



*What's Up with WOTUS: An Overview of
"Waters of the United States" and Why it
Matters to Agriculture*

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What's Going On?

- The term “waters of the United States” – aka, WOTUS – is central to the Clean Water Act
 - Only those waters defined as WOTUS are regulated under the CWA
- Defining WOTUS has proven to be a challenge
- In December 2022, EPA released its latest rule redefining WOTUS
 - This is approx. the fourth WOTUS rulemaking EPA has undertaken since 2015



Overview

- ✓ WOTUS Background
- What's in the New Rule?
- Current Legal Challenges
- WOTUS and Agriculture
- Final Thoughts

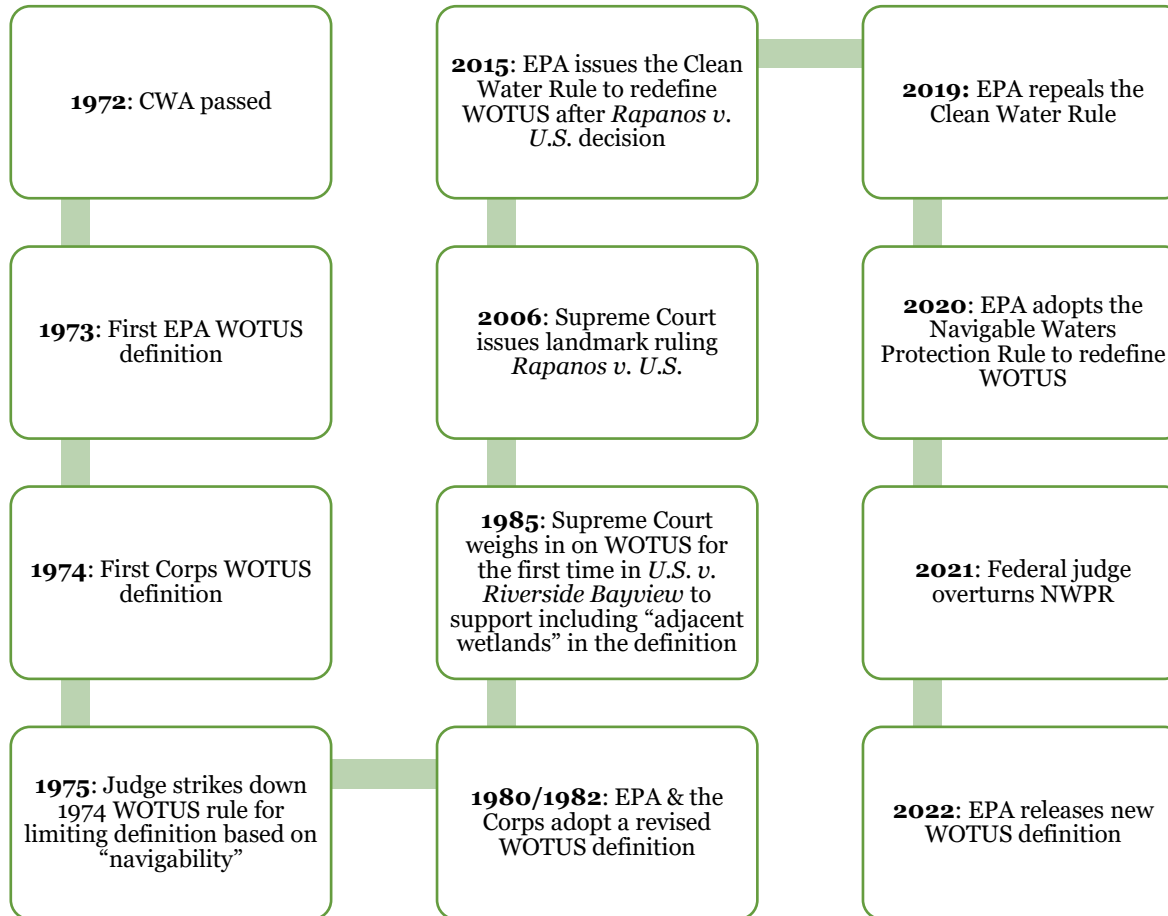


WOTUS Background: The Basics

- Congress passed the CWA in 1972 in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
- To accomplish this goal, the CWA prohibits unpermitted discharges of any pollutant from a discernable, concrete source into “navigable waters.” 33 U.S.C. § 1342.
- The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
- Congress did not define the term “waters of the United States,” instead leaving it up to EPA and the Army Corps of Engineers
- Since 1972, there have been multiple agency regulations and Supreme Court decisions aimed at defining WOTUS



