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Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act

Updated February 23, 2023

Congressional Research Service
https://crsreports.congress.gov
R47408

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R47408

February 23, 2023

Kate R. Bowers
Legislative Attorney

Laura Gatz
Specialist in Environmental Policy

Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act

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. (These regulations, as further interpreted by the courts and agencies are often referred to as the *pre-2015 rules*.) The agencies supplemented these regulations with guidance, which they developed in response to Supreme Court rulings related to the scope of the federal government's ability to regulate WOTUS. 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 and Members of Congress requested a formal rulemaking to revise existing regulations.

Successive presidential administrations have engaged in efforts to define WOTUS in regulation. Both the Obama Administration's 2015 Clean Water Rule and the Trump Administration's 2020 Navigable Waters Protection Rule prompted strong reactions from a variety of stakeholders, with numerous groups filing lawsuits challenging the rules. On January 18, 2023, the Corps and EPA, under the Biden Administration, issued a new rule (the 2023 WOTUS Rule) redefining WOTUS in the agencies' regulations. The Corps and EPA have asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of Supreme Court decisions, science, and the agencies' experience and technical expertise. In general, the rule defines WOTUS more narrowly than the Clean Water Rule and more broadly than the Navigable Waters Protection Rule.

While some stakeholders have expressed support for the 2023 WOTUS Rule, others believe that it defines WOTUS too broadly, does not provide regulatory clarity, and should not have been issued prior to the resolution of a pending Supreme Court case addressing aspects of the scope of WOTUS. The new rule is the subject of stakeholder commentary, congressional action, and litigation.

Some stakeholders have urged Congress to take actions regarding regulation of WOTUS. In the 118th Congress, Members have introduced a joint resolution to revoke the 2023 WOTUS Rule through the Congressional Review Act. Members may take action to specifically define the term through amendments to the CWA, introducing legislation, for example, to narrow the term's scope, as was done in the 117th Congress. Committees in the 117th Congress and the 116th Congress held multiple oversight hearings to assess the impacts of rules at that time, and the 118th Congress may conduct similar oversight.

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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 Clean Water Act protects "navigable waters," defined in the statute as "waters of the United States, including the territorial seas."[2] The CWA does not define "waters of the United States" (WOTUS). The scope of the term determines which waters are federally regulated, and thus which waters are subject to CWA requirements and programs. These include CWA permitting requirements; water quality certifications; water quality standards, impaired waters, and total maximum daily loads; and other CWA and non-CWA programs.

Successive administrations have struggled to interpret the term *waters of the United States* for the purpose of implementing various requirements of the CWA. Prior to the Biden Administration, executive branch efforts to define WOTUS administratively included regulations promulgated by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) in the 1980s and supplemented with interpretive guidance developed in response to Supreme Court rulings; the 2015 Clean Water Rule; and the 2020 Navigable Waters Protection Rule.[3] The agencies' efforts to define WOTUS in regulation during both the Obama and Trump Administrations were controversial and led to 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.[4]

On January 18, 2023, the Corps and EPA published a new rule (the 2023 WOTUS Rule) revising the definition of WOTUS.[5] The agencies have asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of Supreme Court decisions, science, and the agencies' experience and technical expertise.[6]

Some stakeholders have expressed support for the 2023 WOTUS Rule, in some cases observing that the rule takes a middle road between the Clean Water Rule and the Navigable Waters Protection Rule.[7] Others have expressed opposition to the 2023 WOTUS Rule, arguing that it does not provide regulatory clarity, is overly broad, and that the Corps and EPA should have delayed issuing a rule pending the resolution of a Supreme Court case addressing aspects of the scope of WOTUS. The new rule is scheduled to take effect on March 20, 2023, though it is

[1] 33 U.S.C. § 1251 *et seq.*

[2] 33 U.S.C. § 1362(7).

[3] 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"); 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").

[4] Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021).

[5] Revised Definition of "Waters of the United States," 88 *Federal Register* 3004, Jan. 18, 2023 (hereinafter "2023 WOTUS Rule"). The final rule was published on Jan. 18, 2023. The agencies released a pre-publication version of the rule on Dec. 30, 2022.

[6] 2023 WOTUS Rule, p. 3019. See also Corps and EPA, *Final Rule: Revised Definition of 'Waters of the United States' Fact Sheet*, Dec. 2022, https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf (hereinafter "2022 WOTUS Fact Sheet").

[7] See, for example, David LaRoss, "Touting 'Durable' Approach, EPA Adopts Dual Tests in Revised WOTUS Rule," *InsideEPA.com*, Dec. 30, 2022.

already the subject of litigation. Additionally, Members have introduced a joint resolution disapproving the rule under the Congressional Review Act.

