to stormwater control features constructed or excavated in nonjurisdictional waters. Ibid.

[82] The Navigable Waters Protection Rule also provided that this exclusion applied to such structures constructed or excavated in nonjurisdictional waters. Ibid.

[83] The Corps and EPA newly defined *waste treatment system* in the Navigable Waters Protection Rule in an aim to improve regulatory predictability and clarity. The rule defined *waste treatment system* to include "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." Navigable Waters Protection Rule, p. 22341.

[84] 2015 Clean Water Rule, pp. 37058, 37105. The 2015 Rule also regulated ditches with intermittent flow that drain wetlands—something not specified in the Navigable Water Protection Rule.

[85] Navigable Waters Protection Rule, pp. 22295, 22338.

ditches that did not meet these criteria were excluded from WOTUS.[86] Because the definition of *tributary* under the Navigable Waters Protection Rule was narrower than the 2015 Clean Water Rule's definition, however, fewer ditches were considered WOTUS under the Navigable Waters Protection Rule.

Second, while all three regulatory frameworks have excluded *prior converted cropland*, the scope of the term has changed over time. Corps and EPA regulations have excluded prior converted cropland since 1993, and the 2015 Clean Water Rule maintained the exclusion.[87] The preamble to the 1993 rule which added the exclusion to regulations included criteria for determining when prior converted cropland was considered abandoned and the exclusion ceased to apply.[88] Specifically, the 1993 rule's abandonment criteria required that an area be used for *production* of an agricultural commodity.[89] The Navigable Waters Protection Rule retained the long-standing exclusion for prior converted cropland, but defined the term in regulations for the first time. The rule clarified the abandonment criteria and specified that an area would cease to be considered prior converted cropland for CWA purposes when both the prior converted cropland "is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years" and the land reverts to wetland status, as defined in the rule.[90] The term *agricultural purposes* was not defined by regulation, but some text in the preamble appeared to broaden the prior converted cropland exception for CWA purposes.

Additionally, the Navigable Waters Protection Rule added three new excluded categories: ephemeral features, diffuse stormwater runoff and directional sheet flow over upland, and waters not identified as categorically WOTUS.[91] As previously discussed, the Navigable Waters Protection Rule specified that ephemeral features, including ephemeral streams, swales, gullies, rills, and pools, were not WOTUS.[92] However, it clarified that a tributary, lake, pond, or impoundment of a jurisdictional water did not lose its jurisdictional status if it contributed surface water flow to a downstream jurisdictional water in a typical year through a channelized ephemeral feature.[93] In contrast, if an upstream water was connected to the downstream jurisdictional water only by diffuse stormwater runoff or directional sheet flow over upland, the upstream water was not jurisdictional under the Navigable Waters Protection Rule.[94] More broadly, the Navigable Waters Protection Rule added an exclusion for waters not identified as

[86] Ibid.

[87] Army Corps of Engineers and EPA, "Clean Water Act Regulatory Programs," 58 *Federal Register* 45008, August 25, 1993 (hereinafter "1993 Rule"); 2015 Clean Water Rule, pp. 37059, 37096. For a more in-depth discussion about the prior converted cropland exclusion under the Clean Water Act, see CRS In Focus IF11136, *Prior Converted Cropland Under the Clean Water Act*, by Laura Gatz and Megan Stubbs. Both CWA regulations and Food Security Act regulations include exceptions to their requirements for prior converted cropland. The Food Security Act of 1985—enacted on December 23, 1985—included a wetland conservation provision ("Swampbuster") which indirectly protects wetlands by making producers who farm or convert wetlands to agricultural production ineligible for select federal farm program benefits. While historically the agencies defined *prior converted cropland* similarly, the way the agencies have determined what qualifies as prior converted cropland has diverged over time.

[88] 1993 Rule, p. 45034.

[89] Ibid.

[90] Navigable Waters Protection Rule, p. 22320.

[91] The Navigable Waters Protection Rule defined *upland* as "any land area that under normal circumstances does not satisfy all three wetland factors … and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water." Navigable Waters Protection Rule, p. 22339.

[92] Navigable Waters Protection Rule, p. 22338.

[93] Navigable Waters Protection Rule, pp. 22306, 22319, 22338-22339.

[94] Navigable Waters Protection Rule, pp. 22278, 22319.

categorically WOTUS, thereby eliminating the category of waters subject to significant nexus analysis.

Implementation Challenges

In promulgating the Navigable Waters Protection Rule, the agencies pointed to its potential benefits in increased certainty over the Clean Water Rule and the pre-2015 regulations. The Navigable Waters Protection Rule, for instance, would have simplified most jurisdictional determinations and eliminated the fact-specific "significant nexus" standard which applied after *Rapanos*. Observers, however, claimed that these changes did not necessarily eliminate uncertainty, but only shifted it to new areas. The Navigable Waters Protection Rule depended upon new definitions or different applications for concepts such as *typical year, perennial*, *intermittent*, and *ephemeral*. Some observers argued that applying these terms to jurisdictional determinations (i.e., determinations as to whether particular water bodies are WOTUS) could be difficult. In addition, some observers argued that the removal of interstate waters as its own category of WOTUS could lead to implementation challenges.

"Typical Year"

The Navigable Waters Protection Rule defined the term *typical year* to mean "when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resources based on a rolling thirty-year period." In the preamble to the rule, the agencies stated that under the final definition, "a typical year would generally not include times of drought or extreme flooding."[95]

Some stakeholders, including scientists and environmental groups, argued that the typical year approach to the rule was concerning in light of climate change.[96] In their comments on the proposed rule, a coalition of scientific groups argued that the typical year approach "ignores the periodic and substantial connectivity that occurs during increasingly frequent atypical years resulting from climate change."[97] Some stakeholders also argued that it was unclear how a jurisdictional determination would be made if agencies were making such a determination when conditions did not reflect a typical year (either too wet or dry).[98] Further, some observed that a water body transitioning between protected and unprotected status in response to weather was not consistent with the agencies' stated objective to provide clarity and predictability through the new rule.[99]

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[95] Navigable Waters Protection Rule, p. 22274. The agencies consider a year to be typical when the rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year average generated at NOAA weather stations. Ibid.

[96] Corps and EPA, *The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 9: Typical Year*, April 21, 2020, p. 11, https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574.

[97] Letter from American Fisheries Society, American Institute of Biological Sciences, and Association for the Sciences of Limnology and Oceanography, et al. to Andrew Wheeler, EPA Administrator and R.D. James, Assistant Secretary of the Army for Civil Works, April 10, 2019, EPA Docket ID No. EPA-HQ-OW-2018-0149.

[98] Corps and EPA, *The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 9: Typical Year*, April 21, 2020, p. 17, https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574.

[99] See, for example Adam S. Ward and Riley Walsh, "New Clean Water Act Rule Leaves U.S. Waters Vulnerable," *American Geophysical Union News*, February 11, 2020, pp. https://eos.org/opinions/new-clean-water-act-rule-leaves-u-s-waters-vulnerable. See also Corps and EPA, *The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 11: Economic Analysis and Resource and Programmatic Assessment*, April 21, 2020, p. 42, https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574.

As they had done under both the pre-2015 rules and the Clean Water Rule, the Corps and EPA signaled that they would rely in part on guidance beyond the text of the rule itself to guide implementation. Concurrent with the issuance of the Navigable Waters Protection Rule, the Corps and EPA published a fact sheet specific to the typical year concept.[100] Responding to some stakeholder concerns, the agencies stated that using data from a shorter-than-30-year period could "potentially exaggerate the effects of short-term trends of drought or excessively rainy periods."[101] They also noted that during atypically wet or dry periods, it might be necessary to rely more heavily on data collected during "typical year" conditions, such as aerial photography or remote sensing imagery.[102]

Differentiating Between Intermittent and Ephemeral

In the Navigable Waters Protection Rule, the Corps and EPA indicated that they included definitions of the terms *perennial*, *intermittent*, and *ephemeral* to ensure clarity.[103] The agencies defined *perennial* as surface water flowing continuously year-round; *intermittent* as flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts); and *ephemeral* as flowing or pooling only in direct response to precipitation (e.g., rain or snowfall).[104] However, some stakeholders expressed concerns regarding the challenges in differentiating between these concepts.

Some commenters on the proposed rule requested further clarification on the distinction between intermittent and ephemeral, noting concerns about various scenarios that could make the difference less certain. For example, some commenters requested clarification regarding whether streams that flow continuously during a rainy season, such as monsoon-driven streams, are considered intermittent. Others requested additional clarification on how to distinguish between melting snowfall (which under the rule could be considered ephemeral flow) versus melting snowpack (which could be considered the source of perennial or intermittent flow).[105] Some city and county stakeholders also noted that, in some parts of the country, the terms can be used interchangeably, especially in areas that experience a lot of rain.[106]

Concurrent with the issuance of the Navigable Waters Protection Rule, the Corps and EPA published a fact sheet focused on implementing the Navigable Waters Protection Rule.[107] In the fact sheet, the agencies discussed some of best available sources of information that could be used to determine flow classification and jurisdiction.

