

## **Legal & Regulatory Timeline of “Waters of the United States”**

*Last Updated: January 9, 2023*

*\*If you have any questions on the actions described below, or if you need more information on the current status of “Waters of the United States” (WOTUS), please contact NCSL staff, [Kristen Hildreth](#)*

### **Legal Impetus for WOTUS Rules**

Two major U.S. Supreme Court (SCOTUS) cases serve as the legal impetus for the promulgation of WOTUS—the 2001, [Solid Waste Agency of Northern Cook County \(SWANCC\) v. United States et al.](#), and the 2006 case [Rapanos et ux., et al. v. United States](#).

- In 2001 SCOTUS heard *Solid Waste Agency of Northern Cook County (SWANCC) v. United States et al.*, a case questioning whether the provisions of the Clean Water Act (CWA) could be extended to state intrastate waters. The court ruled 5-4 that the provision of the CWA, which requires those discharging fill materials into navigable waters to obtain a permit (Section 404) does not extend to “isolated waters,” and that the U.S. Army Corps of Engineers (USACE or Corps) exceeded its authority in using the “migratory bird rule” to interpret its reach. In Chief Justice William H. Rehnquist’s [majority opinion](#), he stated, “the term ‘navigable’ has...the import of showing us what Congress had in mind as its authority has for enacting the CWA; its traditional jurisdiction over waters that were or have been navigable in act or which could reasonable be so made.”
- In 2006 SCOTUS heard *Rapanos et ux., et al. v. United States*, a case challenging federal jurisdiction to regulate certain, isolated, wetlands under the CWA. The court issued a 4-1-4 decision in favor of Rapanos but was split on how to define the federal government’s jurisdiction. Out of the case came two opinions that have influenced future regulatory guidance—Justice Anthony Kennedy’s concurring opinion stating that waters must have a “significant nexus” to actual navigable rivers and sea to qualify as protected under the CWA, and Justice Antonin Scalia’s [plurality opinion](#), which argued that the CWA strictly applies to “navigable waters,” and only applies to non-navigable waters if the waters are “relatively permanent, standing or flowing bodies of water,” such as streams, rivers, lakes, and bodies of waters forming geographical features.

### **Pre-2014 Guidance**

Prior to the promulgation of the 2015 final rule, there are several guidance documents and regulatory definitions regarding which waters fall under federal jurisdiction under the CWA. They are as follows:

- [1986 Final Rule for the Regulatory Programs of the Corps of Engineers](#)
- [1988 – Clean Water Act Section 404 Program Definitions and Permit Exemptions: Section 404 State Program Regulations](#)
- [2003 Legal Memorandum](#)—discussing the scope of the CWA jurisdiction in light of the *SWANCC* ruling and related court decisions.
- [2008 CWA jurisdiction](#) following SCOTUS’s decision in *Rapanos et ux., et al. v. United States*

## WOTUS Timeline – 2014 to Present

### 2014

March: The Environmental Protection Agency (EPA) and the Corps published a [proposed rule](#) aiming to define which waters were to be considered WOTUS and therefore subject to federal oversight.

### 2015

June: EPA and USACE [published the final rule](#), Clean Water Rule: Definition of Waters of the United States, also known as the 2015 Clean Water Rule, or WOTUS. After the rule was issued it was challenged in multiple courts, including federal district and appellate courts.

August: The U.S. District Court for the District of North Dakota [granted a preliminary stay](#) of the rule for 13 states that were suing EPA and USACE, finding the rule exceeded the agencies' congressional mandate to regulation "waters of the U.S.," while also likely violating the Administrative Procedures Act.

October: The U.S. Court of Appeals for the Sixth Circuit issued a [nationwide stay](#) against the enforcement of WOTUS. During the course of the stay, stakeholders were to utilize regulatory guidance that was in place [pre-2015](#).