This report addresses frequently asked questions about WOTUS and the 2023 WOTUS Rule, including actions taken by prior administrations, the contents of the new rule, stakeholder responses and litigation, and options for Congress.

What Actions Have Previous Administrations Taken to Define WOTUS?

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.[8] The agencies have supplemented these regulations with interpretive guidance developed in response to Supreme Court rulings related to the scope of the federal government's ability to regulate WOTUS.[9]

One such Supreme Court case remains particularly relevant to the most recent efforts to redefine WOTUS. In *Rapanos v. United States*, the Court considered the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters.[10] 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, the decision resulted in two alternative tests for evaluating jurisdictional waters: a "relatively permanent" test set forth by a four-Justice plurality in an opinion authored by Justice Antonin Scalia, and a "significant nexus" test proposed by Justice Anthony Kennedy in a concurring opinion.

[8] Army Corps of Engineers, "Final Rule for Regulatory Programs of the Corps of Engineers," 51 *Federal Register* 41206, Nov. 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).

[9] Army Corps of Engineers and EPA, "Appendix A, Joint Memorandum," 68 *Federal Register* 1995, Jan. 15, 2003; 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, Dec. 2, 2008 (hereinafter "2008 Guidance").

[10] 547 U.S. 715 (2006).

Rapanos and the Relatively Permanent and Significant Nexus Tests

The Plurality's "Relatively Permanent" Test: Writing for a four-Justice plurality, Justice Scalia wrote that the word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes.[11] Wetlands could be included only when they have a "continuous surface connection" to such waters.[12]

Justice Kennedy's "Significant Nexus" Test: In a concurring opinion joined by no other Justice, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a "significant nexus" to traditionally navigable waters based on whether the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.[13]

In response to the rulings, the agencies developed guidance to help clarify how EPA and Corps offices should implement the Court's decisions. In particular, the agencies expressed the view that waters meeting *either* the relatively permanent standard articulated by Justice Scalia, *or* the significant nexus standard articulated by Justice Kennedy, were subject to federal jurisdiction under the act.[14] 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] Diverse stakeholders—including Members of Congress, states, the regulated community, and nongovernmental organizations—requested a formal rulemaking to revise the existing rules.[16]

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.[17] The Clean Water Rule retained aspects of the agencies' earlier guidance and also incorporated new features, including a new definition of tributaries and definitions and criteria related to adjacency.[18]

Some stakeholders and observers viewed the Clean Water Rule as an expansion of CWA jurisdiction, while others argued that it excluded too many waters from federal jurisdiction.[19] Numerous parties challenged the Clean Water Rule, and some district courts issued preliminary injunctions temporarily barring the Clean Water Rule from taking effect in certain states.[20] Two courts also remanded the rule to the Corps and EPA, concluding that it violated the

[11] Id. at 739.

[12] Id. at 742.

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

[14] 2008 Guidance; see also *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

[15] 2015 Clean Water Rule, p. 37056.

[16] 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).

[17] 2015 Clean Water Rule.

[18] 2015 Clean Water Rule, pp. 37057-37059, 37105-37106.

[19] See, for example, Carolina Bolado, "Fla., Others Sue EPA, Corps Over Clean Water Act Expansion," *Law360*, June 30, 2015; 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.

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

Administrative Procedure Act (APA) and exceeded the agencies' statutory authority under the CWA.[21] As a result, until its rescission, the Clean Water Rule was in effect in a patchwork of states. In states that were subject to a preliminary injunction or an order remanding the rule to the Corps and EPA, the pre-2015 regulatory framework applied.

2020 Navigable Waters Protection Rule

The Trump Administration described the Clean Water Rule as an example of federal "overreach," and the Corps and EPA engaged in a two-step process to rescind and revise it.[22] In Step One, the Corps and EPA rescinded the Clean Water Rule and recodified the pre-2015 regulations.[23] 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. In April 2020, the Corps and EPA published a final Step Two Rule to redefine WOTUS, titled the Navigable Waters Protection Rule.[24] The rule went into effect on June 22, 2020, replacing the Step One Rule.

Overall, the Navigable Waters Protection Rule narrowed the scope of waters and wetlands that were considered WOTUS (and were therefore under federal jurisdiction) compared to both the Clean Water Rule and the pre-2015 rules. As with the Clean Water Rule, the Navigable Waters Protection Rule prompted a range of reactions from a variety of stakeholders and resulted in many lawsuits around the country.