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[100] Corps and EPA, *"Typical Year" and the Navigable Waters Protection Rule Factsheet*, 2020, https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_typical_year.pdf.

[101] Ibid.

[102] Ibid.

[103] Navigable Waters Protection Rule, p. 22275.

[104] Navigable Waters Protection Rule, p. 22338.

[105] Navigable Waters Protection Rule, p. 22276.

[106] Comment Letter from National Association of Counties, National League of Cities, and the United States Conference of Mayors to EPA and the Corps, "Re: Proposed Rule on the 'Revised Definition of 'Waters of the United States,' Docket No. EPA-HQ-OW-2018-0149," April 15, 2019, https://downloads.regulations.gov/EPA-HQ-OW-2018-0149-4629/attachment_1.pdf.

[107] Corps and EPA, *Implementing the Navigable Waters Protection Rule Factsheet*, 2020, https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_implementation_tools.pdf.

Interstate Waters

Stakeholders also expressed concerns about changes in the Navigable Waters Protection Rule regarding interstate waters. The Navigable Waters Protection Rule removed interstate waters, including interstate wetlands, as a separate category of WOTUS.[108] Although prior regulations—both the pre-2015 rules and the 2015 Clean Water Rule—included interstate waters as a separate category of WOTUS, the Corps and EPA asserted that "interstate waters without any surface water connection to traditional navigable waters or the territorial seas are not within the agencies' authority under the CWA."[109] The agencies nonetheless stated that any interstate waters that otherwise met the criteria for one of the four WOTUS categories under the rule would remain jurisdictional. While some stakeholders supported this change, others expressed concern that loss of interstate management of waters by federal agencies that no longer qualified as WOTUS could lead to complex interstate issues.[110] Specifically, some expressed concerns about resolving conflicts without federal assistance, as well as concerns about pollutants that could come from upstream waters.[111]

Stakeholder Reponses and Litigation Regarding the Navigable Waters Protection Rule

The promulgation of the Navigable Waters Protection Rule prompted a range of reactions from a variety of stakeholders.

Industrial and agricultural groups that supported the Navigable Waters Protection Rule asserted, among other things, that it provided greater certainty and clarity and scaled back federal jurisdiction from the "significant expansion" under the 2015 Clean Water Rule to a more appropriate scope.[112] Some of these groups, in comments filed in favor of the proposed Navigable Waters Protection Rule, explained that while they supported the rule, they also believed the agencies should further narrow jurisdiction by, for example, limiting how they define a traditional

[108] Navigable Waters Protection Rule, pp. 22282-22283.

[109] Navigable Waters Protection Rule, p. 22284.

[110] Corps and EPA, *The Navigable Waters Protection Rule - Public Comment Summary Document, Topic 3: Interstate Waters*, April 21, 2020, https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574. See also ASWM Insights, p. 4, https://www.aswm.org/pdf_lib/aswm_initial_insights_on_final_wotus_rule.pdf.

[111] Association of State Wetland Managers, "The Navigable Waters Protection Rule: Highlights & Initial Take-Aways: Needs and Gaps Identified by State and Tribal Wetland Programs," slide presentation, March 25, 2020, https://www.aswm.org/pdf_lib/member_webinar/navigable_waters_protection_rule_032520_zollitsch.pdf.

[112] See, for example, National Association of Home Builders, *2020 Definition of Waters of the United States*, March 2020, https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/waters-of-the-us/wotus-analysis-2020.pdf. National Mining Association, *Clean Water Regulation That's Clear*, April 1, 2020, https://nma.org/wp-content/uploads/2019/03/2020-WOTUS.pdf. Agricultural Retailers Association, "ARA Supports Navigable Waters Protection Rule's Publishing," press release, April 21, 2020, https://www.aradc.org/news/ara-supports-navigable-waters-protection-rules-publishing. American Farm Bureau Federation, "New Clean Water Rule Provides Clarity, Certainty to Farmers and Ranchers," press release, January 23, 2020, https://www.fb.org/newsroom/new-clean-water-rule-provides-clarity-certainty-to-farmers-and-ranchers.

navigable water.[113] Some states also supported the rule, asserting that they are most knowledgeable about their waters and are in the best position to manage them effectively.[114]

Other stakeholders, including environmental groups and some states, voiced strong opposition to the Navigable Waters Protection Rule. Some of these stakeholders expressed concern that the rule would "roll back" protections on many waters and could have a broad impact on water quality.[115] Some states asserted, among other things, that the rule would result in loss of protection in some areas and uneven protections across states.[116] Some further asserted that the changes could make it more challenging for some states to address pollution from upstream jurisdictions.[117] Some also argued that the interconnectedness of water necessitates a minimum federal standard for most waters rather than a patchwork approach.[118] From a different perspective, some ranching groups opposed the Navigable Waters Protection Rule, arguing that the Corps and EPA defined navigable waters too broadly.[119]

EPA Science Advisory Board Commentary

In February 2020, EPA's Science Advisory Board (SAB), a federal advisory committee which was created in 1978 to provide scientific advice to EPA, finalized and transmitted a commentary on the proposed revised definition of WOTUS.[120] The SAB had previously weighed in on the science of CWA jurisdiction in 2014. Specifically, the SAB conducted a technical review of a report prepared by EPA's Office of Research and Development synthesizing the peer-reviewed science on the relationship and downstream effects of waters (often referred to as the "Connectivity Report"), which provided much of the technical basis for the 2015 Clean Water

[113] See, for example, Letter from Gregory Ugalde, Chairman of the Board, National Association of Home Builders, to Andrew Wheeler, EPA Administrator, April 15, 2019, Docket ID No. EPA-HQ-OW-2018-0149. Letter from Katie Sweeney, General Counsel, National Mining Association, to EPA, April 15, 2019, https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0003.

[114] See, for example, Arizona Department of Environmental Quality, "Waters of the United States (WOTUS)," press release, 2020, https://azdeq.gov/wotus. North Dakota Office of the Governor, "Burgum welcomes clarity of Navigable Waters Protection Rule for farmers, landowners," press release, January 23, 2020, https://www.governor.nd.gov/news/burgum-welcomes-clarity-navigable-waters-protection-rule-farmers-landowners.

[115] See, for example, Waterkeeper Alliance, *'Navigable Water Protection Rule' Guarantees Widespread Pollution of our Nation's Waters*, February 13, 2020, https://waterkeeper.org/news/navigable-water-protection-rule-guarantees-widespread-pollution-of-our-nations-waters/. See also Letter from New Jersey State Legislature Members to Andrew Wheeler, EPA Administrator and R.D. James, Assistant Secretary of the Army for Civil Works, March 2019, https://downloads.regulations.gov/EPA-HQ-OW-2018-0149-9890/attachment_1.pdf.

[116] See, for example, Letter from Kate Brown, Governor, State of Oregon, to Andrew Wheeler, EPA Administrator and R.D. James, Assistant Secretary of the Army for Civil Works, April 11, 2019, https://downloads.regulations.gov/EPA-HQ-OW-2018-0149-5412/attachment_1.pdf.

[117] See, for example, Letter from Ben Grumbles, Secretary, Maryland Department of the Environment, to Andrew Wheeler, EPA Administrator and R.D. James, Assistant Secretary of the Army for Civil Works, April 15, 2019, https://downloads.regulations.gov/EPA-HQ-OW-2018-0149-4901/attachment_1.pdf.

[118] "Coalition of 17 state AGs joins challenges to 2020 WOTUS rule," *InsideEPA*, May 1, 2020, https://insideepa.com/daily-feed/coalition-17-state-ags-joins-challenges-2020-wotus-rule.

[119] Pacific Legal Foundation, "EPA's new navigable waters rule challenged," press release, April 27, 2020, https://pacificlegal.org/press-release/epas-new-navigable-waters-rule-challenged/.

[120] Dr. Michael Honeycutt, Chair, *Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act*, EPA Science Advisory Board, EPA-SAB-20-002, February 27, 2020, https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/729C61F75763B8878525851F00632D1C/$File/EPA-SAB-20-002+.pdf (hereinafter "SAB commentary"). See EPA, "About the Science Advisory Board," https://sab.epa.gov/ords/sab/f?p=100:2:15698006221959 (last visited Sept. 3, 2021).

