

Moving Targets in Muddied Waters: Advising Farmers, Landowners, and Lenders Regarding Waters of the United States

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Clean Water Act – Framework

The Federal Water Pollution Control Act of 1948, 33 U.S.C. §§1251 *et seq.*, also known as the Clean Water Act (“CWA”) after amendment in 1972:

- Prohibits the discharge of pollutants from a point source into “navigable waters” unless otherwise authorized under the CWA. (33 U.S.C. §§1311 and 1362(12)).
- “Navigable waters” are defined in the CWA as “the waters of the United States [“WOTUS”], including territorial seas,” but WOTUS is not further defined by statute. (33 U.S.C. §1362(7)).
- Federal programs protecting water quality under the CWA – e.g., National Pollutant Discharge Elimination Systems (“NPDES”) permits under CWA section 402 (33 U.S.C. §1342) and dredge and fill permits under CWA section 404 (33 U.S.C. §1344) – rely on the term “navigable waters” and WOTUS in establishing their program scope and applicability.
- Thus, what constitutes a WOTUS is critical to determining applicability of CWA programs.

Who/Where/When WOTUS?

Two separate agencies implement the CWA:

- U.S. Environmental Protection Agency (“USEPA”) for the Section 402 NPDES permit program.
- U.S. Army Corps of Engineers (“Corps”) for the Section 404 Dredge and Fill permit program.

USEPA and the Corps have separate regulations defining WOTUS (USEPA now at 40 C.F.R. §120.2 (formerly § 122.2) and Corps at 33 C.F.R. § 323.3), but their interpretations have been similar and the regulations remained largely unchanged from 1977 to 2015 (referred to as the 1986/1988 rules). During this time, case law and guidance documents provided jurisdictional twists and turns.

Since 2015, the USEPA and the Corps have revised the WOTUS definitions via three rule changes:

- Obama Administration: 2015 Clean Water Rule, 80 FR 37054 (June 29, 2015).
- Trump Administration: 2020 Navigable Waters Protection Rule, 85 FR 22250 (April 21, 2020).
- Biden Administration: 2023 Revised Definition of Waters of the United States, 88 Fed. Reg. 3004 (Jan. 18, 2023) – became effective on March 20, 2023 in some States.

Why Is My Head Spinning?

- Constantly changing regulatory definition of WOTUS has proven challenging, especially for long-term projects where permitting the same project may span through a decade of change.
- Training for “on the ground” decision-makers difficult, as soon as one feels caught up, the rules change again.
- Additional U.S. Supreme Court case law further muddying the waters:
 - *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct 1462 (2020) established new “functional equivalent” NPDES permitting test for discharges to groundwater that may reach navigable surface waters
 - *Sackett v. EPA* - awaiting the U.S. Supreme Court’s decision regarding the legal sufficiency of the “significant nexus” test for purposes of determining WOTUS, a critical component of the 2023 Rule.

What is the Status of the 2023 Rule?

As with the 2015 and 2020 Rules, the Biden Administration's 2023 Rule is being challenged, with injunctions sought to block application of the rule:

- *State of Texas v. U.S. EPA* (U.S. District Court, Southern District of Texas)
 - Injunction issued on March 19, 2023 blocking application in Texas and Idaho
 - Court preliminarily finds that the new 2023 rule is "neither understandable nor 'intelligible,' and its boundaries are unlimited."
- *West Virginia, et al. v. U.S. EPA* (U.S. District Court, District of North Dakota)
 - Injunction issued April 12, 2023 blocking application in 24 states (**still applicable in California and Nevada!**). Court criticized the Rule for having an "unlimited" scope and finding it suffers from "a litany of other statutory and constitutional concerns."
- *Kentucky Chamber of Commerce, et al. v. U.S. EPA* (U.S. District Court, Eastern District of Kentucky)
 - Injunction issued on April 20, 2023 until May 10, 2023 by the 6th Circuit blocking application in Kentucky while Plaintiffs appeal a lower court dismissal of case based on standing.

What is the Status of the 2023 Rule?

Arguments against the Biden Administration's 2023 Rule include:

- Violates the Administrative Procedures Act - arbitrary and capricious (e.g., too vague to provide adequate notice), an abuse of discretion, or otherwise not in accordance with the law;
- Final rule's requirements are in excess of statutory authority;
- Intrusion on sovereignty in violation of the 10th Amendment and the Commerce Clause;
- Violation of Due Process under 5th Amendment because adequate notice is required before civil or criminal penalties attach; and
- Agencies finalized overbroad and vague rule largely based on "significant nexus" determinations before Supreme Court ruling on *Sackett*.

How Does the *Rapanos* Case Fit In?