President Biden signaled interest in reconsidering the Navigable Waters Protection Rule immediately upon taking office.[25] After announcing in June 2021 that they intended to revise the definition of WOTUS again, the Corps and EPA asked courts where legal challenges to the Navigable Waters Protection Rule were pending to remand the rule while they developed a new regulation.[26]

On August 30, 2021, the U.S. District Court for the District of Arizona granted the agencies' request for voluntary remand, but also vacated the rule.[27] 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

[21] Georgia v. Wheeler, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); Texas v. EPA, 389 F. Supp. 3d 497 (S.D. Tex. 2019). In this context, to "remand" means to return the rule to the agencies to reconsider possible errors or defects in their action. A court order that remands a rule may or may not render the rule unenforceable during any further proceedings.

[22] 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.

[23] Army Corps of Engineers and EPA, "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 84 *Federal Register* 56626, Oct. 22, 2019.

[24] 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.

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

[26] 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"); see also, e.g., Motion for Remand Without Vacatur, Conservation Law Found. v. EPA, No. 1:20-cv-10820 (D. Mass. June 6, 2021), ECF No. 112.

[27] Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949 (D. Ariz. 2021). One other court subsequently vacated the Navigable Waters Protection Rule, adopting similar reasoning to the *Pascua Yaqui* court. Memorandum Opinion and Order, Navajo Nation v. Regan, No. 2:20-cv-00602 (D.N.M. Sept. 27, 2021), ECF No. 43. In this context, to "vacate" the rule means to declare it invalid, as if the rule had never been in effect.

States had identified concerns with the rule that involved fundamental, substantive, and incurable flaws. In response to the order, 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.[28]

How Does the 2023 WOTUS Rule Define WOTUS?

The Corps and EPA have asserted that their intent in promulgating the 2023 WOTUS Rule was to redefine WOTUS in a durable regulation, updating the pre-2015 rules to reflect consideration of Supreme Court decisions, science, and the agencies' experience and technical expertise.[29] Overall, the definition of WOTUS in the 2023 WOTUS Rule is narrower in scope than the Clean Water Rule and broader than the Navigable Waters Protection Rule.

The 2023 WOTUS Rule is divided into three parts: jurisdictional waters (WOTUS), exclusions, and definitions. These parts are summarized below, and compared to the pre-2015 rules and guidance.

Jurisdictional Waters (WOTUS)

The 2023 WOTUS Rule includes seven WOTUS categories (**Table 1**).

Table 1. Jurisdictional Waters (WOTUS) Under the 2023 WOTUS Rule

Category of WOTUS	Description	Regulatory Text Paragraph
Traditional Navigable Waters	Waters, such as large rivers and lakes, which are, were, or could be used in interstate or foreign commerce, including waters affected by tides.	(a)(1)
Territorial Seas	The territorial seas are the belt of the seas extending three miles out from the coast.	(a)(1)
Interstate Waters	Waters, such as rivers, lakes, streams, or wetlands that flow across or form part of state boundaries.	(a)(1)
Impoundments of Jurisdictional Waters	Impounded waters created in or from jurisdictional waters, whether natural (e.g., beaver ponds) or artificial (e.g., reservoirs).	(a)(2)
Tributaries	Waters such as branches of creeks, streams, rivers, lakes, ponds, ditches, and impoundments that flow into traditional navigable waters, the territorial seas, interstate waters, or impoundments of jurisdictional waters. Tributaries are WOTUS if they meet either the relatively permanent standard or the significant nexus standard as described further in the 2023 WOTUS Rule.	(a)(3)

[28] See EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," Dec. 30, 2022, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

[29] 2023 WOTUS Rule, p. 3019; and 2022 WOTUS Fact Sheet.

Category of WOTUS	Description	Regulatory Text Paragraph
Adjacent Wetlands	Wetlands that are (1) adjacent to a traditional navigable water, the territorial seas, or an interstate water; (2) adjacent and with a continuous surface connection to either relatively permanent jurisdictional impoundments or jurisdictional tributaries that meet the relatively permanent standard; or (3) wetlands adjacent to jurisdictional impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard. Wetlands, defined in the rule, generally include swamps, marshes, bogs, and similar areas. Adjacent is defined in the rule to mean "bordering, contiguous, or neighboring." The definition also specifies that wetlands separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."	(a)(4)
"Additional waters"—intrastate lakes and ponds, streams, or wetlands	Lakes, ponds, streams, or wetlands that do not fall under one of the other WOTUS categories. Such waters are jurisdictional if they meet either the relatively permanent or significant nexus standard.	(a)(5)

Sources: CRS analysis; 2023 WOTUS Rule; 2022 WOTUS Fact Sheet.