Rule.[121] The SAB also reviewed the adequacy of the scientific and technical basis of the proposal for the Clean Water Rule. In providing comments on the Navigable Waters Protection Rule, the SAB thus opted to provide a "commentary" on the rule because the science had not changed, but the agencies' position on how to use the science to inform its policy decision had changed.[122] The SAB found that the proposed Navigable Waters Protection Rule "decreases protection for our Nation's waters" and concluded that it "does not incorporate best available science and as such we find that a scientific basis for the proposed Rule, and its consistency with the objectives of the Clean Water Act, is lacking."[123] The SAB highlighted several concerns about certain types of waters excluded from the definition of WOTUS in the proposed rule, as well as the basis for adopting a surface-water-based definition of WOTUS.[124] The SAB summarized these concerns by stating that the "current scientific understanding of surface and ground water … is not reflected in the proposed Rule. Specifically, the proposed definition of WOTUS excludes ground water, ephemeral streams, and wetlands which connect to navigable waters below the surface."[125] The SAB further stated that the agencies did not present new science to support the new definition, and therefore the proposed rule "lacks a scientific justification, while potentially introducing new risks to human and environmental health."[126]

Litigation and the Biden Administration's Actions

States, environmental groups, tribes, and other stakeholders challenged the Navigable Waters Protection Rule in many separate cases.[127] On June 19, 2020, the U.S. District Court for the District of Colorado issued a preliminary injunction which barred the implementation of the Navigable Waters Protection Rule only in the state of Colorado.[128] However, on March 2, 2021, the U.S. Court of Appeals for the Tenth Circuit reversed and vacated the district court's decision, lifting the injunction and allowing the rule to take effect in Colorado.[129]

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[121] U.S. EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F, Washington, DC, 2015, https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NCEA&dirEntryId=296414.

[122] SAB Commentary, pp. 1-2.

[123] SAB Commentary, p. 1.

[124] SAB Commentary, pp. 2-3.

[125] SAB Commentary, p. 4.

[126] SAB Commentary, p. 4.

[127] Complaint, Pueblo of Laguna v. Regan, No. 1:21-cv-277, Doc. No. 1 (D.N.M. March 26, 2021); Amended Complaint, Waterkeeper Alliance, Inc. v. Wheeler, No. 3:18-cv-3521, Doc. No. 93 (N.D. Cal. Dec. 23, 2020); Complaint, Env't Integrity Project v. Wheeler, No. 1:20-cv-1734, Doc. No. 1 (D.D.C. June 25, 2020); Complaint, Pasqua Yaqui Tribe v. EPA, No. 4:20-cv-266, Doc. No. 1 (D. Ariz. June 22, 2020); Complaint, Puget Soundkeeper Alliance v. EPA, No. 2:20-cv-950, Doc. No. 1 (W.D. Wash. June 22, 2020); Motion for Preliminary Injunction, N.M. Cattle Growers' Ass'n v. EPA, No. 1:19-cv-00988, Doc. No. 30 (D.N.M. May 26, 2020); Complaint, Colorado v. EPA, No. 1:20-cv-1461, Doc. No. 1 (D. Colo. May 22, 2020); Complaint, Navajo Nation v. Wheeler, No. 2:20-cv-602, Doc. No. 1 (D.N.M. June 22, 2020); Amended Complaint, Murray v. Wheeler, No. 1:19-cv-1498, Doc. No. 17 (N.D.N.Y. May 11, 2020); Second Supplemental Complaint, Wash. Cattlemen's Ass'n v. EPA, No. 2:19-cv-00569, Doc. No. 72 (May 4, 2020); Complaint, California v. Wheeler, No. 3:20-cv-03005, Doc. No. 1 (N.D. Cal. May 1, 2020); First Supplemental Complaint, Or. Cattlemen's Ass'n v. EPA, No. 3:19-cv-00564, Doc. No. 90 (D. Or. May 1, 2020); Complaint, Conservation Law Found. v. EPA, No. 20-cv-10820, Doc. No. 1 (D. Mass. April 29, 2020); Complaint, Chesapeake Bay Found., Inc. v. Wheeler, No. 1:20-cv-1063, Doc. No. 1 (D. Md. April 29, 2020); Complaint, S.C. Coastal Conservation League v. Wheeler, No. 2:20-cv-1687, Doc. No. 1 (D.S.C. April 29, 2020).

[128] Colorado v. EPA, 445 F. Sup. 3d 1295 (D. Colo. 2020).

[129] Colorado v. EPA, 989 F.3d 874 (10th Cir. 2021).

To date, courts have not ruled on the merits of the Navigable Waters Protection Rule. However, developments during the Biden Administration have made the legal status of the rule uncertain, and it is not currently being applied anywhere in the country.

President Biden signaled interest in reconsidering the Navigable Waters Protection Rule immediately upon taking office. On January 20, 2021, President Biden issued an executive order (E.O. 13990) which revoked the Trump Administration's executive order directing the Corps and EPA to review and rescind or revise the Clean Water Rule.[130] Although the Biden Administration's executive order did not itself rescind the Trump Administration's Navigable Waters Protection Rule, it also directed the heads of all agencies to "immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted" during the Trump Administration "that are or may be inconsistent with, or present obstacles to, the policy set forth" in the order.[131] The executive order further stated "for any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions."[132] In conjunction with the executive order, the Biden Administration included the Navigable Waters Protection Rule in a fact sheet listing more than 100 agency actions that heads of agencies were to review in accordance with the executive order.[133]

In addition, on January 21, 2021, EPA sent a letter to the U.S. Department of Justice (DOJ) requesting that DOJ seek stays for pending litigation involving judicial review of EPA regulations issued during the Trump Administration.[134] In a number of cases, courts granted requests to stay challenges to the Navigable Waters Protection Rule while EPA reviewed the rule.[135]

Also, in March 2021, EPA's Office of Inspector General published a report, with findings from a year-long performance audit, concluding that EPA failed to adhere to certain aspects of its internal process in promulgating selected rulemakings, including the Navigable Waters Protection Rule.[136]

On June 9, 2021, the Corps and EPA announced their intent to revise the definition of WOTUS.[137] After reviewing the Navigable Waters Protection Rule pursuant to Executive Order 13990, the agencies "determined that the rule is significantly reducing clean water protections." For example, the agencies' review found "numerous clear and consistent indicators of a substantial

[130] Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 *Federal Register* 7037-7043, January 20, 2021.

[131] Ibid, p. 7037.

[132] Ibid.

[133] The White House, "Fact Sheet: List of Agency Actions for Review," press release, January 20, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

[134] Letter from Melissa A. Hoffer, Acting General Counsel, U.S. EPA Office of General Counsel, to Jean E. Williams and Bruce S. Gelber, Deputy Assistant Attorneys General, Environment and Natural Resources Division, U.S. Department of Justice, January 21, 2021.

[135] See Joint Notice Regarding the Status of Pending Litigation in Other Jurisdictions, Conservation Law Found. v. EPA, No. 20-cv-10820, Doc. No. 107 (May 14, 2021) (summarizing the status of litigation challenging the Navigable Waters Protection Rule as of May 14, 2021).

[136] U.S. EPA Office of Inspector General, *EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking*, Report No. 21-P-0115, March 31, 2021, https://www.epa.gov/sites/default/files/2021-03/documents/_epoig_20210331-21-p-0115.pdf.

[137] EPA, "EPA, Army Announce Intent to Revise Definition of WOTUS," press release, June 9, 2021, at https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus (hereinafter "June 2021 Press Release").

reduction in waters covered under the [Navigable Waters Protection Rule] compared to previous rules and practice." Of particular concern to the agencies was the disproportionate impact in arid states. Corps data showed that in New Mexico and Arizona, almost all of the 1,538 streams assessed since the Navigable Waters Protection Rule went into effect were found to be nonjurisdictional.[138] The agencies also noted that at least 333 projects that formerly required CWA Section 404 permits do not require them under the Navigable Waters Protection Rule.[139] Accordingly, in their June 9 announcement, the agencies indicated that they (1) planned to initiate a new rulemaking process to restore the regulatory landscape as it existed prior to implementation of the 2015 Clean Water Rule; and (2) anticipated developing a new rule to define WOTUS through a process that would be informed by stakeholder engagement and the experience of implementing prior rules.[140]

In conjunction with their June 9 announcement, the Corps and EPA began asking courts to remand the Navigable Waters Protection Rule while the agencies develop a new regulation.[141] The agencies argued that remand is appropriate to avoid potentially unnecessary litigation over aspects of the Navigable Waters Protection Rule that may change when WOTUS is redefined.[142] The agencies sought remand without vacatur, meaning that the Navigable Waters Protection Rule would remain in effect pending the development of a new rule if their motions were granted.[143] Some groups opposed this aspect of the agencies' motion, arguing that courts should vacate the Navigable Waters Protection Rule if they grant the remand request.[144] Each case is proceeding on a separate timeline. Some courts have granted the Corps and EPA's motion, remanding the rule but not vacating it.[145]

On August 30, 2021, the U.S. District Court for the District of Arizona granted the agencies' request for voluntary remand in *Pasqua Yaqui Tribe v. EPA*, but it also vacated the rule.[146] While the court did not issue a ruling on the merits of the Navigable Waters Protection Rule, it found that both the plaintiffs and the United States had identified concerns with the rule that "involve

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[138] Department of the Army and EPA, *Memorandum for the Record: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule*, June 8, 2021, https://www.epa.gov/sites/default/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf.

[139] Ibid.

[140] June 2021 Press Release.

[141] E.g., Motion for Remand Without Vacatur, Conservation Law Found. v. EPA, No. 1:20-cv-10820, Doc. No. 112 (D. Mass. June 6, 2021).

[142] Id. at 1.

