

BACK TO THE FUTURE: WHAT IS A WATER OF THE UNITED STATES?

Joan E. Drake
Modrall Sperling

On January 18, 2023, the U.S. Environmental Protection Agency (“EPA”) and the Department of the Army jointly published their latest final rule, referred to as the “2023 Rule,” on the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act.¹ The Clean Water Act authorizes the regulation of activities in Navigable Waters, which are comprised of WOTUS, and delegates regulatory implementation to the U.S. Army Corps of Engineers (“Corps”) and EPA. The scope and extent of WOTUS is not defined in the statute, and the agencies and courts have wrestled with its scope and extent since the Act was enacted in 1972. The agencies state that the 2023 Rule is focused on meeting the objectives of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. The 2023 Rule is founded upon the pre-2015 definition of WOTUS, which included tributaries and intermittent streams as well as permanently flowing (traditionally navigable) waters, with updates to reflect consideration of U.S. Supreme Court decisions, science, and the agencies’ technical expertise. The preamble to the 2023 Rule provides substantial discussion of the agencies’ consideration of over 100,000 comments, rationale for its rulemaking decisions, and advice to landowners and agency staff regarding tools and approaches to implementation of the 2023 Rule.

Why It Matters: The scope of WOTUS is important because the Clean Water Act imposes significant regulatory requirements on public and private activities that affect waterways. Section 404 requires Corps permits for placement of “fill” material in WOTUS; Section 311 mandates provisions for oil spill prevention and response; Section 402 imposes permitting requirements for point source discharges, which can include stormwater discharges; and Section 401 requires state or tribal water quality certifications. Issuance of a Clean Water Act permit is a federal action that triggers the requirements of the National Environmental Policy Act (“NEPA”) and other federal statutes, including the Endangered Species Act (“ESA”) and the National Historic Preservation Act (“NHPA”). A determination that an activity triggers regulatory jurisdiction under the Clean Water Act can result in significant delays and expense unless it is covered under a Nationwide Permit or other General Permit.

How Did We Get Here: In what has become a political see-saw, this is the fourth revision since 2015 of this key definition in the agencies’ Clean Water Act regulatory program. Prior to 2015, the definition of WOTUS that the agencies applied since 1977 (codified in the 1986 regulations (the “1986 Rule”)), specified that WOTUS, while including traditionally navigable waters, also included tributaries and adjacent wetlands that did not have to be navigable in fact but must have a connection to interstate or foreign commerce.² Agency staff

¹ 88 Fed. Reg. 3004 (Jan. 18, 2023). This article is based on a review of the prepublication version of the rule, issued December 30, 2022, prior to publication in the *Federal Register*. Further information can be accessed here: <https://www.epa.gov/wotus/revising-definition-waters-united-states>. The rulemaking amends the Corps’ regulations at 22 C.F.R. Part 328, and EPA’s regulations at 40 C.F.R. Part 120.

² Two key U.S. Supreme Court decisions affected the agencies’ jurisdictional interpretations prior to 2015. First, the Court excluded isolated intrastate waters from Clean Water Act jurisdiction. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (“SWANCC”). Then, a fractured decision resulted in the predominance of Justice Kennedy’s view in his concurring opinion that the agencies must establish a “significant

typically performed desktop analyses as well as in-field case-by-case jurisdictional determinations, which could be time consuming.

In 2015, the Obama administration issued its final rule (the “2015 Rule”) replacing the 1986 Rule, which broadened the definition of WOTUS to include all tributaries as “jurisdictional by rule,” but did not provide clarity on the upstream extent of jurisdiction. In October 2019, the Trump administration issued a rule (the “2019 Rule”) that repealed the 2015 Rule, reinstated the 1986 Rule, and instructed agencies to implement an interpretation of WOTUS consistent with Justice Scalia’s more restrictive definition, which focused on relatively permanent, standing, or continuously flowing bodies of water, in his plurality opinion in *Rapanos*. In January 2020, the Trump administration issued a further final rule (the “2020 Rule”) with a WOTUS definition based primarily on Justice Scalia’s more limited test in *Rapanos*.