Traditional Navigable Waters, the Territorial Seas and Interstate Waters (Paragraph (a)(1) Waters)

The 2023 WOTUS Rule retains three categories without changes to the text or substance from pre-2015 regulations.[30] These include the traditional navigable waters, the territorial seas, and interstate waters. However, the agencies restructured the rule to streamline the regulatory text, and combined these three still-separate categories under one paragraph (i.e., (a)(1) waters) because, as the agencies explain in the rule's preamble, the jurisdictional status of other categories of waters relies on their connection to waters from one of these three categories.[31]

Impoundments of Jurisdictional Waters

The 2023 WOTUS Rule also retains the impoundments of jurisdictional waters category with one change from the pre-2015 regulations.[32] The pre-2015 regulations included impoundments of any WOTUS, but the 2023 WOTUS Rule would exclude impoundments of waters determined to be jurisdictional under paragraph (a)(5), which the Corps and EPA in their fact sheet refer to as "additional waters."[33] These "additional waters" are a subset of what was previously referred to as the "other waters" category. (See further discussion on "additional waters" below.)

Tributaries, Adjacent Wetlands, and "Additional Waters"

The remaining three categories—tributaries, adjacent wetlands, and "additional waters"—reflect the definition of WOTUS from pre-2015 regulations, but include changes that the agencies assert

[30] 2023 WOTUS Rule, p. 3068.

[31] Ibid.

[32] 2023 WOTUS Rule, pp. 3075-3076.

[33] 2023 WOTUS Rule, p. 3066; and 2022 WOTUS Fact Sheet, p. 2. Note that impoundments of (a)(5) waters may still be determined to be jurisdictional if they meet the requirements of another category of WOTUS.

reflect Supreme Court precedent, science, and their technical expertise.[34] For example, the 2023 WOTUS Rule clarifies that the waters in these three categories may meet either the relatively permanent standard or the significant nexus standard for purposes of determining jurisdiction.[35] The Corps and EPA explained that this aspect of the 2023 WOTUS Rule is not an application or interpretation of the multiple opinions in *Rapanos*.[36] Instead, these standards are contained in the 2023 WOTUS Rule text and are informed by, but separate from, the two tests identified by the Supreme Court. In addition, the agencies made certain changes to each of the categories that constrain which waters are jurisdictional, in comparison to the pre-2015 regulations.

- **Tributaries**: A tributary is considered a WOTUS under the 2023 WOTUS Rule if it is a tributary of a traditional navigable water, the territorial seas, an interstate water, or an impoundment of a jurisdictional water and also meets either the relatively permanent or significant nexus standard.[37]

  As compared to the pre-2015 regulations, the 2023 WOTUS Rule adds the territorial seas to the list of waters to which a water may be a tributary. The agencies note that, in practice, this is not a significant change as most tributaries will reach a traditional navigable water before they reach the territorial seas.[38]

  The 2023 WOTUS Rule also deletes the "additional waters" category from the list of waters to which a water may be a tributary.[39] The pre-2015 regulations included the comparable "other waters" category on the list, and the "other waters" category itself was broader, as discussed below.[40]

  Similar to the pre-2015 regulations, the 2023 WOTUS rule does not contain a definition of "tributary."[41] In addition, consistent with the pre-2015 regulations, the 2023 WOTUS rule does not include or exclude tributaries as WOTUS based on their flow regime (i.e., meaning whether they flow year-round, seasonally, or only in response to precipitation events).[42]

[34] 2023 WOTUS Rule, pp. 3005-3006; and 2022 WOTUS Fact Sheet.

[35] Ibid.

[36] 2023 WOTUS Rule, p. 3022.

[37] 2023 WOTUS Rule, p. 3142.

[38] 2023 WOTUS Rule, pp. 3079-3080.

[39] Ibid.

[40] 1986 Corps Rule, p. 41250.

[41] 2023 WOTUS Rule, pp. 3080-3081. Both the Clean Water Rule and the Navigable Waters Protection Rule included a definition of "tributary." In the preamble to the 2023 WOTUS Rule, the agencies concluded that a definition was not required because the agencies have decades of experience implementing the 1986 regulations, which also did not include a definition. Further, the agencies assert that they "articulate and explain the agencies' well-established interpretation and practices for identifying tributaries" in the preamble.

[42] 2023 WOTUS Rule, pp. 3080-3081. The rule's preamble clarifies that "a tributary for purposes of this rule includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water." Note that the Navigable Waters Protection Rule's definition required that a tributary be *perennial* (i.e., flow year-round) or *intermittent* (i.e., flow continuously only during certain times of the year, such as seasonally) and excluded *ephemeral* streams (i.e., those that flow only in response to precipitation events). The Clean Water Rule's definition provided that a tributary could be perennial, intermittent, or ephemeral as long as other criteria in the definition were met.

