

Locke Lord QuickStudy: Back to the Future: EPA and Corps of Engineers Announce Intent to Restore Previous Definition of WOTUS

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On June 9, 2021, the U.S. EPA and U.S. Army Corps of Engineers (collectively, the “Agencies”) jointly announced their intention to revisit and revise the definition of “waters of the U.S.” (WOTUS). The definition of WOTUS and the resulting extent of federal jurisdiction under the Clean Water Act is one of the most controversial and frequently litigated topics in environmental law. The result has been a near constant ebb and flow in the scope of federal jurisdiction as the definition is repeatedly challenged, interpreted, and revised by different courts and administrations. With this latest announcement the Biden Administration is continuing that cycle in search of the elusive definition that would be at once clear, defensible, and sufficiently non-controversial to not become a target of a future Republican administration.

Recent History

Since 2006, the definition of WOTUS had been interpreted in accordance with the “significant nexus” test established by Justice Kennedy in the 2006 Supreme Court case *Rapanos v. United States*. The Obama Administration undertook a major rulemaking to strengthen and, ostensibly, to clarify the definition, culminating in the 2015 Clean Water Rule. The Clean Water Rule significantly expanded the extent of federal jurisdiction, subjecting many waters and wetlands to federal jurisdiction that previously had not been regulated. It also muddied the waters in many cases as many waters and wetlands required site-specific jurisdictional determinations by the Corps of Engineers. Predictably, the Clean Water Rule was hailed by the environmental community and criticized as overreaching by industry and conservatives. It was challenged in numerous lawsuits and stayed by courts in multiple jurisdictions. The Clean Water Rule became a primary target of the Trump Administration, which promulgated its own rule redefining WOTUS in June of 2020, the Navigable Waters Protection Rule (NWPR). The NWPR provided the clearest, but also the narrowest, definition of WOTUS of any prior rule or interpretation. See our previous Quick Studies ([here](#) and [here](#)) for more detail and background on both the NWPR and the Clean Water Rule.

Agencies’ New Direction

When President Biden took office, he promptly announced a review of major environmental rules promulgated by the Trump Administration, including the NWPR. After completing that review, the Agencies determined that the

narrow scope of federal jurisdiction under the NWPR “is leading to significant environmental degradation.” For example, the Agencies noted that every one of over 1,500 streams assessed in the states of Arizona and New Mexico has been found to be non-jurisdictional, and over 333 projects that would have required a Clean Water Act section 404 permit under the Clean Water Rule no longer do under the NWPR. Accordingly, the Agencies plan to undertake a new rulemaking to come up with a definition of WOTUS “informed by a robust engagement process as well as the experience of implementing the pre-2015 rule, the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule.”

According to the Agencies’ joint announcement, the new rulemaking will be guided by the following considerations:

- Protecting water resources and our communities consistent with the Clean Water Act.
- The latest science and the effects of climate change on our waters.
- Emphasizing a rule with a practical implementation approach for state and Tribal partners.
- Reflecting the experience of and input received from landowners, the agricultural community that fuels and feeds the world, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

Outlook for Developers

It is clear that the new rule developed by the Biden Administration will be more expansive than the NWPR. Not as clear is whether it will be more or less expansive than the Clean Water Rule. Given the success of numerous legal challenges to the Clean Water Rule, it’s reasonable to expect something more restrained, and the Agencies indicated in their announcement that they intend to “restore[] the protections in place prior to the 2015 Clean Water Rule.” But the Biden Administration has not been shy about going bold on issues involving climate and environmental justice, and WOTUS involves both, so an expansive rule is certainly a possibility.

The rulemaking process is likely to take at least 2-3 years. In the meantime, the Agencies have asked the court in pending litigation challenging the NWPR to remand the rule, but without vacatur. That would leave the NWPR in place while the new rule is developed, which would provide a window during which many waters and wetlands not qualifying as jurisdictional under the NWPR could legally be filled and developed.

The Agencies are expected to provide further detail on their plans and process for the rulemaking in the weeks to come. Locke Lord’s environmental attorneys will be following this issue closely and are available to address questions regarding WOTUS and the rulemaking process in the meantime.

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