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# A look at the past and future of WOTUS

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On June 22, 1969, the Cuyahoga River, which runs through the heart of Cleveland before emptying into Lake Erie, caught fire for the 13th time. Time Magazine ran a story that highlighted the river's severe pollution, and the national reaction to that article is widely credited as the impetus for the Federal Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act (CWA).

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] This seemingly straightforward and worthy objective has, however, led to over 50 years of uncertainty and litigation over what constitutes "the nation's waters" or "waters of the United States." The definition of the term "waters of the United States" (or WOTUS) is critical in determining whether the CWA's protections apply to a given water.

## The pre-2015 definition

The CWA itself does not define "waters of the United States." Beginning in the mid-1980s, the U.S. EPA and the Army Corps of Engineers (Agencies) have issued several regulatory definitions of the term. Each definition has contained two fundamental categories: (1) waters that qualify as traditional navigable waters under section (a)(1) of the various WOTUS definitions (paragraph (a)(1) waters), and (2) waters that do not qualify as traditional navigable waters but still fall within the definition of waters of the United States. The Agencies consistently define and interpret the first category, traditional navigable waters:

> [T]he (a)(1) "traditional navigable waters" include, but are not limited to, the "navigable waters of the United States." A water body qualifies as a "navigable water of the United States" if it meets any of the tests set forth in 33 C.F.R. Part 329 (e.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce).[2]

The Agencies' definition and interpretation of paragraph (a)(1) waters has not been subject to significant legal challenges.

The second category, on the other hand, has repeatedly been the subject of varied interpretations, rulemaking, and litigation. One school generally advocates for policies that result in more limited jurisdiction and fewer protections, while the other generally advocates for policies that result in broader jurisdiction and greater protections. This has often resulted in litigation concerning whether certain waters fall within the Act's jurisdiction and whether the Agencies' rules and interpretations are consistent with the Act.

The Supreme Court entered the fray on three occasions prior to 2015, culminating with the landmark case, *Rapanos v. United States*.[3] The Court did not, however, issue a majority opinion. Four justices joined Justice Scalia's plurality; four joined Justice Stevens' dissent; and Justice Kennedy issued a concurring and controlling opinion. These opinions are at the heart of current legal debates surrounding the 2023 WOTUS Rule.

## Justice Scalia and the 'relatively permanent' test

In his plurality opinion, Justice Scalia outlined what is often referred to as the Relatively Permanent test for determining whether waters in the second category fall under the jurisdiction of the CWA:

> On its only plausible interpretation, the phrase 'the waters of the United States' includes 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.' The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[4]

[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters.[5]

As Justice Kennedy pointed out in his concurring opinion, this test would exclude "torrents thundering at irregular intervals through otherwise dry channels" like the Los Angeles River and wetlands that have significant effects on water quality and the aquatic ecosystem."[6]

## Justice Kennedy and the 'significant nexus' test

In his concurring — and controlling — opinion, Justice Kennedy outlined the Significant Nexus Test:

> Consistent with legal precedent and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over

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> wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C.A. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12).

With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters — functions such as pollutant trapping, flood control and runoff storage. 33 C.F.R. § 320.4(b)(2).

Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[7]

The Agencies relied on Justice Kennedy's controlling opinion to develop guidance used by the Agencies and stakeholders to make jurisdictional determinations.

## WOTUS from 2015 to 2023

Since 2015, the political pendulum has had a direct impact on the definition of waters of the United States. To bring regulatory clarity to the definition, the Obama administration issued a revised definition of WOTUS in 2015. The faction in favor of more limited jurisdiction launched legal attacks on the rule.

*The definition of the term "waters of the United States" is critical in determining whether the CWA's protections apply to a given water.*

In 2019, these attacks culminated in the administration issuing a restrictive definition of WOTUS, which, in turn, was met with challenges from those who advocated for the protections of the CWA to extend to waters with a significant nexus to traditional navigable waters.

Earlier this year, the political pendulum swung back when the Biden administration issued the latest WOTUS rule.

## 2023 WOTUS rule

On January 18, 2023, the Agencies published a final rule defining the "waters of the United States" (2023 WOTUS Rule). The Agencies based the 2023 WOTUS Rule on "the pre-2015 definition of 'waters of the United States,'" and updated the definition "to reflect consideration of Supreme Court decisions, the science, and the agencies' technical expertise."[8] In doing so, the Agencies anticipate that the 2023 definition will "restore[] fundamental protections so that the nation will be closer to achieving Congress' direction in the Clean Water Act that our waters be fishable and swimmable. It will also ensure that our waters support recreation and wildlife."[9]

The 2023 WOTUS Rule generally defines "waters of the United States" to once again include "traditional navigable waters (e.g., certain large rivers and lakes), territorial seas and interstate waters."[10] In defining those waters that do not qualify as traditional navigable waters but still fall within the definition of waters of the United States, the Agencies considered "the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining 'waters of the United States.'" 88 Fed. Reg. 3004, at 3005 (Jan. 18, 2023).