- **Adjacent wetlands:** Under the 2023 WOTUS Rule, adjacent wetlands are considered WOTUS if (1) they are adjacent to traditional navigable waters, interstate waters, or the territorial seas; (2) they are adjacent to and with a continuous surface connection to jurisdictional impoundments or tributaries that meet the relatively permanent standard; or (3) they are adjacent to jurisdictional impoundments or tributaries and meet the significant nexus standard.[43] The pre-2015 regulations more broadly included wetlands adjacent to waters in any of the WOTUS categories, other than wetlands themselves.[44] Thus, in comparison to the pre-2015 regulations, the 2023 WOTUS Rule requires an additional demonstration for wetlands adjacent to waters that are not (a)(1) waters, that the wetlands have a continuous surface connection to a relatively permanent water or a significant nexus to an (a)(1) water.[45]
- **"Additional waters":** Under the 2023 WOTUS Rule, intrastate lakes, ponds, streams, or wetlands not identified in the other WOTUS categories similarly must meet either the relatively permanent standard or the significant nexus standard.[46] The agencies clarify that this category is substantially narrower than the non-exclusive list of "other waters" that was included under the pre-2015 regulations.[47] The agencies also replaced the broad Commerce Clause basis for jurisdiction from the pre-2015 regulations with the relatively permanent and significant nexus standards.[48]

Exclusions

The 2023 WOTUS Rule includes eight exclusions from the definition of WOTUS.[49] Some are long-standing exclusions for prior converted cropland and waste treatment systems that were included in pre-2015 regulatory text. Others exclude features that were generally considered non-jurisdictional under the pre-2015 regime, but were listed as such in preamble language and guidance rather than the regulatory text.[50] Furthermore, these eight features were excluded in each of the subsequent rules defining WOTUS (the Clean Water Rule and the Navigable Waters Protection Rule), so the exclusions of the 2023 WOTUS Rule do not substantially change the scope of federal jurisdiction.[51] The exclusions include

- **Waste treatment systems**, including treatment ponds or lagoons designed to meet the requirements of the CWA;
- **Prior converted cropland** (see discussion below);
- **Ditches** (including roadside ditches), excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

[43] 2023 WOTUS Rule, p. 3142.

[44] 1986 Corps Rule, p. 41250.

[45] 2023 WOTUS Rule, pp. 3090, 3142.

[46] 2023 WOTUS Rule, p. 3142.

[47] 2023 WOTUS Rule, p. 3097.

[48] Ibid. The pre-2015 regulatory framework included as jurisdictional waters "the use, degradation, or destruction of which could affect interstate or foreign commerce." 1986 Corps Rule, p. 41250.

[49] 2023 WOTUS Rule, pp. 3066-3067 and 3142-3143.

[50] Ibid.

[51] 2023 WOTUS Rule, p. 3103. See also 2015 Clean Water Rule, p. 37118; 2020 Navigable Waters Protection Rule, p. 22340. Note these exclusions were either explicitly listed, or were excluded under a broader exclusion category.

- **Artificially irrigated areas** that would revert to dry land if the irrigation ceased;
- **Artificial lakes or ponds** created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- **Artificial reflecting pools or swimming pools or other small ornamental bodies of water** created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- **Waterfilled depressions** created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction is abandoned and the resulting body of water meets the definition of WOTUS; and
- **Swales and erosional features** (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Regarding prior converted cropland, in the 2023 WOTUS Rule, the agencies repromulgated the pre-2015 regulatory exclusion, but also made certain changes to the regulatory text in what the agencies described as an effort to improve clarity and consistency with the implementation by the U.S. Department of Agriculture (USDA) of the Food Security Act of 1985, as amended.[52] The Food Security Act includes a provision (the "Swampbuster" exception) which requires USDA to make determinations about whether wetland areas qualify as prior converted cropland.[53] The new regulatory text in the 2023 WOTUS Rule specifies that prior converted cropland designated by USDA is excluded. The regulatory text also clarifies that the exclusion would cease upon a change of use, meaning the area is no longer available for the production of agricultural commodities.[54] This change aligns the WOTUS regulatory exclusion with the Swampbuster exception for prior converted cropland.[55]

Definitions

The 2023 WOTUS Rule includes six definitions. Five of the six definitions are unchanged from the pre-2015 regulations, including the definitions for "wetlands," "adjacent," "high tide line," "ordinary high water mark," and "tidal water."[56]

The 2023 WOTUS Rule newly defines the term "significantly affect," for purposes of determining whether a water meets the significant nexus standard, to mean "a material influence on the chemical, physical, or biological integrity" of an (a)(1) water (i.e., traditional navigable waters, the territorial seas, or interstate waters).[57] The definition also identifies functions to be assessed and factors to be considered in determining whether waters, either alone or in combination with similarly situated waters in the region, significantly affect an (a)(1) water.[58]

[52] 2023 WOTUS Rule, pp. 3105-3107.

