

Waters of the United States

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Waters of the United States (WOTUS)

Clean Water Act (CWA) prohibits discharge of pollutants and dredged or fill material from a point source into “navigable waters” without a permit.

CWA defines “navigable waters” as “waters of the United States,” but does not define what that means.



Definition of WOTUS

Why does this matter?

- Section 404 permitting
- Section 401 water quality certifications
- Section 402 (NPDES) permitting
- Section 311 spill prevention, control, and countermeasures
- Water quality standards, total maximum daily loads, and related requirements (Section 303, 304, and 305)



Regulatory and Litigation Background

2015 WOTUS Rule (Obama)

Stopped in 27 ½ states

2019 Repeal Rule (Trump)

Repeals 2015 WOTUS Rule in *all* states → 1986 Regs + SCOTUS Guidance

2020 Replacement Rule – Navigable Waters Protection Rule (NWPR) (Trump)

Establishes new Clean Water Rule

Aug & Sept 2021

Two courts vacate NWPR (6 other courts have thus far refused to do so)

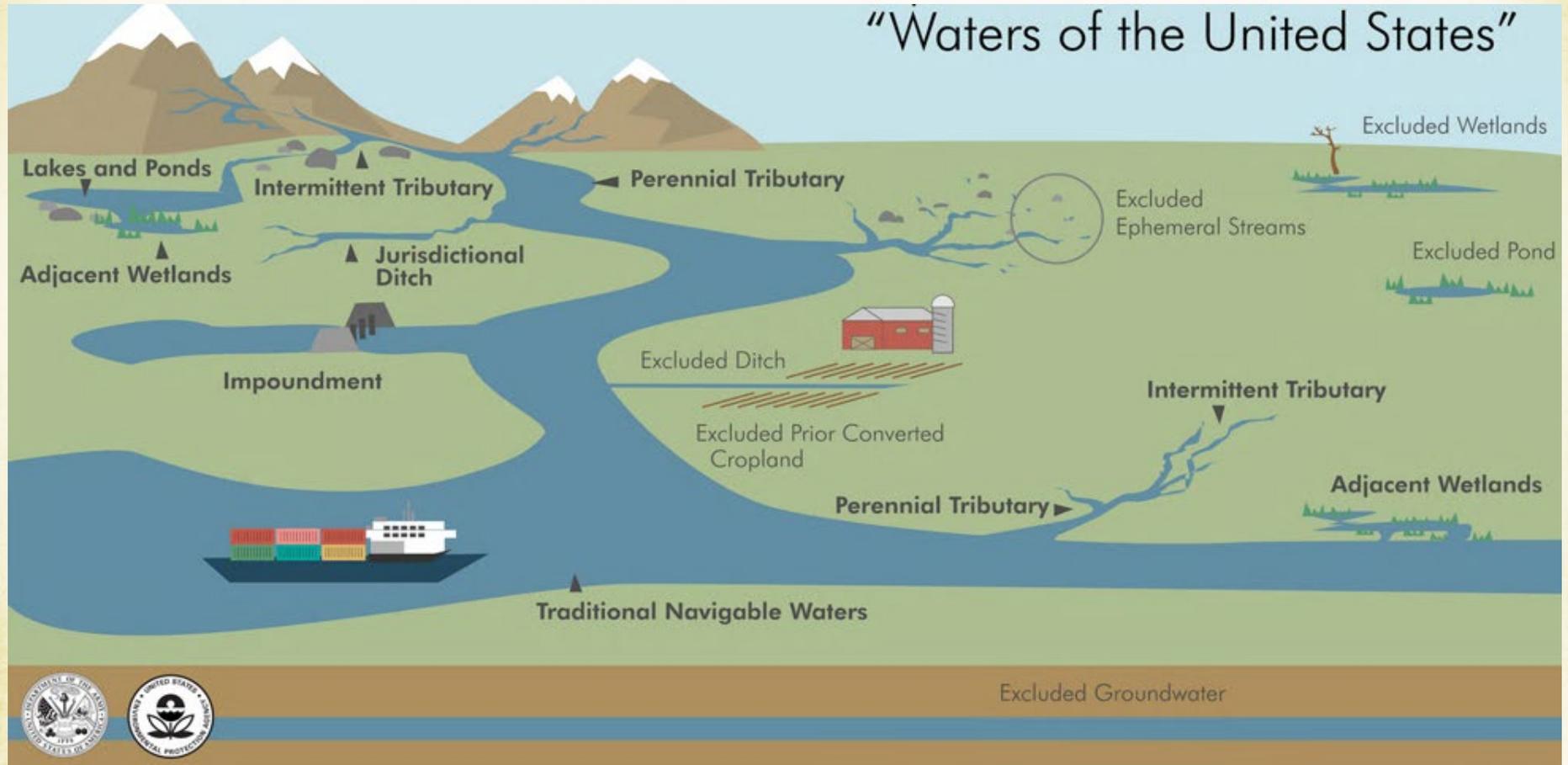
Jan 2023 Finalized Rule (Biden)

Repeals NWPR → 1986 Regs + expanded interpretation of 2008 guidance

2023 Another New WOTUS Rule?? (Biden?)



What might be jurisdictional?



Finalized New Rule

- Greatly expands the scope of federal jurisdiction
- Brings back the subjective significant nexus test
- Relies on a host of ambiguously defined terms (“similarly situated” “in the region” or “significantly effect.”)
- Expands list of exemptions to include artificially irrigated areas, stock watering, irrigation/settling basins and prior converted cropland
- A number of inconsistencies and need for clarifications.
- Not as broad as the proposal but considerably more expansive than 2008 guidance



Ephemerals



2015 Rule: jurisdictional by category

NWPR: not jurisdictional

Finalized new rule: jurisdictional with significant nexus test

Why do farmers and ranchers care?

- The regulation of low spots on farmlands and pastures as jurisdictional “waters” means that any **activity on those lands that moves dirt (404) or applies any product (402)** to that land could be subject to regulation.
- What kind of activities? Everyday activities such as **plowing, planting, or fence building** in or near ephemeral drainages, ditches, or low spots
- Problem with having to obtain a CWA Permit : it requires time and money. The time to obtain a permit can range from several months for a nationwide permit to potentially years for an individual permit. The costs of the permit, mitigation and delay can be exorbitant.
- For these reasons, farmers and ranchers have a keen interest in how the Agencies define “waters of the United States.”



SCOTUS takes WOTUS

- Supreme Court announced that they would hear the high-profile Clean Water Act case, *Sackett v. Environmental Protection Agency*.
- A decision in *Sackett* could provide significant clarity to the proper scope of WOTUS.
- Decision will be handed down in first half of 2023.



Biden WOTUS Rulemaking(s)

What happens next?

- AFBF sued EPA
- *Sackett v. EPA* decision
- Another WOTUS rulemaking in 2023