WOTUS Background: General Timeline



WOTUS Background: “Navigable Waters”

- The legal concept of “navigable waters” arose from Supreme Court case law
- In *The Daniel Ball*, 77 U.S. 557 (1870), the Court stated:

“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”
- The Court’s finding in *The Daniel Ball* continues to serve as the definition for waters that are considered “navigable-in-fact”



WOTUS Background: “Navigable Waters” Under the CWA

- When the Corps released its first definition of WOTUS in 1974, it defined jurisdictional waters as “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 C.F.R. § 209.12(d)(1) (1974)
- A year later, a federal court in the District of Columbia struck down the Corps’ 1974 WOTUS definition in *Nat. Res. Defense Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975), finding that WOTUS could not be “limited to the traditional tests of navigability” because Congress had “asserted federal jurisdiction over the nation’s water to the maximum extent permissible.”
- While no court has held that CWA jurisdiction is limited to waters which are “navigable-in-fact,” the Supreme Court in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) concluded that “the term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA[.]”



WOTUS Background: 1980s WOTUS Definition

In the 1980s, WOTUS was defined by EPA and the Corps as:

- All waters which are susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide
- All interstate waters, including interstate wetlands
- All other intrastate waters of which the use, degradation, or destruction of would affect interstate or foreign commerce
- All impoundments of waters otherwise defined as a WOTUS
- Tributaries of waters identified in the previous four categories
- The territorial seas
- Wetlands adjacent to any WOTUS (so long as that WOTUS is not itself a wetland; inclusion of adjacent wetlands was upheld by the Supreme Court in *U.S. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985))



WOTUS Background: *Rapanos v. U.S.*

- The Supreme Court's landmark WOTUS decision, *Rapanos v. U.S.*, 547 U.S. 715 (2006) considered the scope of wetlands jurisdiction under the CWA
 - Specifically, the Court considered the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters
- The Court did not produce a majority opinion; instead, the case resulted in a four-justice plurality opinion authored by Justice Scalia and a concurrence from Justice Kennedy writing for himself
- Following *Rapanos*, courts and EPA have either applied Justice Kennedy's opinion on its own or together with the plurality opinion
 - No court has applied the plurality opinion on its own



WOTUS Background: Relatively Permanent vs. Significant Nexus

The relatively permanent standard comes from the plurality opinion authored by Justice Scalia in *Rapanos v. U.S.*

