The WOTUS Rollercoaster Continues

The **Waters Advocacy Coalition** (WAC) includes nearly **50 organizations** representing agriculture, energy, infrastructure, construction and real estate, manufacturing, mining, recreation, specialty pesticides, state departments of agriculture, and many other **job creators that represent virtually every corner of the American economy.**

WAC members **need a clear, commonsense WOTUS definition** to create jobs and support their communities while **protecting clean water resources**. The new WOTUS rule makes these efforts more difficult, puts much needed infrastructure projects at risk, and threatens to make food, housing, and energy more expensive for American families.

Background on the Clean Water Act and WOTUS

In the Clean Water Act (CWA), Congress gave the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) authority to regulate **"navigable waters"**, defined in the statute as "**the waters of the United States"** (WOTUS). Any waters not regulated by the EPA and Corps as WOTUS are under exclusive state and local government authority.

While the term "waters of the United States" has been defined by the EPA and Corps through regulation, the definition has been marred by uncertainty, controversy, and litigation for decades. Multiple Supreme Court decisions have touched on the definition over the years, but neither the Supreme Court nor the Agencies have provided sufficient clarity. Concerns about ambiguous terms, congressional intent, and how to determine jurisdiction persist today. The Supreme Court is currently considering *Sackett v. EPA,* a case that could have significant ramifications for the scope of any future WOTUS rule. Despite significant urging by Congress and the regulated community to delay a new regulation until that case is decided, the Agencies disregarded this commonsense request and prematurely finalized yet another complex rule.

Impact on National Economy and Jobs

Every sector of the national economy – from small businesses and farmers, to manufacturers and homebuilders – depends on a clear, predictable, and transparent WOTUS rule so they can protect the environment, operate with certainty, and create jobs in their communities. Continual repeals, remands, and reintroductions of WOTUS definitions only sow confusion and thwart regulatory certainty. The new WOTUS rule will make economic development more difficult and make it more expensive to invest in U.S. operations and businesses.

New WOTUS Rule: Myth vs. Fact

Myth #1: The Supreme Court's pending decision in *Sackett v. EPA* won't affect the new WOTUS rule.

Fact: The Supreme Court is poised to issue an opinion very soon in *Sackett v. EPA*. In this case, the Court will consider whether the "significant nexus" test - the *same* jurisdictional test that forms the foundation of the Agencies' final rule – is the right test for determining federal CWA jurisdiction over wetlands. Despite pleas from Congress and other stakeholders to wait until the Supreme Court decided the case, the agencies charged ahead with this premature rulemaking. The Court's decision in *Sackett* could render substantial portions of the final rule non-applicable and irrelevant – and require *yet another* WOTUS rule and more years of regulatory uncertainty and litigation.

Myth #2: The new WOTUS Rule generally recodifies the pre-2015 regulatory framework.

Fact: The new WOTUS rule expands federal jurisdiction over dry land and isolated waters beyond the status quo in several ways. First, it creates a new "catch-all" category of various waters – known as (a)(5) waters – that the Agencies have not asserted jurisdiction under since 2003. Second, the final rule not only continues to rely on the "significant nexus" test, which is the subject of the *Sackett v. EPA* case before the Supreme Court, but even redefines it in a way that expands its application. It also expands the *Rapanos v. U.S.* plurality's "relatively permanent" standard compared to pre-2015 practice. Finally, it places additional limits on several key, long-standing regulatory exclusions.

Myth #3: The new WOTUS rule is clear, durable, and easy to implement and has *de minimis* cost impact.

Fact: The new WOTUS rule lacks definitions for key terms, uses vague and conflicting examples, and doubles down on an expanded and subjective "significant nexus" test. It complicates an already complex process without corresponding environmental benefits. Small businesses and landowners will be forced to spend tens of thousands of dollars to hire consultants and lawyers simply to determine whether there is a WOTUS on their property and if they need a federal permit. Delays due to regulatory uncertainty, plus increased permitting and mitigation costs, will make it more difficult and expensive to grow food, produce energy, and build infrastructure. The Agencies say this rule will have only *de minimis* impacts. But there is no question this rule will impose significant costs on farmers, ranchers, small businesses and communities.

Timeline

- **1972**: Congress passes the Clean Water Act.
- **1980s**: EPA and the Corps promulgate revised regulations defining WOTUS, known as the "1986 regulations."
- **1985**: In *U.S. v Riverside Bayview Homes*, the Supreme Court limits federal CWA jurisdiction.
- **2001**: In *SWANCC v. Army Corps of Engineers*¸ the Supreme Court limits federal CWA jurisdiction.
- **2006**: In *Rapanos v. U.S.*, the Supreme Court issues a split 4-1-4 decision. Two tests for federal CWA jurisdiction emerge – the plurality's "relatively permanent" test and the problematic "significant nexus" test crafted from Justice Kennedy's concurrence.
- **2015**: The Obama administration promulgates the 2015 WOTUS Rule, which significantly expands federal jurisdiction over land and water features. The rule was enjoined, or blocked, in around half of the states.
- **2019-2020**: The Trump administration repeals the 2015 WOTUS Rule and replaces it with the Navigable Waters Protection Rule (NWPR), a clear and easy to implement WOTUS rule.
- **2021-2022**: The Biden administration moves to rescind and replace the NWPR. After a court in Arizona vacates the NWPR, the agencies halted implementation of the NWPR nationwide and return to the "pre-2015 framework," a combination of the 1986 regulations plus guidance following *SWANCC* and *Rapanos*.
- **2022**: The Supreme Court takes up *Sackett v EPA*, which addresses the validity of the "significant nexus" test.

Status and Next Steps

- The Biden administration finalized a new WOTUS rule on December 30, 2022, once again expanding federal authority based on the flawed "significant nexus" test and creating uncertainty.
- This new WOTUS rule takes effect on March 20, 2023. This is the fifth WOTUS rule in ten years and is likely to be short-lived, depending on *Sackett v. EPA*.
- The Supreme Court's decision in *Sackett* could render much of the final rule non-applicable and irrelevant – and require *yet another* WOTUS rulemaking.
- In the meantime, important projects and ordinary activities are stuck in regulatory limbo, tied up in uncertainty, and could become vulnerable to citizen lawsuits.