### 2016

During 2016 several district courts dismissed challenges to WOTUS citing lack of jurisdiction in light of the Sixth Circuit's ruling, including the U.S. District Court of the [Southern District of Ohio](#), the U.S. District Court for the District of Arizona, and the U.S. District Court for the [District of Minnesota](#). The U.S. District Court of the District of North Dakota [stayed](#) WOTUS proceedings pending further decision by SCOTUS.

### 2017

January: SCOTUS [granted certiorari](#) in order to determine whether or not the Sixth Circuit "erred when it held that it has jurisdiction...to decide petitions to review the waters of the United States rule." The court then held all litigation challenging WOTUS in abeyance until the court ruled on whether U.S. courts of appeals or federal district courts held jurisdiction over challenges to the rule.

February: President Donald Trump signed [executive order \(EO\) 13778](#), "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," directing EPA and USACE to review and potentially rescind the 2015 rule. The EO called on the agencies to rely on Justice Antonin Scalia's *Rapanos* plurality opinion in any revisions to the rule.

June: EPA and USACE published a [proposed rule](#) to repeal WOTUS, and re-codify regulations that existed prior to the 2015 rule. The action was the first step of a two-step, repeal-and-replace process.

November: EPA and USACE proposed a rule to delay the applicability date of WOTUS by 2 years until 2020, as an [attempt](#) to "provide continuity and certainty for regulated entities, the States and Tribes, agency staff, and the public."

## 2018

January: SCOTUS [ruled](#) on whether U.S. courts of appeals or federal district courts have jurisdiction to hear challenges to the WOTUS rule, deciding that challenges to the rule must be heard in federal district courts. The court remanded the case to the Sixth Circuit, with instructions to dismiss the case.

### February:

- EPA and USACE [finalized](#) the two-year delay of WOTUS, pushing back the applicability date of the rule to Jan. 31, 2020. The two-year delay was [immediately challenged](#) in a lawsuit filed in U.S. district court by the attorneys general of California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington and the District of Columbia.
- The Sixth Circuit Court of Appeals [vacated](#) its nationwide stay and dismissed consolidated petitions for review due to a lack of jurisdiction.

### June:

- The U.S. District Court for the Southern District of Georgia [granted](#) a regional injunction of WOTUS to 11 states—Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah and Wisconsin.
- EPA and USACE issued a [supplemental notice](#) to its June 2017 proposal to repeal WOTUS and recodify prior guidance, clarifying the administration's intent to repeal the rule in its entirety.

August: The U.S. District Court for the District of South Carolina [ruled](#) that EPA and USACE failed to comply with the Administrative Procedures Act when issuing the two-year extension of the WOTUS applicability date. The action reinstated WOTUS in 26 states, the District of Columbia and Territories, while the rule remained stayed in 24 states due to separate injunctions.

September: The U.S. District for the Southern District of Texas [granted](#) an injunction of WOTUS to Louisiana, Mississippi and Texas, and a federal judge in North Dakota [ruled](#) that Iowa could join the other states previously granted an injunction of WOTUS in [2015](#). The two actions [increase](#) the number of states where WOTUS remains stayed to 28 states and reduces the number of states where the rule is in effect to 22.

December: EPA and USACE [announced](#) their proposed WOTUS rewrite, the second step in a two-step process to repeal and replace the 2015 final rule to clarify federal authority under the CWA. Publication in the Federal Register will kick off a 60-day comment period. Public meetings for the regulation have been postponed due to the partial government Shutdown.

## 2019

February: The WOTUS rewrite announced in December is published in the Federal Register on Feb. 14 kicking off a 60-day comment period with comments due April 15.

March: The administration withdrew its appeal efforts regarding its Feb. 2018 attempt to delay the implementation date for EPA’s 2015 Clean Water Rule – in Aug. 2018 the U.S. District Court for the District of South Carolina [ruled](#) that EPA and USACE failed to comply with the Administrative Procedures Act when issuing the two-year extension of the WOTUS applicability date.