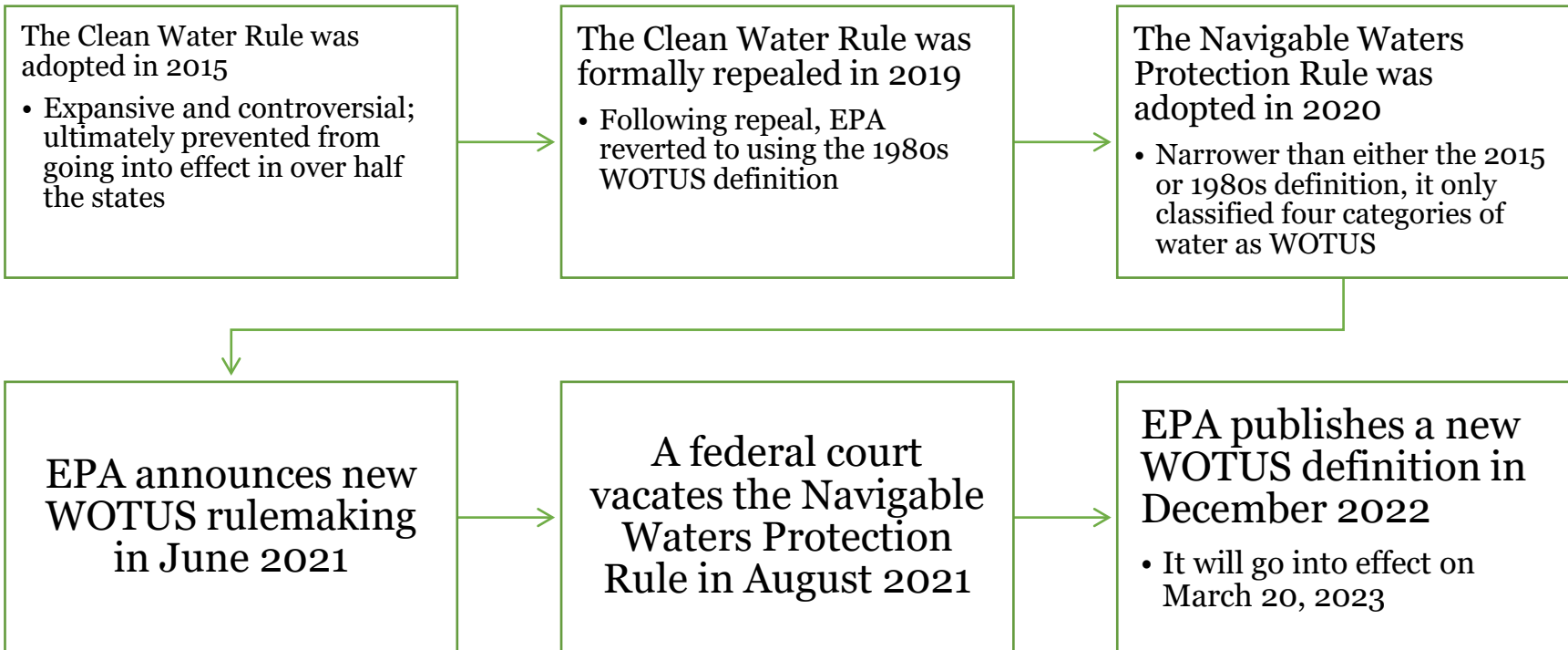
- Interprets WOTUS to include non-navigable waters only if they are “relatively permanent, standing or continuously flowing bodies of water” and wetlands that share a “continuous surface connection with” such waters

The significant nexus test comes from Justice Kennedy’s concurrence in *Rapanos v. U.S.*

- Interprets WOTUS to include waters or wetlands that possess “a significant nexus to waters that are or were navigable in fact or that could reasonably be made so”
- A significant nexus exists if the water or wetland “either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable”



WOTUS Background: Response to *Rapanos* – 2015 to Present



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What's in The New Rule?: The Basics

New rule includes five categories of WOTUS:

1. Traditional navigable waters used for interstate or foreign commerce; the territorial seas; and interstate waters
2. Impoundments of waters otherwise identified as a WOTUS, except for impoundments of waters identified under the fifth category of WOTUS
3. Tributaries of traditional navigable waters or impoundments that are either: relatively permanent, standing or continuously flowing bodies of water; or that alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters
4. Wetlands adjacent any of the following: traditional navigable waters; a relatively permanent, standing or continuously flowing impoundment or tributary; an impoundment or tributary if the wetlands either alone or in combination with similarly situated waters have a significant nexus with a traditional navigable water
5. Interstate lakes and ponds, streams, or wetlands that do not fall into any of the above categories provided the water shares either a continuous surface connection or a significant nexus with a WOTUS



What's in the New Rule?: “Adjacent”

- “Adjacent” is defined under the 2022 rule as “bordering, contiguous, or neighboring.”
- “Adjacent wetlands” are defined as wetlands that are “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like[.]”
- The same definition of “adjacent” has been used in WOTUS definitions since the 1980s



What's in the New Rule?: “Significantly Affect”