[143] E.g., Memorandum of Law in Support of Motion for Voluntary Remand Without Vacatur, Conservation Law Found. v. EPA, No. 1:20-cv-10820, Doc. No. 113, at 9 (D. Mass. June 9, 2021).

[144] E.g., Response in Partial Opposition to Defendants' Motion for Remand Without Vacatur, Conservation Law Found. v. EPA, No. 1:20-cv-10820, Doc. No. 115 (D. Mass. June 23, 2021).

[145] Order, S.C. Coastal Conservation League v. Regan, No. 2:20-cv-1687, Doc. No. 147 (D.S.C. July 15, 2021); Order, Conservation Law Found. v. EPA, No. 1:20-cv-10820, Doc. No. 122 (D. Mass. Sept. 1, 2021); Order, Murray v. Regan, No. 1:19-cv-01498, Doc. No. 46 (N.D.N.Y. Sept. 7, 2021); Order Granting Motion to Remand, California v. Regan, No. 3:20-cv-03005, Doc. No. 271 (N.D. Cal. Sept. 16, 2021); Order Granting Motion to Remand, Waterkeeper Alliance, Inc. v. EPA, No. 18-cv-03521, Doc. No. 125 (N.D. Cal. Sept. 16, 2021); Memorandum Opinion and Order Granting Motion to Remand and Finding Vacatur Issue Now Moot, Pueblo of Laguna v. Regan, No. 1:21-cv-00277, Doc. No. 40 (D.N.M. Sept. 21, 2021).

[146] Order, Pasqua Yaqui Tribe v. EPA, No. 4:20-cv-00266, Doc. No. 99 (D. Ariz. Aug. 30, 2021). The court did not address the plaintiffs' pending challenges to the Trump Administration's 2019 rule repealing the 2015 Clean Water Rule, but indicated that it would order further proceedings regarding to resolve that portion of the litigation. Id. at 10-11. Although the caption refers to the tribe as the "Pasqua Yaqui Tribe," the correct spelling is "Pascua Yaqui."

fundamental, substantive flaws that cannot be cured without revising or replacing the [rule's] definition of [WOTUS]."[147] Additionally, the court found that remanding without vacatur "would risk serious environmental harm" in light of the reduction in waters considered to be WOTUS.[148] The court also found that vacatur and a return to the pre-2015 regulatory regime would not result in an unacceptable level of regulatory uncertainty.

The district court's order did not specify what would take the place of the Navigable Waters Protection Rule following vacatur, nor did it specify whether the vacatur of the rule would apply nationwide or only in Arizona.[149] Commentators have suggested that stakeholders may take differing views regarding the ruling's application, and may appeal the vacatur order.[150] It is therefore possible that, on appeal, the district court's order could be reversed and the Navigable Waters Protection Rule could be reinstated (either nationwide, or in parts of the country that are not subject to the court's order). In response to the order, however, the Corps and EPA announced that they had halted implementation of the Navigable Waters Protection Rule and would interpret WOTUS consistent with the pre-2015 regulatory regime until further notice.[151]

Meanwhile, the Corps and EPA have begun the stakeholder engagement process. On July 30, 2021, the Corps and EPA signed a notice of public meeting dates and solicited preproposal feedback from interested stakeholders on defining WOTUS and implementing the definition.[152] The notice, published in the *Federal Register* on August 4, 2021, included a schedule for public meetings to take place in August 2021 and solicited written public comment on or before September 3, 2021.[153] The agencies specified several issues in the notice for which they are particularly interested in obtaining feedback, including implementation of the various prior and current regulatory regimes; regional, state, and tribal interests; science; environmental justice

[147] Id. at 8-9.

[148] Id. at 9-10.

[149] Id. at 10.

[150] Hannah Northey and Pamela King, "What's next for WOTUS after judge jettisons Trump rule," *Greenwire*, August 31, 2021, https://subscriber.politicopro.com/article/eenews/2021/08/31/whats-next-for-wotus-after-judge-jettisons-trump-rule-280131. Another court that granted the United States' motion for remand after the *Pasqua Yaqui* order noted that it "would not be inclined to impose vacatur" had the Arizona district court not mooted the question of whether vacatur was appropriate, because there had been "no evaluation of the merits—or concession by defendants—that would support a finding that the rule should be vacated." Order Granting Motion to Remand, California v. Regan, No. 3:20-cv-03005, Doc. No. 271 (N.D. Cal. Sept. 16, 2021); Order Granting Motion to Remand, Waterkeeper Alliance, Inc. v. EPA, No. 18-cv-03521, Doc. No. 125 (N.D. Cal. Sept. 16, 2021); see also Memorandum Opinion and Order Granting Motion to Remand and Finding Vacatur Issue Now Moot, Pueblo of Laguna v. Regan, No. 1:21-cv-00277, Doc. No. 40 (D.N.M. Sept. 21, 2021) (granting the United States' remand motion, but finding the question of whether the Navigable Waters Protection Rule should be vacated to be moot following the Arizona district court's decision). One other court has granted the United States' motion for remand and vacated the Navigable Waters Protection Rule, adopting similar reasoning to the *Pasqua Yaqui* court. Memorandum Opinion and Order, Navajo Nation v. Regan, No. 2:20-cv-00602, Doc. No. 43 (D.N.M. Sept. 27, 2021). For more general discussion of the practice of vacating agency action or issuing injunctions nationwide, see CRS Report R46902, *Nationwide Injunctions: Law, History, and Proposals for Reform*, by Joanna R. Lampe.

[151] See EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," September 3, 2021, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

[152] Department of the Army and EPA, "Notice of Public Meetings Regarding 'Waters of the United States,'" press release, July 30, 2021, https://www.epa.gov/wotus/notice-public-meetings-regarding-waters-united-states.

[153] Corps and EPA, "Notice of Public Meetings Regarding 'Waters of the United States'; Establishment of a Public Docket; Request for Recommendations," 86 *Federal Register* 41911, August 4, 2021. Corps and EPA, "Notice of Public Meetings Regarding 'Waters of the United States'; Establishment of a Public Docket; Request for Recommendations," Prepublication version *Federal Register*, July 29, 2021.

interests; climate implications; the scope of jurisdictional tributaries, jurisdictional ditches, and adjacency; and exclusions from the definition.[154]

Some Members of Congress have been critical of the Biden Administration's actions to date. Some have been supportive of the Administration's intent to develop a new rule to replace the Navigable Waters Protection Rule, but criticized the Administration for not immediately repealing the rule.[155] Others have criticized the Administration for not providing a sufficient period of time for stakeholder input, and have asked the Corps and EPA to extend their public meeting schedule and public comment period to ensure meaningful input.[156]

Potential Impacts of Revised WOTUS Definitions

The potential impacts of the Navigable Waters Protection Rule remain relevant even though the Biden Administration has indicated that it has halted implementation of the rule and plans to rescind and replace it with a new definition of WOTUS. As a practical matter, the Corps and EPA have not yet addressed what regulatory regime will apply to projects that are already under way. If an appeal of the Arizona district court's decision results in a reversal of the August 30 vacatur order or a revision of the scope of the order to limit it to the parties to the litigation, the Navigable Waters Protection Rule could go back into effect in at least some parts of the country. Additionally, the agencies may consider the Navigable Waters Protection Rule and stakeholder comments on it when determining how to define WOTUS in a new regulatory action.

As the foregoing discussion of the controversy over WOTUS suggests, the Biden Administration's decisions about definitions will incorporate policy choices about the scope of waters that the CWA should address. Stakeholder comments about the final Navigable Waters Protection Rule reflected that policy issue, as observers highlighted potential impacts and challenges that could arise as the rule was implemented. Because the Navigable Waters Protection Rule narrowed the definition of WOTUS, CWA requirements and programs no longer applied to waters that were previously subject to CWA requirements but no longer qualified as WOTUS. The reductions in federal protection created by the rule and the potential impacts of the changes in scope were likely to differ among states. Likewise, if the Corps and EPA develop a new definition of WOTUS that is broader than the one established in the Navigable Waters Protection Rule, more waters will be subject to CWA programs and requirements.

Changes in Federal Protection

In narrowing the scope of federal jurisdiction, the Navigable Waters Protection Rule protected fewer waters than were protected under prior regulations. One challenge in assessing any WOTUS definition is that the impacts and effects of particular definitions can be difficult to identify with precision. This section illustrates how that uncertainty was manifest in stakeholders'

[154] Ibid.

[155] House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, "Chairs DeFazio, Napolitano Statements from the Subcommittee's First Hearing in a Series on President Biden's Fiscal Year 2022 Budget Request," press release, June 24, 2021, https://transportation.house.gov/news/press-releases/chairs-defazio-napolitano-statements-from-the-subcommittees-first-hearing-in-a-series-on-president-bidens-fiscal-year-2022-budget-request.

[156] Committee on Transportation and Infrastructure, "Graves & Rouzer Ask Biden Administration to Extend its Brief Public Comment Period & Meetings on Waters of the United States," press release, August 26, 2021, https://republicans-transportation.house.gov/news/documentsingle.aspx?DocumentID=405571.

evaluations of the Navigable Waters Protection Rule, but similar questions arose under the 2015 Clean Water Rule—and are likely to continue in further rulemaking by the Biden Administration.