*One rationale for Clean Water Act regulation is that wetlands can perform critical functions related to the integrity of other waters — functions such as pollutant trapping, flood control and runoff storage.*

Essentially, the 2023 WOTUS Rule codified the pre-2015 regulatory regime that had been in place since the Supreme Court's decision in *Rapanos*. "To determine jurisdiction for tributaries, adjacent wetlands, and additional waters, the final rule relies on the longstanding approach of applying two standards. Certain types of waters are jurisdictional under the final rule if they meet either the relatively permanent standard or significant nexus standard."[11]

The Agencies further clarified their interpretation of those standards under the 2023 WOTUS Rule:

> Relatively Permanent is a test that provides important efficiencies and clarity for regulators and the public by readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters. To meet the relatively permanent standard, the waterbodies must be relatively permanent, standing, or continuously flowing waters connected to paragraph (a)(1) waters or waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters.

Significant Nexus is a test that clarifies if certain waterbodies, such as tributaries and wetlands, are subject to the Clean Water Act based on their connection to and effect on larger downstream waters that Congress fundamentally sought to protect. A significant nexus exists if the waterbody (alone or in combination) significantly


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affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. [12]

Despite the Agencies' reliance on Supreme Court precedent and experience that includes more than a decade of working with the regulated community to make jurisdictional determinations under this standard, the 2023 WOTUS Rule has, predictably, come under attack.

## Current attacks on WOTUS and the significant nexus test

In recent months, federal district court judges have issued preliminary injunctions and an administrative stay of the 2023 WOTUS Rule. As a result, Agencies are "interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime in 26 States until further notice."[13] These include Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas Utah, Virginia, West Virginia and Wyoming.

*If the Supreme Court limits the EPA's ability to protect our nation's waters, states and clean water champions can continue to use legislation and litigation to strive for clean water.*

Although the practical effect of the stay may be rather insignificant, Justice Kennedy's Significant Nexus Test is certainly under attack. The opinion from the U.S. District Court for the Southern District of Texas, for example, includes multiple footnotes questioning the validity of the Significant Nexus Test, stating "[t]he court has considerable concerns with the significant-nexus test, even as contrived in Justice Kennedy's *Rapanos* concurrence" and "[t]he court is also concerned that the significant-nexus test poses due process concerns."

## The Supreme Court and *Sackett*

The Supreme Court may directly address the debate when it decides *Sackett v. Environmental Protection Agency*, which it certified in January 2022. The petitioners in *Sackett* urge the Supreme Court to abandon the Significant Nexus Test and instead adopt a modified version of Justice Scalia's Relatively Permanent Test to define waters of the United States. The Biden administration has echoed the concerns Justice Kennedy noted nearly two decades ago, explaining to the Court that abandoning the Significant Nexus Test would "seriously compromise the Act's comprehensive scheme by denying protection to many adjacent wetlands — and thus the covered waters with which those wetlands are inextricably linked."[14]

## What's next?

Proponents of clean water hope the Supreme Court will side with the EPA and confirm that the EPA's use of Justice Kennedy's Significant Nexus Test comports with the scope of the Clean Water Act and the U.S. Constitution. Should the Court instead side with the petitioners and leave vulnerable significant waters throughout the country, all hope is not lost.

States can fill the regulatory void by regulating waters within their own jurisdictions. Most states define "waters of the state" expansively. For example, several states' water pollution statutes define "waters" as "all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon the state." Many states also require permits for groundwater discharges or land application of wastewater sludge (which often results in groundwater or surface water contamination).

Private parties can also fill the regulatory void through private suits to enjoin water pollution that affects their property interests and for damages to compensate them for those damages. For example, if a developer pollutes a creek with sediment that flows downstream into a property owner's portion of the creek or lake, the downstream property owner will, in most states, have actionable claims under common laws of trespass and nuisance, as well as potentially applicable state-specific anti-pollution statutes.[15]

Clean water is essential to all life on this planet. The CWA is essential to the EPA's efforts to control water pollution and achieve water quality that protects life. Yet even if the Supreme Court limits the EPA's ability to protect our nation's waters, states and clean water champions can continue to use legislation and litigation to strive for clean water.

## Notes

[1] Clean Water Act, 33 U.S.C.A. § 1251.

[2] Waters that Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations (https://bit.ly/3LBR1Ca)

[3] *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (internal citations omitted).

[4] *Rapanos*, 547 U.S. at 739.

[5] *Id.* at 742.

[6] *Id.* at 769.

[7] *Id.* at 780.

[8] Envtl. Prot. Agency, Final Rule: Revised Definition of "Waters of the United States" Fact Sheet (Dec. 2022) ("2022 Fact Sheet").

[9] *Id.*

[10] 88 Fed Reg. 3004, 3088 (Jan. 18, 2023).

[11] 2022 Fact Sheet.

[12] *Id.*

[13] Envtl. Prot. Agency, *Definition of "Waters of the United States": Rule Status and Litigation Update*, https://bit.ly/3LSJik8 (last visited May 4, 2023).

[14] Brief for the Respondents, *Sackett v. Envtl. Prot. Agency* (2022) (No. 21-454), 2022 WL 2119244, at *18.

[15] *See, e.g., Whiteside Ests., Inc., v. Highlands Cove, L.L.C.*, 553 S.E.2d 431 (N.C. Ct. App. 2001).


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