- This is the first time a definition of “significantly affect” has been codified in the WOTUS context
- “Significantly affect” is defined to mean “a material influence on the chemical, physical, or biological integrity of” traditional navigable waters, the territorial seas, and interstate waters
- To determine whether a water “significantly affects” a traditional navigable water, territorial sea, or interstate water, EPA will consider different functions and factors

Functions:

- Contribution of flow
- Transport of materials
- Retention and attenuation of floodwaters and runoff
- Modulation of temperature in traditional navigable waters
- Provision of habitat for aquatic species in a traditional navigable water

Factors:

- Distance of water from a traditional navigable water
- Hydrologic factors and the rate of hydrologic connections
- Size, density, or number of waters that are “similarly situated”
- Landscape position and geomorphology
- Climatological variables



What's in the New Rule?: “Similarly Situated”

- The term “similarly situated” is not defined in the text of the 2022 rule itself, but EPA has provided guidance on how the term is implemented
- According to EPA, waters will be “similarly situated” when they lie within the catchment area of the WOTUS of interest
 - When implementing the significant nexus standard, tributaries and adjacent wetlands within the catchment area of the WOTUS of interest will be analyzed as part of the significant nexus analysis
- EPA will use a variety of tools to determine a catchment area including topographic maps, automated modeling systems, and GIS tools



What's in the New Rule?: Exclusions

Excluded from the definition of WOTUS:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet CWA requirements
- Prior converted cropland
- Ditches, including roadside ditches, excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water
- Artificially irrigated areas that would revert to dry land if irrigation ceased
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water which are used for purposes such as stock watering, irrigation, settling basins, or rice growing
- Artificial reflecting or swimming pools or other small ornamental bodies of water
- Waterfilled depressions created in dry land incidental to construction activity
- Swales and erosional features such as gullies or small washes that are characterized by low volume, infrequent, or short duration flow



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Current Legal Challenges: Lawsuits

- Currently, there are three lawsuits that have been filed to challenge the new WOTUS rule
 - *State of Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.)
 - *Kentucky Chamber of Commerce v. EPA*, No. 3:23-cv-00008 (E.D. Ky.)
 - *State of West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.)
- Plaintiffs raise numerous arguments, but three claims are raised in each case:
 1. The 2022 rule impermissibly expands CWA jurisdiction
 2. The 2022 rule violates the Tenth Amendment of the U.S. Constitution
 3. The 2022 rule violates the Major Questions Doctrine



Current Legal Challenges: Jurisdictional Claim

- Plaintiffs challenging the 2022 WOTUS rule claim that it expands CWA jurisdiction beyond what is authorized in the statute
- Specifically, plaintiffs argue that the text of the CWA limits WOTUS to “navigable waters”
- Plaintiffs argue that CWA jurisdiction should be limited to those traditionally navigable waters that can be used as “highways for commerce over which trade and travel are or may be conducted”



Current Legal Challenges: Tenth Amendment Claim

- The Tenth Amendment of the U.S. Constitution provides that:
 - “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people.” U.S. Const. amend. X.
- The Constitution does not grant the federal government power to regulate land and water resources, that power is generally regarded as belonging to the states
 - Congress adopted the CWA pursuant to its Commerce Clause authority
- Plaintiffs argue that the 2022 WOTUS rule violates the Tenth Amendment by allowing EPA to regulate water resources beyond the scope of interstate commerce



Current Legal Challenges: Major Questions Doctrine Claim

The Major Questions Doctrine arises from case law concerning the scope of agency authority

- According to the doctrine, if an agency acts on an issue of major national significance, the action must be founded on clear congressional authorization
- In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court stated that it will reject claims of agency authority under the Major Questions Doctrine when the claim concerns an issue of “vast economic and political significance” that Congress has not clearly empowered the agency to act on
- Note: This is the only Supreme Court opinion applying the Major Questions Doctrine in a majority opinion



Plaintiffs argue that the 2022 WOTUS rule violates the Major Questions Doctrine because it has vast economic significance to regulate the development of land and water resources, and Congress did not clearly empower EPA with such authority



Current Legal Challenges: Congressional Challenge

- Congress has launched its own challenge to the 2022 WOTUS rule under the Congressional Review Act
- The Congressional Review Act allows Congress to review and disapprove of agency regulations
- The CRA process is simple: both houses of Congress must approve a resolution of disapproval which must then be signed by the President
- If an agency rule is successfully overturned, the CRA prevents the agency from issue a rule that is “substantially the same” as the overturned rule
 - The CRA does not clarify what “substantially the same” means
- About 20 rules have been overturned via the CRA since the statute was adopted in 1996



Current Legal Challenges: Congressional Challenge Cont.