- Biden Administration relied heavily on the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) when developing the 2023 WOTUS Rule. That case represented a fractured Court. While dissents (Justices Breyer and Stevens) argued that the Corps has broad authority to regulate virtually all wetlands, the plurality of the Court (Justice Scalia authoring, with Chief Justice Roberts, and Justices Thomas and Alito, joining) concluded that the CWA's protection of WOTUS is limited to those bodies of water that are "permanent, standing or continuously flowing," and thus does not embrace channels through which water flows only some of the time. According to this opinion, the Corps may not assert jurisdiction over wetlands unless they have a permanent surface connection with a navigable waterway.
- Justice Kennedy's concurring but separate opinion was broader, stating that the Corps has jurisdiction over wetlands that, "alone or in combination with similarly-situated wetlands, significantly affect the chemical, physical and biological integrity of other covered waters understood as navigable in the traditional sense." This is known as the "significant nexus" test.

How Does the *Rapanos* Case Fit In?

- Because the *Rapanos* decision was essentially a 5-4 decision, Justice Kennedy's vote was decisive to the result. As Justice Roberts (who signed onto Justice Scalia's interpretation of the CWA) points out in his concurring opinion, the holding of the Court is the position taken by those Members who concurred in the judgment on the narrowest grounds. (*Marks v. United States*, (1977) 430 U.S. 188, 193.)
- Justice Kennedy's concurring opinion was on the "narrowest grounds," as his opinion places fewer restrictions on the Corps than Justice Scalia's, but also provides a more ambiguous interpretation of the CWA. *Rapanos* provided neither the curtailment of federal power sought by the petitioners, nor the bright line test sought by many of the *amicus* briefs. This circumstance created the current calls for regulatory overhaul and bright line rules, which each administration since the Obama Administration has tried to accomplish.
- By largely codifying the *Rapanos* decision, the Biden Administration's 2023 WOTUS Rule continues the ambiguity that plagued the regulatory environment, with wide discretion as to how to apply the Kennedy criteria in individual cases.

So, What Is a WOTUS Under the 2023 Rule?

The Biden Administration's 2023 WOTUS Rule provides jurisdiction over:

- **Traditionally Navigable Waters (“TNWs”).** Waters which are currently used, previously used, or susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide; territorial seas; or interstate waters, including interstate wetlands (“TNW”);
- **Impoundments** of WOTUS;
- **Tributaries** of TNWs or Impoundments when the tributaries are (a) relatively permanent, standing or continuously flowing bodies of water, or (b) that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of TNWs or Impoundments;
- **Wetlands** adjacent to WOTUS, wetlands adjacent to and with a continuous surface connection to “relatively permanent” Impoundments, wetlands adjacent to Tributaries that meet the “relatively permanent” standard, and wetlands adjacent Impoundments or jurisdictional tributaries when the wetlands meet the “significant nexus” standard; and
- **Intrastate lakes and ponds, streams, or wetlands not otherwise identified above** that meet either the “relatively permanent” standard or the “significant nexus” standard.

So, What Is a WOTUS Under the 2023 Rule?

Key Definitions

- **Wetlands:** Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent:** Bordering, contiguous, or neighboring. Wetlands 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.”
- **Significantly affect:** To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of TNWs or Impoundments: (1) **functions** will be assessed to determine if there is a “nexus”; (2) logical and practical **factors** will be considered.

So, What Is a WOTUS Under the 2023 Rule?

- **Functions** to be assessed:
 - 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 TNWs;
 - Provision of habitat and food resources for aquatic species in TNWs.

- The following **Factors** are to be **considered**:
 - Distance from a TNW;
 - Hydrologic factors such as the duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;
 - 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.

2023 WOTUS Rule – What’s Out

- Waste treatment systems, including ponds or lagoons, designed to meet requirements of the CWA;
- Prior converted cropland designated by the Secretary of Agriculture; only covers **wetlands, and only if** they meet the USDA’s longstanding definition of prior converted cropland. Loses exclusion status if there is a “change in use,” area no longer available for the production of ag commodity.
- Ditches excavated wholly in and draining only dry land that do not carry a relatively permanent flow of water;
- 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 which are used for such purposes as stock watering irrigation, settling basins, or rice growing;
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
- Water filled 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 or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS;
- Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

2023 WOTUS Rule - What's Different?

- Notable exemptions in Trump Administration 2020 Rule not specifically codified in Biden 2023 Rule – these are all going to be handled on a “case by case” basis (88 Fed. Reg. at 3104):
 - (1) Groundwater (*more about this in a moment*);
 - (2) Ephemeral water features that flow only in direct response to precipitation;
 - (3) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters; and
 - (4) Groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters.

- Other differences from 2020 Rule
 - The term “tributaries” is no longer defined.