Using the Navigable Waters Protection Rule as an example, stakeholders held differing views regarding how many wetlands and streams would have been excluded from federal jurisdiction under that rule, as well as the degree to which such excluded waters could have been protected or managed under state laws and regulations.

Estimates of Changes in Jurisdiction

In evaluating the impact of the Navigable Waters Protection Rule, some attempted to estimate how many of the nation's wetlands and streams might be excluded from federal jurisdiction under the Navigable Waters Protection Rule. Many observers cited estimates prepared by EPA and Corps staff in 2017, and obtained through the Freedom of Information Act.[157] These estimates indicated that the proposed Navigable Waters Protection Rule would have excluded at least 18% of streams and 51% of wetlands nationwide from federal protection under the CWA.[158] The estimates were higher in the Arid West, where 35% of all streams, comprising 39% of stream length, are ephemeral.[159]

However, in a fact sheet accompanying the issuance of the final Navigable Waters Protection Rule, the Corps and EPA dismissed the estimates and asserted that they were "highly unreliable and are based on stream and wetland datasets that were not created for regulatory purposes and which have significant limitations."[160] The agencies also noted that prior administrations similarly did not use maps to estimate changes in jurisdiction when issuing 2003 and 2008 guidance from the *SWANCC* and *Rapanos* decisions, nor when the 2015 Clean Water Rule was promulgated.[161]

The Corps and EPA addressed this issue again in their June 2021 press release announcing the Biden Administration's intent to revise the definition of WOTUS. Based on a review of Corps

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[157] Ariel Wittenberg and Kevin Bogardus, "EPA falsely claims 'no data' on waters in WOTUS rule," *E&E News*, December 11, 2018, https://www.eenews.net/stories/1060109323. Audubon Society, *New Federal Water Rules Ditch Protections for Wetlands and Small Streams*, January 23, 2020, https://www.audubon.org/news/new-federal-water-rules-ditch-protections-wetlands-and-small-streams. Environmental Law Institute, *WOTUS Proposal Poses Challenge for States*, February 18, 2019, https://www.eli.org/vibrant-environment-blog/wotus-proposal-poses-challenge-states. Center for American Progress, *Debunking the Trump Administration's New Water Rule*, March 27, 2019, https://www.americanprogress.org/issues/green/news/2019/03/27/467697/debunking-trump-administrations-new-water-rule/.

[158] The Corps and EPA used two datasets to generate their 2017 estimates. They used the U.S. Geological Survey National Hydrography Dataset (NHD) to estimate the percentages of streams that are perennial, intermittent, and ephemeral. They also used the NHD and the U.S. Fish and Wildlife Service National Wetlands Inventory (NWI) to generate estimates of the percentages of wetland acres that intersect streams that are perennial, intermittent, and ephemeral, as well as wetland acres that do not intersect streams. The agencies' analysis showed that nationwide, 18% of streams (both in length and in number) are ephemeral (and thus would not be covered under the Navigable Waters Protection Rule). The agencies' analysis also indicated that 51% of NWI-mapped potential wetlands by acreage do not intersect any NHD stream feature, and therefore may not be considered adjacent under a definition that requires that an adjacent wetland "touch" a WOTUS. See Corps and EPA internal briefing slides, available at https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf.

[159] Ibid.

[160] Army Corps and EPA, *Mapping and the Navigable Waters Protection Rule Fact Sheet*, January 2020, https://www.epa.gov/sites/production/files/2020-01/documents/nwpr_fact_sheet_-_mapping.pdf. For example, they assert that "the NHD—even at high resolution—cannot differentiate between intermittent or ephemeral flow in most parts of the country," and that the NWI "does not contain information sufficient to evaluate whether those mapped wetlands meet the definition of 'adjacent wetlands' under previous regulations or under the final rule."

[161] Ibid.

data, the agencies found clear indicators of a substantial reduction in waters covered under the Navigable Waters Protection Rule compared to previous rules and practice, particularly in arid states.[162]

Regional Differences in Jurisdictional Changes

Because the status of ephemeral and intermittent waters has been a significant issue in successive rulemakings, states where such waters are common may experience greater changes in federal jurisdiction from rule to rule. The Corps, EPA, and observers generally agree that the Navigable Waters Protection Rule excluded more waters from federal jurisdiction in some regions of the United States than others based on differences in climate. The Arid West, for example, has many waterways that are dry for much of the year, but can experience high flows after storm events. Such waterways, under the Navigable Waters Protection Rule, would likely have been considered ephemeral and no longer under federal jurisdiction.[163] Other, wetter, regions of the United States may have had comparatively fewer waterbodies lose federal protection.[164]

Ability of States to Address Reduced Federal Jurisdiction

Another significant question with respect to the Navigable Waters Protection Rule, and likely with any future rulemaking, is the balance between federal jurisdiction and state and local actions. Some observers argue that whatever changes resulted from reduced federal jurisdiction under the Navigable Waters Protection Rule (as compared to other historical or potential definitions of WOTUS) could be addressed, at least in part, by state and local programs and actions. States' abilities to manage waters that are not WOTUS may vary for reasons such as current state laws and regulations as well as differing permitting authority among states.

Differing State Laws and Regulations

In the preamble to the Navigable Waters Protection Rule, EPA noted that nothing in the rule or the CWA prevents states from protecting nonjurisdictional waters through their own actions.[165] Critics of broad assertion of federal jurisdiction over water resources point out that many states have authorities to regulate waters of their state, often beyond the scope of federal jurisdiction.[166] Other observers argue that many states effectively adopt the scope of federal CWA jurisdiction as a factor that determines their own agencies' authority to regulate waters.[167] The Corps and EPA

[162] June 2021 Press Release.

[163] U.S. EPA and Department of the Army, *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States,"* January 23, 2020, p. 22, https://www.epa.gov/sites/production/files/2020-01/documents/rpa_-_nwpr_.pdf (hereinafter "Resource and Programmatic Assessment").

[164] Association of State Wetland Managers, *ASWM Insights on the Final WOTUS Rule: The 2020 Navigable Waters Protection Rule*, April 2020, p. 5, https://www.aswm.org/pdf_lib/aswm_insights_on_final_wotus_rule_final_5.7.20.pdf (hereinafter "ASWM Insights").

[165] Navigable Waters Protection Rule, p. 22334.

[166] U.S. EPA, "EPA and Army Deliver on President Trump's Promise to Issue the Navigable Waters Protection Rule - A New Definition of WOTUS," press release, January 23, 2020, https://www.epa.gov/newsreleases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-1. U.S. EPA, "More Widespread Support for EPA and Army's Navigable Waters Protection Rule—A New Definition of WOTUS," press release, January 24, 2020, https://www.epa.gov/newsreleases/more-widespread-support-epa-and-armys-navigable-waters-protection-rule-new-definition.

[167] Resource and Programmatic Assessment, pp. 42-46. See also ASWM Insights, p. 4. See also Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, May 2013, p. 1, https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf

compiled information on state authorities in developing the Navigable Waters Protection Rule. The agencies concluded that "approximately half or more of the states regulate at least some waters beyond the scope of federal CWA requirements,"[168] but that many states face some constraints in their current authority to fill gaps. For example:

- "There are some state laws that constrain the state's authority to regulate more broadly than the federal 'floor' set by the CWA in various respects."
- "Thirteen states have adopted laws that require their state regulations to parallel federal CWA regulations."
- "Some state laws limit the application of state regulations to certain industries, certain types of permits, or certain types of resources. Such requirements exist in six states."
- "Seven states have enacted requirements that no environmental state agencies can promulgate state regulations beyond what is required under federal regulations. These requirements include limits on geographic jurisdiction of state regulations to match CWA jurisdiction."
- "Twenty-four states have adopted laws that require extra steps or findings of benefits in order to impose state regulations beyond federal requirements."
- "Twenty-one states and the District of Columbia do not appear to have any laws that address state regulations outside the scope of CWA jurisdiction."[169]

The prevalence of constraints and absence of protections broader than federal requirements in many states indicate that, in these states, there would be at least some time in which the Navigable Waters Protection Rule would reduce protections for waters with no countervailing state authority to regulate those waters. State legislators have the ability to alter their statutes or enact additional protections, irrespective of whether a new rule issued by the Biden Administration changes the universe of waters that are considered WOTUS. Addressing the changes, however, would require time and resources to take on these responsibilities and to develop effective programs.[170]

Differing Permitting Authority

The potential impacts of changes in federal jurisdiction in states may also vary depending upon whether the state or a federal agency (i.e., EPA or the Corps) is the CWA permitting authority. Specifically, if a state already has a permitting program established, that state may be able to address any reductions in coverage more easily than a state that does not have such a program because it has already established the legal, logistical, human resource, and financial infrastructure for permit program administration.

The CWA authorizes states to assume administration of the two key permitting programs under the statute—National Pollutant Discharge Elimination System (NPDES) permits under CWA

(hereinafter "ELI State Constraints Report").