A key issue of contention has been the expansiveness or restrictiveness of the agencies’ regulatory jurisdiction. The preamble to the 2023 Rule notes that approximately 75% of water bodies were found to be non-jurisdictional under the 2020 Rule as opposed to only 45% under the prior regulations.³ This effect was particularly evident in the arid Southwest. The preamble notes that in New Mexico, of the 263 streams assessed via Approved Jurisdictional Determinations (“AJDs”) in the first 12 months of implementation of the 2020 Rule (i.e., from June 22, 2020, to June 21, 2021), 100% were found to be non-jurisdictional ephemeral features. In Arizona, of the 1,525 streams assessed in AJDs in the first year of implementation of the 2020 Rule, 1,518, or 99.5%, were found to be non-jurisdictional ephemeral resources. Eliminating these streams from jurisdiction under the 2020 Rule also typically eliminated jurisdiction over wetlands that otherwise might meet adjacency criteria.⁴

Both the Obama and Trump administrations asserted the intent of their 2015, 2019, and 2020 rulemakings was to clarify the definition of WOTUS, make it easier and faster to obtain a jurisdictional determination, and provide greater certainty for the regulated community. However, the extreme reversals from an expansive interpretation to a constrained interpretation of the extent of WOTUS, and the ensuing plethora of lawsuits and judicial decisions, have left the regulated community with confusion and uncertainty. The 2023 Rule seeks a middle ground that draws from previous experience and rulings, and attempts to avoid the legal pitfalls of drawing administratively convenient but extreme bright lines.

2023 Rule WOTUS Definition: Paragraph (a) of the 2023 Rule defines WOTUS to include the following:

- (1) Traditional navigable waters, the territorial seas, and interstate waters (“paragraph (a)(1) waters”). This definition provides no change to the 1986 Rule.
- (2) Impoundments of WOTUS (“paragraph (a)(2) impoundments”).

nexus” with a downstream WOTUS “more readily understood as navigable” in order to exert jurisdiction over upstream tributaries (in contrast to Justice Scalia’s plurality view that the predominant factor should be relatively permanent flow). *Rapanos v. United States*, 547 U.S. 715 (2006). Uncertainty regarding the “significant nexus” test, what factors to apply, and how to maintain consistency across different regions led the Obama and Trump administrations to establish bright lines in their rulemakings to provide more certainty and ease of implementation. Both the 2015 and 2020 Rules faced headwinds in implementation and were challenged in court.

³ Final Rule, prepublication version, at 215.

⁴ *Id.* at 217.

- (3) Tributaries to traditional navigable waters, the territorial seas, and interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”).
- (4) Adjacent wetlands as follows (“jurisdictional adjacent wetlands”):
 - wetlands adjacent to paragraph (a)(1) waters,
 - wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or to jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard, and
 - wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard.
- (5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4) that meet either the relatively permanent standard or the significant nexus standard (“paragraph (a)(5) waters”).

Exclusions: Paragraph (b) of the 2023 Rule includes the long-standing exclusions from the pre-2015 regulations, as well as additional exclusions based on well-established practice. These features were excluded by regulation or general practice under the pre-2015 regulatory regime and each of the subsequent rules. Exclusions include:

- (1) prior converted cropland;
- (2) waste treatment systems;
- (3) ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- (4) artificially irrigated areas that would revert to dry land if irrigation ceased;
- (5) artificial lakes and ponds created by excavating or diking dry land to collect rain and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- (6) 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;
- (7) waterfilled 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; and
- (8) swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Other Definitions: The 2023 Rule contains several defined terms not changed from the 1986 Rule, including the definitions of “wetlands,” “adjacent,” “high tide line,” “ordinary high water mark,” and “tidal water.” The 2023 Rule includes a new term and definition for “significantly affect” as applied to the significant nexus test, discussed below.

Key Changes:

- **Tributaries:** The 2023 Rule does not provide a definition of the term “tributary,” but relies on the agencies’ many years of implementing the Clean Water Act and identifying tributaries. The 2023 Rule adds territorial seas to the list of waters to which a water may be a tributary, and deletes from the list intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4), which were the “(a)(3) other waters” provision in the 1986 Rule. A tributary for purposes of the 2023 Rule includes rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water. A tributary may flow through a number of downstream waters, including a non-jurisdictional tributary or non-jurisdictional features, such as a ditch excluded under paragraph (b) of the 2023 Rule or an excluded waste treatment system, and jurisdictional waters that are not tributaries, such as an adjacent wetland. But to be jurisdictional, the tributary must be part of a tributary system that eventually flows to a traditional navigable water, the territorial seas, or an interstate water. The agencies will utilize the Corps’ well-established definition of an ordinary high water mark (“OHWM”) to assist in identifying tributaries for purposes of this rule.
- **Standards applied to tributaries and adjacent wetlands:** The scope and extent of tributaries and wetlands that are regulated as WOTUS have been among the most controversial issues regarding the WOTUS definition. The standards in the 2023 Rule to determine whether tributaries and adjacent wetlands are jurisdictional draw from both Justice Kennedy’s “significant nexus” standard articulated in his *Rapanos* concurring opinion and the 2020 Rule’s focus on relatively permanent waters. The 2023 Rule defines the “relatively permanent standard” to mean relatively permanent, standing, or continuously flowing waters connected to paragraph (a)(1) water, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. The relatively permanent standard encompasses tributaries that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. The 2023 Rule defines the “significant nexus standard” to mean waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.
- The 2023 Rule defines the term “significantly affect,” for purposes of determining whether a water meets the significant nexus standard, to mean “a material influence on the chemical, physical, or biological integrity of” a paragraph (a)(1) water. The 2023 Rule acknowledges that paragraph (a)(1) waters, which are indisputably included within WOTUS, can be affected by actions that affect waters connected to or upstream from such waters, which compels their inclusion in the Clean Water Act’s regulatory jurisdiction. The agencies did not include a statistical or quantitative measure to determine “significance” of an affect. Rather, the agencies continue to rely on a variety of site-specific functions and factors to determine significance.