- House of Representatives voted to pass a resolution of disapproval on March 10, 2023. Next, it will go to the Senate for approval
- President Biden has stated that he would veto a CRA challenge to WOTUS
- If the CRA challenge is successful, many questions still remain:
 - How does the prohibition on “substantially the same” come into effect?
 - How much would EPA need to change the WOTUS definition to comply?
 - Would Congress want to amend the Clean Water Act to clarify?



Current Legal Challenges: *Sackett v. EPA*

- On October 3, 2022, the Supreme Court heard arguments in *Sackett v. EPA* which concerns wetland jurisdiction under the CWA
- Question before the Court:
 - Should *Rapanos* be revisited to adopt the plurality's relatively permanent test for WOTUS jurisdiction under the CWA?
- The Court has yet to issue its ruling
- The ruling could have a major impact on EPA's new WOTUS rule
 - What happens if the significant nexus test is thrown out?
 - What happens if the Court fully adopts the plurality's definition?



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WOTUS & Agriculture: The Basics



- The two sections of the Clean Water Act most relevant to agriculture are Section 402 (prohibition against point source discharges) and Section 404 (prohibition against dredge and fill)
- Both sections require a permit before discharging into a WOTUS



WOTUS & Agriculture: Section 402

- Section 402 of the CWA prohibits the discharge of any pollutant from a point source into a navigable water without a permit
 - Discharge: The addition of a pollutant into a navigable water
 - Pollutant: Includes dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water
 - Point source: Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft
 - Navigable waters: Waters of the United States and territorial seas



WOTUS & Agriculture: Section 404

- Section 404 of the CWA prohibits the discharge of dredged or filled material into a navigable water without a permit
 - Discharge: The addition of dredged or filled material into a navigable water
 - Dredged or filled material: Dredged material is a mixture of sand, silt, and clay, including gravel, rock, organic matter, and contaminants. Fill material is defined as concrete, dirt, rock, pilings, or side cast material
 - Navigable waters: Waters of the United State and the territorial seas



WOTUS & Agriculture: Exemptions

Agricultural exemptions to Section 402 permitting requirements include:

- Agricultural stormwater discharges
- Return flows from irrigated agriculture

Agricultural exemptions to Section 404 permitting requirements include:

- Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices
- Maintenance of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures
- Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches



WOTUS & Agriculture: Section 402 Examples

- A rancher grazes his cattle on a field next to a stream that satisfies the WOTUS definition. The cattle have access to the stream and at times introduce manure into the stream. Does the rancher need a Section 402 permit?
- The same rancher also grows alfalfa which he irrigates during the growing season. Return flow from his irrigation activities enter the same stream. Does the rancher need a Section 402 permit?
- A concentrated animal feeding operation makes occasional discharges of wastewater into a nearby stream that meets the WOTUS definition. Does the operator of the facility need a Section 402 permit?



WOTUS & Agriculture: Section 404 Examples

- A farmer is in the process of harvesting his fields which are located directly next to a stream that meets the WOTUS definition. During the harvest process, he causes some soil to enter the lake. Does he need a Section 404 permit?
- The same farmer is planning on constructing a new barn with a cellar in a different field that abuts the same stream. He uses his backhoe to start digging out the cellar, causing silt, clay, and other debris to enter the stream. Does he need a Section 404 permit?



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Final Thoughts

- The WOTUS ride is likely not over – *Sackett v. EPA* and other legal challenges all have the potential to change aspects of the WOTUS definition
- Changes could come quickly, its important to stay up-to-date
- Farmers, ranchers, and producers should be aware of how WOTUS and the CWA impact their operations

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