[168] Resource and Programmatic Assessment, p. 45.

[169] Resource and Programmatic Assessment, pp. 45-46.

[170] ASWM Insights, pp. 4-5. See also Letter from Allison Woodall, Association of Clean Water Administrators President, to Andrew Wheeler and R.D. James, April 15, 2019, https://www.acwa-us.org/documents/acwa-comments-on-revised-definition-of-waters-of-the-united-states-proposed-rule/, p. 6 (hereinafter "ACWA Comment Letter").

Section 402 and dredge and fill permits under CWA Section 404.[171] If states apply to EPA to administer either program and meet statutory criteria, then EPA must approve those states' assumption of their programs. Almost all states (with the exception of Massachusetts, New Hampshire, and New Mexico) have assumed administration of their CWA Section 402 NPDES permitting programs. In the three states that have not, EPA is the permitting authority. In contrast, three states (Florida, Michigan, and New Jersey) have assumed administration of their CWA Section 404 dredge and fill permitting programs. In the other 47 states, the Corps is the permitting authority.[172] When a state assumes administration of its CWA Section 404 permitting program, its administration applies only to *assumed waters*, while the Corps continues to administer the CWA for *retained waters*.[173]

According to the Association of State Wetland Managers, interest in state assumption of the Section 404 program increased following the *SWANCC* and *Rapanos* rulings, which narrowed federal protections for certain waters.[174] Many states have explored assumption, and some continue to pursue it.[175] Many have explored but ultimately not pursued assumption, citing barriers such as lack of funding to administer a state program, uncertainty over the extent of waters that can be assumed, and significant modifications to state regulatory programs that would be necessary.[176]

Programmatic Impacts

Changes to the scope of waters subject to federal jurisdiction under the CWA also affect the applicability of CWA requirements and programs to many waters and wetlands. Affected provisions and programs include water quality standards, impaired waters, and total maximum daily loads; water quality certifications; CWA permitting programs; and other CWA and non-CWA programs. With respect to the Navigable Waters Protection Rule, some of the potential programmatic impacts were highlighted in stakeholder responses, the rule's preamble, and the

[171] CWA §§402(b) and 404(g); 33 U.S.C. §§1342(b) and 1344(g).

[172] EPA approved Michigan's and New Jersey's requests to assume their CWA §404 permitting programs in 1984 and 1994, respectively. EPA approved Florida's request to assume its CWA §404 permitting program in 2020 (85 *Federal Register* 83553, December 22, 2020).

[173] Under CWA §404(g) the Corps retains responsibility for waters "which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto." EPA has recognized that the uncertainty over assumable waters needs clarification, has taken initial steps to revise existing CWA §404(g) regulations, and has included it on the agency's Spring 2021 Unified Regulatory Agenda. See U.S. Environmental Protection Agency, "Current Efforts Regarding Assumption under CWA Section 404," https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404; Office of Information and Regulatory Affairs, *Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions*, *EPA/Office of Water, Clean Water Act 404 Assumption Update Regulation*, RIN No. 2040-AF83.

[174] Leah Stetson and Jeanne Christie, *Expanding the States' Role in Implementing CWA §404 Assumption*, Association of State Wetland Managers, November 10, 2010, p. 2, https://www.aswm.org/pdf_lib/expanding_states_role_implementing_cwa_section_404_assumption_111810.pdf.

[175] Association of State Wetland Managers, *Status and Trends Report on State Wetland Programs in the United States*, 2015, p. 29, https://www.aswm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf. See also Association of State Wetland Managers, *Assumption Frequently Asked Questions—Fall 2020*, https://www.aswm.org/pdf_lib/assumption_faq.pdf.

[176] Ibid.

Economic Analysis and Resource and Programmatic Assessment the Corps and EPA developed for the final rule.[177]

Water Quality Standards, Impaired Waters, and Total Maximum Daily Load Programs (CWA Section 303)

CWA Section 303(c) requires states to adopt water quality standards for WOTUS.[178] They may also adopt standards for additional surface waters if their own state laws allow them to do so.[179] Water quality standards are the foundation for a number of CWA programs. They establish the water quality goals for waterbodies, including which designated uses the waterbody should support (e.g., recreation, fish consumption, public water supply) and the conditions in the water body necessary to support those uses (e.g., concentrations of pollutants).[180] States are required to review their water quality standards at least once every three years, and EPA is required to review and approve or disapprove any new or revised standards for WOTUS.[181]

To the extent that a definition of WOTUS narrows the scope of federal jurisdictional waters in comparison to prior regulations and practice, then states would not be required to maintain (or adopt new) water quality standards for excluded waters. States may or may not opt to continue to apply and enforce their water quality standards in such nonjurisdictional waters. If they decide to maintain or adopt water quality standards for nonjurisdictional waters, EPA would no longer be required to review them. As the Corps and EPA noted in the Navigable Waters Protection Rule Resource and Programmatic Assessment, "should they choose, states and tribes may apply standards under state or tribal law for waters that are not 'waters of the United States,' but they would not be in effect for CWA purposes."[182] In contrast, any new definition of WOTUS that broadens the scope of jurisdictional waters would require states to adopt water quality standards for those waters.

The definition of WOTUS is also relevant to the identification and development of requirements for waters that are not achieving water quality standards (also known as "impaired waters"). CWA Section 303(d) requires states to identify any impaired waters on a biannual basis.[183] This list of impaired waters is also known as the 303(d) list. CWA Section 303(d) also requires that, for any impaired waters, states establish total maximum daily loads (TMDLs) for pollutants that prevent or are expected to prevent the attainment of water quality standards. A TMDL, essentially a "pollution diet" for a water body, is the maximum amount of a pollutant that a water body can receive and still meet water quality standards, allocated among the pollutant's sources (including a margin of safety).[184]

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[177] Resource and Programmatic Assessment. See also EPA and Department of the Army, *Economic Analysis for the Navigable Waters Protection Rule: Definition of 'Waters of the United States,'* January 22, 2020, p. 59, https://www.epa.gov/sites/production/files/2020-01/documents/econ_analysis_-_nwpr.pdf (hereinafter "Economic Analysis").

[178] 33 U.S.C. §1313(c). "States" collectively refers to states, territories, and authorized tribes.

[179] CWA §510; 33 U.S.C. §1370.

[180] See CWA Section 303(c)(2)(A) for designated uses and criteria. Note that water quality standards also include an antidegradation policy, per CWA Sections 101(a) and 303(d)(4)(B). Also see EPA's implementing regulations at 40 C.F.R. §131.

[181] CWA §303(c); 33 U.S.C. §1313(c).

[182] Resource and Programmatic Assessment, p. 60.

[183] 33. U.S.C. §1313(d).

[184] 40 C.F.R. §130.2.

In responding to the proposed and final Navigable Waters Protection Rule, some observers expressed concern that the narrower WOTUS definition may exclude some impaired waters and waters with established TMDLs.[185] The Corps and EPA acknowledged that the change in scope could affect existing and future 303(d) lists and TDML restoration plans, noting that states might not assess nonjurisdictional waters and may identify fewer waters as impaired and therefore develop fewer TDMLs.[186] They further acknowledged that "this could result in reduced protection for aquatic ecosystems if other mechanisms for restoration are not available or utilized."[187] The Corps and EPA also noted that states may be better "able to focus limited resources on assessing and developing TMDLs for more priority waters that otherwise might be delayed due to the need to assess all federal waters within state borders. The result may be greater ecological restoration of high priority resources earlier."[188] To the extent that the Navigable Waters Protection Rule is replaced by the pre-2015 regulations or a broader definition of WOTUS, more waters will be subject to the protections afforded by inclusion on a 303(d) list, but states will again need to develop a greater number of TMDLs.

CWA Permitting Programs (CWA Sections 402 and 404)

CWA Section 301 prohibits the discharge of pollutants from any point source (i.e., a discrete conveyance, such as a pipe, ditch, etc.) to WOTUS without a permit.[189] For both of the CWA permitting programs—authorized under CWA Sections 402 and 404—the requirement for a permit is triggered when there is a discharge into a WOTUS. Consequently, the Navigable Waters Protection Rule reduced the scope of waters subject to CWA permitting.[190] However, the extent of the potential impacts of reduced federal jurisdiction on CWA permitting under CWA Sections 402 and 404 is not entirely certain and could vary across states based on how states address the changes (e.g., by modifying their regulatory programs). Further rulemaking on WOTUS may once again change the scope of waters subject to CWA permit requirements, though it is not yet certain how that scope would compare to the waters covered under prior regulatory definitions.

CWA Section 402 NPDES Permitting

Under CWA Section 402, the discharge of any pollutant from a point source into a WOTUS requires an NPDES permit.[191] A narrower WOTUS definition, therefore, would reduce the number of point-source discharges that require a permit. The Corps and EPA have stated that some existing or new NPDES permits may still be needed even if a water that was jurisdictional under prior regulations is no longer jurisdictional.[192] For example, under the Navigable Waters Protection Rule, discharges that travel through nonjurisdictional conveyances (such as an ephemeral stream), but reach WOTUS, would still have required a permit.[193] However, in such

[185] Corps and EPA, *The Navigable Waters Protection Rule—Public Comment Summary Document, Topic 11: Economic Analysis and Resource and Programmatic Assessment*, April 21, 2020, pp. 15, 43-46. https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574. See also ACWA Comment Letter, p. 7.