- The 2023 Rule identifies specific functions to be considered in the assessment of whether a water has a material influence on the integrity of a paragraph (a)(1) water, including:
 - distance from a paragraph (a)(1) water;
 - hydrologic factors such as frequency, 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.
- Additional factors to be considered include:
 - 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 paragraph (a)(1) waters; and
 - provision of habitat and food resources for aquatic species located in paragraph (a)(1) waters.
- Impoundments: Under the 2023 Rule, impoundments of paragraph (a)(5) waters may retain their jurisdictional status following impoundment only if they meet jurisdictional standards under other paragraphs.
- Intrastate waters: The agencies replaced the 1986 Rule’s broad Commerce Clause basis for jurisdiction for these “other waters” with the relatively permanent standard and significant nexus standard, and limited waters under this provision to the enumerated list of lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4). The 2023 Rule deletes the detailed list in the 1986 Rule that was, at times, erroneously construed to be exclusive—mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds—since it caused confusion.
- Groundwater: Consistent with past rules, groundwater is not included in the definition of WOTUS since it is not a surface water and is therefore regulated under other regimes. However, the preamble notes that groundwater can form a connection to a downstream WOTUS to establish jurisdiction of an upstream water.

Key Issues for WOTUS in the Southwest: Because of its relatively low levels of precipitation and prevalence of intermittent and ephemeral channels, consistent and meaningful determination of jurisdictional tributaries in the arid Southwest has been challenging. The key limitations that the 2020 Rule created in its definition of “tributary,” which the 2023 Rule does not adopt, were the categorical exclusion of ephemeral streams and the requirement that streams contribute flow to a traditional navigable water or territorial sea in a “typical year.” The agencies agreed with commenters who noted that ephemeral streams can provide many important

functions for paragraph (a)(1) waters. The agencies also found that the “typical year” requirement for tributaries was not supported by science. Scientific information does not demonstrate that only those streams that contribute intermittent or perennial flow to a traditional navigable water or territorial sea in a “typical year” have significant effects on the chemical, physical, and biological integrity of larger downstream waters, including paragraph (a)(1) waters.

In response to comments that the 2023 Rule’s definition of “tributary” is too broad, the preamble notes that, applying the standards in the Rule, the following waters would *not* be considered jurisdictional in the arid West and Southwest because they would not materially affect the chemical, physical, and biological integrity of a paragraph (a)(1) water:

- a group of non-relatively permanent tributaries and adjacent wetlands located within a closed basin in the arid West that does not connect to any paragraph (a)(1) water; and
- a non-relatively permanent tributary located within a small catchment with another non-relatively permanent tributary and few adjacent wetlands in the arid West, which exhibits losing stream conditions and capacity to provide only infrequent and very low volume flows to the paragraph (a)(1) water.

In contrast, the preamble notes that the following *would* be considered jurisdictional under the standards in the 2023 Rule because they could materially affect the chemical, physical, and biological integrity of a paragraph (a)(1) water:

- a second-order headwater non-relatively permanent tributary located within a catchment with several other tributaries and several adjacent wetlands in the Southwest, which are a moderate distance from the paragraph (a)(1) water but contribute high magnitude and high volume flows downstream during seasonal precipitation events that lead to strong effects of the functions on the paragraph (a)(1) water, including the transport of large volumes of sediment and woody debris that help shape and structure the channel of the paragraph (a)(1) water by slowing the flow of water through channels and providing habitat and food sources for the fish that live in the paragraph (a)(1) water; and
- an adjacent wetland in the Mountain West that is similarly situated with dozens of other adjacent wetlands and several tributaries, has the capacity to store high volumes of floodwaters and to store and process nutrients that would otherwise reach a downstream paragraph (a)(1) water, thereby reducing flooding and the potential for algal blooms in the paragraph (a)(1) water, and that provides strong functions to a paragraph (a)(1) water given its landscape position in relation to the tributary network and the paragraph (a)(1) water.