[53] See CRS In Focus IF11136, *Prior Converted Cropland Under the Clean Water Act*, by Laura Gatz and Megan Stubbs for more information.

[54] 2023 WOTUS Rule, p. 3142.

[55] 2023 WOTUS Rule, pp. 3105-3107.

[56] 2023 WOTUS Rule, pp. 3067, 3143.

[57] Ibid.

[58] Ibid. Functions, as listed in the rule, include contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature in paragraph (a)(1) waters; or provision of habitat and food resources for aquatic species in

Which Rule Is in Effect Now?

The 2023 WOTUS Rule is scheduled to take effect on March 20, 2023. Until the 2023 WOTUS Rule takes effect, the pre-2015 regulatory framework applies, as it has since a federal district court vacated the Navigable Waters Protection Rule in August 2021.[59]

Litigation could change which rule is in effect. Previous lawsuits challenging the Clean Water Rule and the Navigable Waters Protection Rule resulted in preliminary injunctions and other rulings that barred implementation of the challenged rule and resulted in a prior regulatory framework returning to effect, at least in some places.[60] Parties challenging the 2023 WOTUS Rule have sought a preliminary injunction, which, if granted, could result in similar limitations on the rule's implementation.[61]

A change in regulatory regime does not result in the retroactive application of a new rule to all potentially covered waters. In particular, the transition to the 2023 WOTUS Rule does not necessarily invalidate approved jurisdictional determinations (or AJDs), which the Corps issues to identify whether a particular parcel of land contains WOTUS, and which may be used in the CWA permitting process.[62] Approved jurisdictional determinations completed when the Navigable Waters Protection Rule or pre-2015 regulatory framework was in effect will not be reopened before their expiration date unless they satisfy specific criteria for revision.[63] Additionally, enforcement actions for violations of the CWA are typically based on the statutory and regulatory framework that was in effect at the time the violations occurred, even if the rule has since changed.

Has the 2023 WOTUS Rule Been Challenged in Court?

The litigation landscape is developing rapidly, but as of the date of this report, four pending lawsuits challenge the 2023 WOTUS Rule.

The first two lawsuits were filed on January 18, 2023, and have been consolidated in the U.S. District Court for the Southern District of Texas.[64] First, the State of Texas argues that the rule unlawfully expands the Corps and EPA's jurisdiction beyond the bounds of the CWA, violates the major questions doctrine[65] because the CWA does not authorize the agencies to determine the

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paragraph (a)(1) waters. Factors, as listed in the rule, include the distance from a paragraph (a)(1) water; hydrologic factors such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; the size, density, or number of waters that have been determined to be similarly situated; landscape position and geomorphology; and climatological variables such as temperature, rainfall, and snowpack.

[59] EPA, "Definition of 'Waters of the United States': Rule Status and Litigation Update," Dec. 30, 2022, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update.

[60] For a discussion of litigation regarding the 2015 Clean Water Rule, see 2023 WOTUS Rule, p. 3016.

[61] Motion for Preliminary Injunction, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Feb. 7, 2023), ECF No. 13; Motion for Preliminary Injunction, Am. Farm Bureau Fed'n v. EPA, No. 3:23-cv-00020, (S.D. Tex. Feb. 7, 2023), ECF No. 15.

[62] See 33 C.F.R. § 331.2.

[63] See EPA, "Current Implementation of Waters of the United States," Jan. 18, 2023, https://www.epa.gov/wotus/current-implementation-waters-united-states; and U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-02 (June 14, 2005).

[64] Order, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Feb. 13, 2023), ECF No. 27.

[65] Under the major questions doctrine, an agency must provide clear congressional authorization in certain cases when

scope of their own jurisdiction, intrudes upon state sovereignty, and violates due process by failing to provide adequate notice of what conduct is prohibited under the statute.[66] Second, a coalition of agricultural and industry groups argues that the rule is unsupported by law and scientific and economic evidence; violates the Commerce Clause, the Due Process Clause of the Fifth Amendment, the major questions doctrine, and the nondelegation doctrine;[67] exceeds the Corps' and EPA's statutory authority; and unlawfully fails to include a regulatory flexibility analysis.[68] An environmental group has intervened in the lawsuits in support of the Corps and EPA.[69]

Third, a group of 24 states has challenged the 2023 WOTUS Rule in the U.S. District Court for the District of North Dakota.[70] In addition to arguments similar to those made by the Texas plaintiffs, the state plaintiffs allege that the rule violates the APA because the final rule is not a "logical outgrowth" of the rule the agencies proposed in December 2021 and that the rule violates the Tenth Amendment by asserting federal jurisdiction over intrastate waters and lands that are ordinarily regulated by the states.[71] The agricultural and industry groups challenging the rule in Texas are also seeking to intervene in the North Dakota litigation in support of the state plaintiffs.[72]