[186] Navigable Waters Protection Rule, p. 22333.

[187] Resource and Programmatic Assessment, p. 62.

[188] Ibid.

[189] 33 U.S.C. §1311.

[190] Navigable Waters Protection Rule, p. 22333.

[191] 33 U.S.C. §1342.

[192] Navigable Waters Protection Rule, p. 22333 and Resource and Programmatic Assessment, p. 79.

[193] Ibid.

cases, the permittee may have been able to request a modification to its permit to account for potential dilution of the pollutant that may have occurred before it reached jurisdictional waters.[194] In contrast, under any potential new definition of WOTUS that expands the scope of jurisdictional waters, NPDES permits would be required for discharges to any waters that become jurisdictional.

CWA Section 404 Dredge and Fill Permitting

Under CWA Section 404, the discharge of dredged or fill material into WOTUS, including wetlands, requires a Section 404 permit.[195] Such discharges may be associated with pipeline projects, water resource projects, mining projects, or other development. The Section 404 permitting process requires a permit applicant to demonstrate that they have taken steps to avoid impacts to wetlands, streams, and other aquatic resources; that potential impacts have been minimized; and that compensatory mitigation will be provided for all remaining unavoidable impacts.[196]

As with Section 402 NPDES permits, a broader definition of WOTUS would expand the scope of waters and wetlands that require Section 404 permits, and a narrower definition of WOTUS would reduce the scope. Accordingly, under the Navigable Waters Protection Rule, waters (including wetlands) that were previously considered jurisdictional, but no longer qualified as WOTUS, could be filled by developers and other project proponents without a Section 404 permit. In the Economic Analysis accompanying the Navigable Waters Protection Rule, the Corps and EPA acknowledged that absent any state or local programs to address such activities, developers or other project proponents might not take steps to avoid, minimize, or mitigate impacts in nonjurisdictional waters and wetlands.[197] As mentioned previously, in the Corps and EPA's press release announcing their intent to revise the definition of WOTUS, the agencies stated that they were "aware of 333 projects that would have required Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer do."[198]

In addition, stakeholders have observed that states considering the feasibility of assuming their CWA Section 404 permitting programs may have to adjust their analyses in light of any potential new definition of WOTUS. In a comment letter on the proposed Navigable Waters Protection Rule, the Association of Clean Water Agencies (ACWA) explained that "a narrowing of federal jurisdiction may impact [ACWA members'] evaluation of the efficiencies gained by assuming 404 programs as they may be assuming less waters."[199] This could ultimately impact the number of states that decide to pursue assumption of their CWA Section 404 programs.

Water Quality Certifications (CWA Section 401)

Changes to the definition of WOTUS also have an impact on the extent to which states and tribes may use CWA Section 401 water quality certifications to manage their waters. Under CWA Section 401, any applicant for a federal license or permit to conduct any activity that may result in any discharge into WOTUS shall provide the federal licensing or permitting agency a CWA

[194] Navigable Waters Protection Rule, p. 22333 and Economic Analysis, p. 59.

[195] 33 U.S.C. §1344.

[196] 40 C.F.R. § 230.

[197] Economic Analysis, p. 68.

[198] June 2021 Press Release.

[199] ACWA Comment Letter, p. 9.

Section 401 certification that the project will comply with applicable provisions of certain sections of the CWA, including state water quality standards.[200] CWA Section 401 provides states, certain tribes, and in certain circumstances, EPA (i.e., certifying authorities) the authority to grant, grant with conditions, deny, or waive certification of proposed federal licenses or permits that may result in a discharge into WOTUS. If a certifying authority denies certification, the federal licensing or permitting agency cannot issue the license or permit. If a certifying authority grants the certification with conditions, those conditions must become a term of the federal license or permit if one is issued. Consequently, some states view CWA Section 401 certification as a critical tool to manage and protect the quality of waters within their states.[201] In addition, some states rely on CWA Section 401 water quality certification procedures to protect wetlands in lieu of assuming CWA Section 404 permitting authority, recognizing that they have the ability to affect the federal permit and to exercise some regulatory control over wetlands without the expense of establishing independent state programs.[202]

The authority of states and other certifying authorities under CWA Section 401 directly depends upon whether a permit issued by a federal agency under Sections 402 or 404 is required for waters within the states. The narrower scope of WOTUS under the Navigable Waters Protection Rule (or any future rule that narrows the scope of WOTUS) would have reduced the number of federal permits required, thereby affecting how often states exercised their CWA Section 401 authority.[203] Under the Trump Administration, EPA published a final rule (the Section 401 Certification Rule) updating regulations on water quality certification on July 13, 2020.[204] The rule included numerous changes to prior regulation and practice that narrowed the authority of certifying authorities when acting on Section 401 certification requests. (For further discussion of the rule and related policy issues, see CRS Report R46615, *Clean Water Act Section 401: Overview and Recent Developments*, by Laura Gatz and Kate R. Bowers.)

When considered together, the Navigable Waters Protection Rule and the Section 401 Certification Rule would likely have considerably narrowed states' ability to use water quality certification to manage their waters, for example by imposing conditions on federal project permitting. In addition to revising the definition of WOTUS, however, the Biden Administration has announced its intent to reconsider and revise the Section 401 Certification Rule.[205] Accordingly, the interplay between the two sets of potential regulatory changes could have implications for the water quality certification process.

CWA Section 311

CWA Section 311 prohibits discharges of oil or hazardous substances in harmful quantities into or upon specified waters, including the navigable waters of the United States or adjoining

[200] 33 U.S.C. §1341.

[201] See, for example, Letter from Western Governors' Association, National Conference of State Legislatures, and National Association of Counties, et al. to Honorable John Barrasso and Honorable Tom Carper, November 18, 2019, https://www.acwa-us.org/wp-content/uploads/2019/11/Coalition-Letter-Clean-Water-Act-Section-401-Legislation-11-18-19.pdf.

[202] Association of State Wetland Managers, *Status and Trends Report on State Wetland Programs in the United States*, 2015, pp. 12-13, https://www.aswm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf.

[203] Navigable Waters Protection Rule, p. 22333. Economic Analysis, p. 29.

[204] EPA, "Clean Water Act Section 401 Certification Rule," 85 *Federal Register* 42210-42287, July 13, 2020.

[205] EPA, "Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule," 86 *Federal Register* 29541, June 2, 2021.

shorelines, or waters of the contiguous zone.[206] It also requires reporting spills of harmful quantities to the federal government and authorizes the federal government to respond to and enforce penalties for discharges into waters subject to CWA jurisdiction. Implementation of the CWA Section 311 program cannot be delegated to states or tribes, so the scope of the program is directly tied to the scope of WOTUS.

A discussion of CWA Section 311 and the Oil Pollution Act's regulatory scheme is outside of the scope of this report. However, broadly speaking, a reduction in jurisdictional waters under the Navigable Waters Protection Rule, or any other potentially narrowed definition of WOTUS, may reduce the applicability of the CWA oil spill prevention, preparedness, and response programs and the associated Oil Spill Liability Trust Fund. For example, requirements to develop and implement certain spill prevention and preparedness plans depend on whether a facility poses a reasonable potential for a discharge to reach a water subject to CWA jurisdiction.[207] If waters that could be affected by a spill from a facility are no longer considered jurisdictional under a narrowed definition of WOTUS, prevention and preparedness plans may no longer be required.[208] In addition, the Oil Spill Liability Trust Fund—which is available to reimburse costs of assessing and responding to oil spills in waters subject to CWA jurisdiction—is not available for waters outside CWA jurisdiction.[209] Therefore, costs incurred by states or tribes to clean up spills in waters no longer considered jurisdictional, and costs related to business impacts associated with those spills, might not be reimbursed, and the responsible parties might not be subject to federal penalties.[210] In contrast, under any potential new definition of WOTUS that expands the scope of jurisdictional waters, the CWA Section 311 program would be applicable to those additional jurisdictional waters.

CWA Financial Assistance Programs

EPA administers a number of financial assistance programs under the CWA, including the Section 106 Water Pollution Control Grant Program, the Section 319 Nonpoint Source Management Grant Program, the Section 320 National Estuary Program, and various grant programs authorized under CWA Section 104(b)(3). Some stakeholders have expressed concern about the potential impacts of changes in CWA jurisdiction on various CWA financial assistance programs.[211] In its Resource and Programmatic Assessment accompanying the Navigable Waters Protection Rule, however, the Corps and EPA concluded that they did not anticipate that the final rule would affect EPA's current CWA financial assistance programs, as the scope of these grant programs is not linked to CWA jurisdiction.[212] For example, funds from some of these programs have long supported projects and efforts for waters that are not jurisdictional, such as groundwater.