The preamble provides other examples, such as: “while almost all the streams in Arizona regularly do not have water in them, they are essential to the flow in downstream waters, like the Colorado River; similarly, headwater ephemeral streams in the forests of the Northeastern United States are essential to flow in downstream rivers.”⁵ The preamble goes on to note that “filling ephemeral streams could cause significant harm to the downstream rivers. The importance of ephemeral streams is evident from videos of these streams flowing after rain events in the Southwest. This video . . . also highlights the difference between dry land and ephemeral

⁵ *Id.* at 468.

tributaries and demonstrates why landowners would not want to construct a building in an ephemeral stream.”⁶

Conclusion: The 2023 Rule rejects the recent attempts by the two prior administrations to establish simple bright-line tests for jurisdictional WOTUS under the Clean Water Act, acknowledging that the determination of a significant nexus can be complex and there are differences between regions of the United States that compel detailed site-based evaluations. The preamble to the Rule provides substantial background on its rationale for its definition, and guidance on implementation. Agency staff and the regulated community will likely be relieved that the new Rule substantially relies on pre-2015 rules and practices, with which the agencies and regulated community have decades of experience, provides useful updates and guidance based on agency experience, and acknowledges regional differences.

Two lawsuits in the U.S. District Court for the Southern District of Texas have been filed against the 2023 Rule by 18 industry groups and Texas Attorney General Ken Paxton along with other state agencies.⁷ In the consolidated lawsuits, on March 19, 2023, the federal judge stayed the Rule in Texas and Idaho but declined to stay the Rule nationwide because “[a]t least twenty-five other states have filed complaints and motions for preliminary injunctions against the Rule” and “[t]he judicial process will benefit from the reasoning and conclusions of other courts weighing in”⁸ In addition, on March 29, 2023, by a 53 to 43 roll call vote, the U.S. Senate voted to use the Congressional Review Act to overturn the 2023 Rule, following a similar earlier vote by the U.S. House of Representatives, under a joint resolution of disapproval.⁹ The resolution of disapproval, however, was vetoed by President Biden on April 6, and there is insufficient opposition to override the veto.¹⁰

The timing of the 2023 Rule issuance may be a strategic move in light of the pending consideration of WOTUS jurisdiction before the U.S. Supreme Court in the latest *Sackett v. EPA* litigation, in which a ruling is expected in 2023. The conservative majority on the Court may presage limitation of WOTUS jurisdiction. By issuing the 2023 Rule before the Court acts, the agencies may give themselves more flexibility to interpret the eventual Court ruling in light of the new Rule rather than being limited by the Court’s ruling if it precedes the Rule’s issuance.

Further, given the long-standing controversy regarding the scope and extent of the definition of WOTUS for regulatory purposes, past experience suggests it is likely that some dissatisfied groups and/or states will file lawsuits challenging the 2023 Rule on various grounds. However, the extensive (514 page) final rule with preamble, in addition to technical support documents, derives from and builds upon well-established pre-2015 experience, and provides

⁶ *Id.* (referring to a video available at U.S. Department of Agriculture, Agricultural Research Service, Multiflume Runoff Event August 1, 1990, at <https://www.tucson.ars.ag.gov/unit/WGWebcam/WalnutGulchWebcam.htm>).

⁷ *See Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex., Galveston Div., Mar. 19, 2023) (memorandum opinion and order granting preliminary injunction).

⁸ *Id.* at 33.

⁹ E.A. Crunden, “Senate Votes to Overturn Biden Water Rule,” *E&E News PM* (Mar. 29, 2023), <https://www.eenews.net/articles/senate-votes-to-overturn-biden-water-rule/>.

¹⁰ Jeremy Dillon, “Biden Vetoes Clean Water Act Resolution,” *E&E News PM* (Apr. 6, 2023), <https://www.eenews.net/articles/biden-vetoes-clean-water-act-resolution/>.

solid foundations and rationales for the Rule. This foundation, plus the middle-ground approach taken in the 2023 Rule, may help it withstand legal challenges.