December 2022 Joint Agency Memorandum Re Implementation of CWA Section 404 in Agricultural Setting

- Rescinds prior July 2020 Joint Agency Memorandum
- Prior Converted Cropland
 - The NRCS determines whether land is prior converted cropland for FSA purposes.
 - Corps and USEPA are responsible for determining prior converted cropland exclusion for CWA.
 - Corps and USEPA will recognize any NRCS CWS when evaluating applicability of the exclusion
 - Then the Corps and/or USEPA will evaluate the eligible land to determine whether the exclusion is inapplicable because there has been a change in use.
 - Does not exclude: other types of non-wetland aquatic resources (e.g., tributaries, ponds, ditches) that are located within prior converted cropland, nor areas designated by USDA as meeting other FSA exemptions (e.g., farmed wetlands), nor areas that meet the USDA definition of wetlands but do not have a PCC designation.

December 2022 Joint Agency Memorandum Re Implementation of CWA Section 404 in Agricultural Setting

➤ Change in Use

- PCC will not be lost as long as it is reasonably conceivable that an area in its current condition would still be available for commodity crop production (*i.e.*, the area has not undergone soil disturbances such that significant effort (such as removal of permanent structures) would be required to enable production).

- **What is not a change in use:**

1. when land is idled for agricultural or conservation purposes;
2. planting of agricultural crops; crop production of food, fiber, or horticultural products; haying or grazing;
3. idling consistent with USDA programs or conservation uses;
4. cropland rotations into long-term agroforestry; idling land for soil recovery following natural disasters;
5. irrigation tailwater storage; crawfish farming; cranberry bogs or other perennial crops;
6. nutrient retention; or diversion from crop production for purposes of preventing erosion or other degradation.

Changing Gears, What Does The New Rule Mean for CWA 404 Projects?

As part of the regulatory process of implementing the 2023 WOTUS Rule, the USEPA and Corps sought to clarify how the rule will affect the regulated public who may be in the process of securing an approved jurisdictional determination (“AJD”) or implementing a project that has received an AJD, and has dedicated a webpage to the “Current Implementation of WOTUS” to provide guidance:

- [https://www.epa.gov/wotus/current-implementation-waters-united states](https://www.epa.gov/wotus/current-implementation-waters-united-states)

The Agencies note that actions are governed by the definition of WOTUS that is *in effect at the time the Corps completes an AJD*, not by the date of the request for an AJD. Further, the Corps clarifies it will make new permit decisions pursuant to the currently applicable regulatory regime (*i.e.*, the 2023 WOTUS Rule) irrespective of the date of an AJD.

And Discharges to Groundwater Are No Longer Exempt from the CWA?

- Section 301 of the CWA makes it unlawful to “discharge” any “pollutant” from a “point source” into “navigable waters” without an NPDES permit.
- Section 402 of the CWA sets forth the National Pollutant Discharge Elimination System (NPDES) permitting program to regulate such discharges.
- Section 502 of the CWA defines “point source” as “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged,” including any “pipe, ditch, channel, tunnel, conduit,” or “ well.”
- Defines “discharge” as any addition of a pollutant to navigable waters from a point source.
- “Navigable waters” are generally surface waters and wetlands, not groundwater.

Regulatory Dilemma

- When pollutants from a discharge into groundwater reach a navigable waters of the US, is an NPDES Permit required?
- Major point of contention for decades with disparate outcomes within the nation's District Courts and Courts of Appeal.
- U.S. Supreme Court asked to resolve this thorny question in *County of Maui, Hawaii v. Hawaii Wildlife Fund* case.



County of Maui, Hawaii v. Hawaii Wildlife Fund (S. Ct)

- Found Ninth Circuit’s “fairly traceable” standard an unreasonable expansion of CWA’s jurisdictional reach to include discharges that take years to reach navigable waters, and only in a highly diluted form. Court says this would lead to “surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird’s feathers[.]”
- **Instead, Court “requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.”**
 - The new test advances Congress’s goal of providing “federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater.” The functional equivalent of a direct discharge is one that “reaches the same results through roughly similar means.”
- This is anything but a “bright line” test. Will be applied on a “case-by-case” basis, which will lead to inconsistent results.

County of Maui, Hawaii v. Hawaii Wildlife Fund (S. Ct)

- Most important factors for “Functional Equivalent” Test, according to U.S. Supreme Court:
 - Time
 - Distance that pollutants travel between the point source and navigable water

- Other relevant factors include:
 - The nature of the material through which the pollutant travels;
 - The extent to which the pollutant is diluted or chemically changed as it travels;
 - The amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source;
 - The manner by or area in which the pollutant enters the navigable waters; and
 - The degree to which the pollution has maintained its specific identity.

- On Dec. 4, 2020, USEPA issued a guidance document that largely re-iterated the factors enunciated by the Court to determine whether a “functional equivalent” discharge is occurring but added another new factor, the “design and performance of the system or facility from which the pollutant is released.”

What Does This *All Really* Mean?

- Retain well-informed professionals before developing property or modifying operations.
- Determinations will be very case-by-case, frustrating calls for consistency and transparency from the regulated community.
- Keep abreast of case law and changes to regulatory guidance.
- Biden Administration is increasing enforcement efforts, do not become an enforcement statistic.

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