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[206] 33 U.S.C. §1321(b)(3) prohibits discharges of oil or hazardous substances "(i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976."

[207] Resource and Programmatic Assessment, p. 70.

[208] Ibid.

[209] Economic Analysis, p. 32; Resource and Programmatic Assessment, p. 71.

[210] Ibid.

[211] Navigable Waters Protection Rule, p. 22334.

[212] Navigable Waters Protection Rule, p. 22334; Resource and Programmatic Assessment, pp. 87-90.

CWA Enforcement

When a discharge of pollutants into WOTUS occurs without a permit (or other authorization or exemption) or in violation of a permit, the CWA provides for administrative, civil, and criminal enforcement actions.[213] The enforcement authorities for each of the CWA permitting programs depend on whether a state has assumed the permitting. Both states and EPA are authorized to enforce NPDES permits in the 47 states that have assumed administration of their NPDES programs. In the three states where EPA is the permitting authority, EPA is authorized to enforce those permits. In the three states that have assumed their Section 404 permitting programs, the state, the Corps, and EPA are authorized to enforce permits. In the 47 states that have not assumed their Section 404 programs, the CWA authorizes the Corps and EPA to enforce permits.

Waters that are no longer considered WOTUS (whether under the Navigable Waters Protection Rule or any future rule that narrows the scope of WOTUS) would fall outside of the scope of the Corps and EPA's enforcement authorities under the CWA.[214] If subsequent revisions expand the definition of WOTUS, any enforcement actions would likely be based on the rule that was in effect at the time of the discharge. However, as EPA and the Corps noted in the Navigable Waters Protection Rule Resource and Programmatic Assessment, "nothing in the revised definition of 'waters of the United States' affects the ability of states and tribes to apply and enforce independent authorities over aquatic resources under state or tribal law."[215] As discussed in the permitting section above, the extent to which states are able or decide to permit waters that fall outside the scope of WOTUS (and enforce those permits) may vary across states.

Other Potential Program Impacts

In addition to these CWA programs, the Navigable Waters Protection Rule Resource and Programmatic Assessment also describes potential impacts on other EPA programs—including the Safe Drinking Water Act and the Resource Conservation and Recovery Act—as well as other federal programs, such as the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act.[216] These programs, and impacts on them from either the Navigable Waters Protection Rule or a revised definition of WOTUS, are outside the scope of this report.

Congressional Interest and Options

Considering the numerous court rulings, ongoing legal challenges, and issues that successive administrations have faced in defining the scope of WOTUS, some stakeholders have urged Congress to more specifically define the term through amendments to the CWA. Others argue that the Corps and EPA, with their specific knowledge and expertise, are in the best position to determine the scope of the term. Moving forward, Congress may be interested in overseeing the Biden Administration's efforts to review and potentially revise the definition, or introducing legislation that provides a definition of the term or expresses a clearer intent as to how Congress believes the term should be defined. In the 117th and 116th Congresses, some committees have held hearings and some Members introduced legislation related to the scope of WOTUS.

[213] CWA enforcement actions are authorized under CWA §§309, 311, and 404.

[214] Resource and Programmatic Assessment, p. 92

[215] Ibid.

[216] Resource and Programmatic Assessment, pp. 93-101.

117th Congress

In the 117th Congress, the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, have held hearings which included discussion of the Biden Administration's plans to develop a new definition of WOTUS.[217] While some Members have criticized the Corps and EPA's stated intent to rescind the Navigable Waters Protection Rule, others have criticized the agencies for allowing the rule to remain in effect. In addition, some Members have introduced free-standing legislation related to the definition of WOTUS. Two of these bills would enact the Navigable Waters Protection Rule's definition of WOTUS into law. Other proposed legislation would amend the CWA to add a narrower definition of *navigable waters*. Because WOTUS is a statutory phrase that defines *navigable waters*, a different definition of the latter term could obviate the need to interpret the former, though it could introduce new interpretive questions.

- H.R. 2660, the "Withstanding Attempts to Encroach on our Resources (WATER) Act," would amend the CWA to codify the definition of WOTUS as revised under the Navigable Waters Protection Rule.
- H.Res. 318 and S.Res. 17 would express the sense of the House and Senate, respectively, that clean water is a national priority and that the Navigable Waters Protection Rule should not be withdrawn or vacated.
- H.R. 4570 and S. 2168, identical bills titled the "Define WOTUS Act of 2021," would amend the CWA to change the definition of *navigable waters*. The language, as introduced, would narrow the scope of waters subject to CWA jurisdiction in comparison to the Navigable Waters Protection Rule. It would also amend the CWA to make changes to the Corps process for making jurisdictional determinations.[218]
- S.Con.Res. 5, a concurrent budget resolution passed by the Senate and adopted by the House, included a provision that would allow for adjustments related to preserving the continued implementation of the categories of jurisdictional and excluded waters in the Navigable Waters Protection Rule. The amendment that added the provision (S.Amdt. 655) was agreed to by yea-nay vote (51-49).
- S. 2517, the "Defense of Environment and Property Act of 2021," would amend the CWA to change the definition of *navigable waters*. The language, as introduced, would narrow the scope of waters subject to CWA jurisdiction in comparison to the Navigable Waters Protection Rule. It would also prohibit the use of a significant nexus test; nullify the 1986 Corps Rule, 2008 Guidance, and any subsequent regulation or guidance that defines or interprets the terms *navigable waters* or WOTUS; and prohibit the Corps and EPA from promulgating any rules or issuing any guidance that expands or interprets the definition of *navigable waters* unless authorized by Congress. It would also

[217] U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *President Biden's Fiscal Year 2022 Budget Request: Agency Policies and Perspectives (Part I)*, 117th Cong., 1st sess., June 24, 2021; U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *President Biden's Fiscal Year 2022 Budget Request: Agency Policies and Perspectives (Part II)*, 117th Cong., 1st sess., July 14, 2021. U.S. Congress, Senate Committee on Environment and Public Works, *Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency*, 117th Cong., 1st sess., February 3, 2021, S.Hrg. 117-1.

[218] This bill was previously introduced in the 116th Congress.

amend the CWA to make changes to the Corps process for making jurisdictional determinations.[219]

- S. 2567, the "Navigable Waters Protection Act of 2021," would enact into law the Navigable Waters Protection Rule's definition of the term *waters of the United States*.

116th Congress

Multiple hearings in the 116th Congress also discussed WOTUS.[220] During these hearings, some Members expressed support for the Trump Administration's efforts to more clearly and narrowly define WOTUS, while others opposed its efforts and expressed concern about the loss of protection for many waterways across the nation. In addition, some Members introduced free-standing legislation related to the definition of WOTUS. One of these bills would have prohibited implementation of the Navigable Waters Protection Rule and required the Corps and EPA to promulgate a new regulation. Other proposed legislation would have, among other things, repealed or nullified the 2015 Clean Water Rule and amended the CWA to add a narrower definition of *navigable waters*.

- H.R. 6745, the "Clean Water for All Act," would have nullified the Navigable Waters Protection Rule and prohibited the Corps and EPA from implementing or enforcing it. It would have also required the Corps and EPA to promulgate a regulation defining WOTUS within two years, subject to certain requirements laid out in the bill.
- H.R. 667, the "Regulatory Certainty for Navigable Waters Act," would have repealed the 2015 Clean Water Rule and amended the CWA by changing the definition of *navigable waters*. The language, as introduced, would have narrowed the scope of waters subject to CWA jurisdiction in comparison to the 2015 Clean Water Rule. It would have also amended the CWA to make changes to the Corps process for making jurisdictional determinations (i.e., determinations as to whether a water body is jurisdictional under the CWA).
- H.R. 2287, the "Federal Regulatory Certainty for Water Act," would have nullified the 2015 Clean Water Rule and amended the CWA by changing the definition of *navigable waters*. The language, as proposed, would have narrowed the scope of waters subject to CWA jurisdiction in comparison to the 2015 Clean Water Rule.

[219] This bill was previously introduced in the 116th Congress.

[220] U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *The Administration's Priorities and Policy Initiatives Under the Clean Water Act*, 116th Cong., 1st sess., September 18, 2019, H.Hrg. 116-31. U.S. Congress, Senate Committee on Environment and Public Works, *Hearing on the Nomination of Andrew Wheeler to be Administrator of the Environmental Protection Agency*, 116th Cong., 1st sess., January 16, 2019, S.Hrg. 116-9. U.S. Congress, Senate Committee on Environment and Public Works, *A Review of Waters of the U.S. Regulations: Their Impact on States and the American People*, 116th Cong., 1st sess., June 12, 2019, S.Hrg. 116-45. U.S. Congress, Senate Committee on Environment and Public Works, *Oversight of the Environmental Protection Agency*, 116th Cong., 2nd sess., May 20, 2020, S.Hrg. 116-391. U.S. Congress, Senate Committee on Environment and Public Works, *Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act*, 116th Cong., 2nd sess., September 16, 2020.

Author Information

Laura Gatz
Analyst in Environmental Policy

Kate R. Bowers
Legislative Attorney

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