October: EPA and USACE published the [final rule](#) that repealed the 2015 WOTUS rule and restored the 1986 regulatory definition of “Waters of the United States,” – step 1 of the two-step process.

December: EPA and USACE completed [step 1](#), repealing the 2015 Rule and re-codifying the 1986 regulatory definition of WOTUS that existed prior to the 2015.

## **2020**

January: EPA and USACE [released the](#) “Navigable Waters Protection Rule” which updates the federal definition for a WOTUS – the second step in the two-step process to repeal and replace the 2015 rule.

April: EPA and USACE published the “Navigable Waters Protection Rule: Definition of ‘Waters of the United States’,” in the [Federal Register](#) on April 21 – the rule will go into effect on June 22, 2020.

## **2021**

January: President Joe Biden issued [EO 13990](#), “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” directing EPA and USACE to “to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations [including the Navigable Waters Protection Rule or “NWPR”] and other actions during the last four years that conflict with these important national objectives.” The order also specifically revoked [EO 13778](#) which resulted in promulgation of the NWPR.

June: EPA and USACE [announced](#) their intent to revise the definition of WOTUS.

### September:

- The U.S. District Court for the District of Arizona vacated and remanded the NWPR in the case of [Pascua Yaqui Tribe v. EPA](#), effectively ceasing the implementation of the NWPR nationwide and leaving the agencies to apply the pre-2015 WOTUS definition. The district court found “fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition” and accordingly remanded and vacated the rule. The administration did not request that the court vacate the NWPR, and instead [requested](#) for it to remain in place while it developed a new regulation.
- The agencies halted implementation of the NWPR nationwide following receipt of the order in [Pascua Yaqui Tribe](#) and began interpreting “waters of the United States” consistent with the pre-2015 regulatory regime.

December: USACE and EPA [published in the \*Federal Register\* a proposed rulemaking](#) to revise the definition of WOTUS which would put back into place the pre-2015 definition of WOTUS, updated to reflect the consideration of Supreme Court decisions.

## **2022**

January: SCOTUS agrees to hear [Sackett v. Environmental Protection Agency](#), a case which will rule on “whether the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under the CWA.” The Ninth Circuit Court of Appeals had previously ruled adopting Justice Anthony Kennedy’s “significant nexus” test from *Rappanos*.

December: The Army and EPA finalized their redefinition of WOTUS. The rulemaking codifies the use of pre-2015 regulations and updates them accordingly to be “consistent with relevant Supreme Court decisions.”

## **NCSL Resources & Engagement**

### **NCSL Federal Engagement:**

- February 2022: Letter RE: Revised Definition of “Waters of the United States,” Docket ID No. EPA-HQ-OW-2021-0602-0001
- October 2021: Letter RE: Response to EPA’s Intent to Revise the Definition of “waters of the United States.”
- April 2019: Letter RE: Proposed Rule on the “Revised Definition of “Waters of the United States.” Docket No. EPA-HQ-OW-2018-0149
- March 2019: Joint Letter RE: Proposed Rule on the “Revised Definition of “Waters of the United States.” Docket No. EPA-HQ-OW-2018-0149
- June 2017: Letter RE: Waters of the United States to EPA Administrator Pruitt

### **NCSL Information Alerts:**

- January 2020: [EPA and the Corps Issue Final Rule Re-defining “Waters of the United States”](#)
- December 2018: [The Environmental Protection Agency and the Army Corps of Engineers Issues Proposed Rule Re-defining "Waters of the United States"](#)
- August 2018: ['Waters of the United States' in Effect for 26 States](#)
- February 2018: [EPA Finalizes Two-Year Delay of 2015 Clean Water Rule](#)
- June 2017: [EPA Proposes to Rescind 2015 WOTUS Final Rule and Issues Final Rules for Chemical Safety Implementation](#)
- March 2017: [President Trump Issues Executive Order to Review, and Potentially Rescind, WOTUS Final Rule](#)