Finally, the Commonwealth of Kentucky has challenged the 2023 WOTUS Rule in the U.S. District Court for the Eastern District of Kentucky, raising similar allegations to those made by Texas and the other state plaintiffs.[73]

Both sets of plaintiffs in the Texas lawsuits, as well as the state plaintiffs in the North Dakota lawsuit, have asked the courts to bar implementation of the 2023 WOTUS Rule while the litigation is pending.[74] The courts have not yet ruled on the motions. As in litigation over the 2015 and 2020 rules, the issuance of one or more preliminary injunctions would limit the applicability of the rule and leave in place the prior regulatory framework where any such injunction was in effect.

Other stakeholders could also challenge the 2023 WOTUS Rule. Consistent with the statute of limitations for APA claims, potential litigants would generally be required to file suit within six

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it seeks to decide an issue of major national significance. For additional background on the major questions doctrine, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers.

[66] Complaint, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Jan. 18, 2023), ECF No. 1.

[67] The nondelegation doctrine is the separation-of-powers principle that limits Congress's ability to cede its legislative power to other branches of government or nongovernmental entities. For further discussion of the nondelegation doctrine, see Nondelegation Doctrine, Constitution Annotated, https://constitution.congress.gov/browse/article-1/?anchor=I_S1_5#I_S1_5.

[68] First Amended Complaint, Am. Farm Bureau Fed'n v. EPA, No. 3:23-cv-00020 (S.D. Tex. Feb. 2, 2023), ECF No. 1.

[69] Bayou City Waterkeeper Motion to Intervene, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Feb. 9, 2023), ECF No. 20; Bayou City Waterkeeper Motion to Intervene, Am. Farm Bureau Fed'n v. EPA, No. 3:23-cv-00020 (S.D. Tex. Feb. 9, 2023), ECF No. 16; Order, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Feb. 14, 2023), ECF No. 30.

[70] Complaint, West Virginia v. EPA, No. 3:23-cv-00032 (D.N.D. Feb. 16, 2023), ECF No. 1.

[71] Ibid.

[72] Motion to Intervene of Proposed Business Intervenors, West Virginia v. EPA, No. 3:23-cv-00032 (D.N.D. Feb. 22, 2023), ECF No. 54.

[73] Complaint, Kentucky v. EPA, No. 3:23-cv-00007 (E.D. Ky. Feb. 22, 2023), ECF No. 1.

[74] Motion for Preliminary Injunction, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Feb. 7, 2023), ECF No. 13; Motion for Preliminary Injunction, Am. Farm Bureau Fed'n v. EPA, No. 3:23-cv-00020 (S.D. Tex. Feb. 7, 2023), ECF No. 15; Plaintiff States' Motion for Preliminary Injunction, West Virginia v. EPA, No. 3:23-cv-00032 (D.N.D. Feb. 21, 2023), ECF No. 44.

years after their claim accrues.[75] Early lawsuits are the most likely to be closely watched, as they will be the courts' first opportunities to issue rulings that may be binding in later cases, and because they will occur before the regulated public has substantially relied on the rule.

Prior rules defining WOTUS were the subject of numerous lawsuits filed by industry groups, environmental groups, and states. In 2018, the Supreme Court held that challenges to a rule defining WOTUS are typically governed by the APA and must be reviewed first in federal district court.[76] That holding limited the degree to which the agencies, under rules of court procedure, can seek a single nationwide decision about the validity of the 2023 WOTUS Rule.

A case currently pending before the Supreme Court could also affect the definition of WOTUS. In *Sackett v. EPA*, landowners challenging a particular compliance order have asked the Court more broadly to revisit *Rapanos* and adopt Justice Scalia's plurality test for determining whether certain adjacent wetlands are WOTUS.[77] The U.S. Court of Appeals for the Ninth Circuit upheld EPA's conclusion that the Sacketts' property contained WOTUS that were subject to federal jurisdiction under the CWA and relevant regulations.[78] EPA has argued that the Court should continue to allow the use of Justice Kennedy's significant nexus test to identify covered wetlands.[79]

The Supreme Court held oral argument in *Sackett* on October 3, 2022, and a decision is expected later this term. Although no agency regulation is presented for the Court's review in *Sackett*, a decision from the Court could affect the implementation or future judicial review of the 2023 WOTUS Rule, particularly with respect to the rule's provisions regarding the jurisdiction of adjacent wetlands. Additionally, although the Corps and EPA stated in the 2023 WOTUS Rule preamble that their interpretation of the CWA is "not an interpretation of the multiple opinions in *Rapanos*,"[80] a Supreme Court holding that considers the continued viability of the standards outlined in *Rapanos* would be relevant to the corresponding relatively permanent and significant nexus tests that the agencies incorporated into the 2023 WOTUS Rule.

