

Waters of the United States (WOTUS)

On January 18, 2023, EPA and the U.S. Department of the Army (together, the “Agencies”) published a final rule in the Federal Register titled “Revised Definition of ‘Waters of the United States’” (the “Final Rule”). The Final Rule is the fourth substantive rulemaking since 2015 to try to address the problematic vagueness of the term “navigable waters,” defined as the “waters of the United States,” which sets the scope of federal jurisdiction under the Clean Water Act (“CWA”)—thereby defining what features are left to be regulated solely by the states. The prior rulemakings all resulted in litigation, a slew of court decisions, and, in the end, continued uncertainty about the scope of federal jurisdiction.

This latest rulemaking is another swing of the pendulum and expands the reach of federal jurisdiction under the CWA over features that convey or hold water to varying, potentially minimal, degrees and durations. The Final Rule, which takes effect March 20, 2023, expands federal jurisdiction to a substantial degree compared to the Navigable Waters Protection Rule (“NWPR”), which became effective in June 2020 and was vacated by two district courts in 2021. The Agencies chose to go forward with the Final Rule, despite the Supreme Court’s pending decision in *Sackett v. EPA* concerning the fundamental test embodied in the Final Rule—the “significant nexus” text. So yet again, we remain on uncertain legal ground.

In 2006, the Supreme Court issued a fractured decision in *Rapanos v. U.S.*, 547 U.S. 715. Justice Scalia’s plurality opinion interpreted “waters of the United States” to “include[] only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams[,] . . . oceans, rivers, [and] lakes,” and only those wetlands with a “continuous surface connection” to such jurisdictional bodies “so that there is no clear demarcation between ‘waters’ and wetlands.” Justice Kennedy’s concurring opinion found that the CWA provides the Agencies with jurisdiction over waters that “possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made,” i.e., when tributaries or wetlands, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” The Agencies adopted guidance addressing the decisions in prior case law and *Rapanos* but for years did not propose to modify the regulatory definition of “waters of the United States” to incorporate these Supreme Court decisions.

In 2015, the Agencies amended the regulatory definition to address the Supreme Court’s interpretations of “waters of the United States” and provide a new basis for federal jurisdiction, promulgating the “Clean Water Rule: Definition of ‘Waters of the United States’” (“2015 Rule”). Largely adopting Justice Kennedy’s concurring opinion in *Rapanos* (and arguably going beyond it), the 2015 Rule asserted jurisdiction over traditional navigable waters and tributaries and wetlands with a significant nexus to such waters and asserted bright line tests for many features. In doing so, the 2015 Rule relied heavily on EPA’s “Connectivity Report,” which synthesized peer-reviewed publications on hydrologic interconnection among water bodies, but which acknowledged connection is a gradient. This rule was stayed and remanded to the Agencies by multiple district courts. It was repealed by rulemaking effective in December 2019.

In June 2020, the NWPR became effective. Because of the decades of uncertainty and litigation over prior assertions of expansive federal jurisdiction under the CWA, this rule adopted a new framework and bright lines excluding ephemeral streams and wetlands that lack surface connection to adjacent jurisdictional waters and leaving such features to state regulatory regimes. Multiple district courts have vacated this rule as well, and the Final Rule is the rulemaking to repeal that rule.

The Agencies' Final Rule does not purely revert to the pre-2015 status quo, which was recodified in a December 2020 rule. Rather, they adopt a regulatory interpretation of the significant nexus standard articulated by Justice Kennedy in *Rapanos* and leave jurisdictional determinations to a case-by-case review under either a "relatively permanent" test or a regulatory "significant nexus" standard.

By failing to apply statutory lines preventing the gradient of connection from being applied to its extremes, the Final Rule either reverts the regulatory landscape to all the uncertainty that has plagued CWA implementation or provides a cover for functionally unfettered assertions of federal jurisdiction that allow the statute's authority to be exceeded. Importantly, all iterations of the definition of waters of the United States, including the Final Rule, have recognized the appropriateness and importance of maintaining long-standing exemptions from federal jurisdiction for prior converted cropland and waste treatment systems and acknowledged that groundwater is not a water of the U.S. The Final Rule does include some express exclusions for longstanding practices to exclude certain ditches and features in uplands from jurisdiction, but these exclusions are narrowed from what was provided in the NWPR. Because the extent and clarity of exemptions expressly stated in the NWPR have been abandoned—such as those for many ditches and other water management infrastructure—there needs to be an effort to otherwise advance certainty going forward. The Agencies have promised a second rulemaking to advance certainty and clarity and it appears likely that they will be required to revisit the Final Rule following any additional guidance from the Supreme Court's ruling in *Sackett*. The Final Rule does not go far enough to (and any revised definition should) respect the traditional state and local governmental authority over land and water use and carry forward and advance appropriate exemptions for ditches, canals, and other man-made water management infrastructure.

Requests of EPA and USACE:

- **Defer the March 20, 2023 effective date of the Final Rule until the Supreme Court issues guidance in *Sackett v. EPA*.** The issue accepted for Court review will inform the scope of federal jurisdiction under the Clean Water Act. Waiting for Court guidance increases the likelihood that a rulemaking could bring clarity to stakeholders and respect the balance of federal and state power.
- **Adopt clear and appropriate limits of federal jurisdiction.** Any future rule should include broad and clear exemptions for ditches, canals, and other man-made water management infrastructure, which are critical to state and local management of land and water use. Any expansion of federal jurisdiction should be acknowledged in a transparent manner.

Request of Congress:

- **Support and adopt the Congressional Review Act Joint Resolution that would rescind the Final Rule** to defer changes in the regulatory landscape until the Supreme Court's input can factor into the next iteration of a definition of waters of the U.S.
- **Provide oversight to ensure transparency and accountability in rulemaking and implementation** so that the Agencies do not have unfettered cover to expand federal jurisdiction under a vague regulatory standard.
- **Provide resources appropriate to assure federal jurisdiction is not unduly burdensome.** Congress should match the burdens of expansive federal jurisdiction with appropriate permitting resources and tools (e.g., flexibilities should be added to general permitting or resources deployed to accommodate reasonable permitting timelines and mitigation approaches).