What Options Are Available to Congress Regarding the Definition of WOTUS?

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.

Congress can also stop agency rulemaking or regulatory enforcement through provisions added to agency appropriations legislation. Such appropriations provisions could include (1) restrictions on the finalization of particular proposed rules, (2) restrictions on regulatory activity within certain

[75] 28 U.S.C. § 2401(a).

[76] Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018).

[77] Sackett v. EPA, *cert. granted*, 142 S. Ct. 896 (No. 21-454) (U.S. Jan. 24, 2022).

[78] Sackett v. EPA, 8 F.4th 1075 (9th Cir. 2021).

[79] Brief for Respondents at 31, 33–34, 35, Sackett v. EPA, No. 21-454 (U.S. June 10, 2022).

[80] 2023 WOTUS Rule, p. 3021.

areas, (3) implementation or enforcement restrictions, and (4) conditional restrictions (e.g., preventing implementation of a rule until certain actions are taken).[81]

The scope of WOTUS has continued to be of interest in the 118th Congress. On February 8, 2023, the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment held a hearing regarding the 2023 WOTUS Rule.[82] Additionally, 152 Members of the House of Representatives and 49 Senators sponsored or consponsored joint resolutions that would disapprove the 2023 WOTUS Rule.[83] The resolutions were introduced under the Congressional Review Act (CRA), a law that allows Congress to overturn certain agency actions in the form of a joint resolution of disapproval.[84] Under the CRA, if both houses pass a joint resolution for disapproval, it is sent to the President for signature or veto. If the President were to veto a resolution, Congress could vote to override the veto with a two-thirds majority in both chambers. If a joint resolution of disapproval is submitted within the CRA-specified deadline, passed by Congress, and signed by the President (or if Congress votes to override a presidential veto), the disapproved rule "shall not take effect (or continue)," and would be deemed not to have had any effect at any time. Furthermore, if a joint resolution of disapproval is enacted, the CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law.

In the 117th and 116th Congresses, some Members introduced legislation related to the scope of WOTUS. Some of these bills would have enacted the Navigable Waters Protection Rule's definition of WOTUS into law, or amended the CWA to add a narrower definition of *navigable waters*.[85] Other bills introduced prior to the vacatur of the Navigable Waters Protection Rule or

[81] CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[82] U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, *Hearing on Stakeholder Perspectives on Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule*, 118th Cong., 1st sess., Feb. 8, 2021.

[83] H.J.Res. 27 (118th Cong.); S.J.Res. 7 (118th Cong.).

[84] 5 U.S.C. § 801. For additional information about the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[85] For example, Withstanding Attempts to Encroach on our Resources (WATER) Act, H.R. 2660 (117th Congress); H.Res. 318 (117th Congress); S.Res. 17 (117th Congress); Define WOTUS Act of 2021, H.R. 4570 and S. 2168 ((117th Congress); Defense of Environment and Property Act of 2021, H.R. 5849 and S. 2517 (117th Congress); Navigable Waters Protection Act of 2022, S. 3456 (117th Congress). 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.

the repeal of the Clean Water Rule addressed the implementation of those rules, respectively.[86] Additionally, committees in the 117th and 116th Congresses held hearings regarding WOTUS.[87]

Moving forward, Congress may oversee the Biden Administration's implementation of the revised definition, or may consider introducing legislation that provides a definition of WOTUS or expresses a clearer intent as to how Congress believes the term should be defined.

Author Information

Kate R. Bowers
Legislative Attorney

Laura Gatz
Specialist in Environmental Policy

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[86] E.g., Clean Water for All Act, H.R. 6745 (116th Congress); Federal Regulatory Certainty for Water Act, H.R. 2287 (116th Congress); Regulatory Certainty for Navigable Waters Act, H.R. 667 (116th Congress).

[87] U.S. Congress, House Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, *Hearing on the Fiscal Year 2023 Budget Request for the Environmental Protection Agency*, 117th Cong., 2nd sess., April 29, 2022. U.S. Congress, Senate Committee on Environment and Public Works, *Hearing on Fiscal Year 2023 Environmental Protection Agency Budget*, 117th Cong., 2nd sess., April 6, 2022. 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, 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, 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., Feb. 3, 2021, S.Hrg. 117-1; 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., Sept. 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., Jan. 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., Sept. 16, 2020.