

New Rules on the Clean Water Act (CWA) and Waters of the U.S. (WOTUS)

Background

The federal wetlands program under Section 404 of the *Clean Water Act* (CWA) regulates the “discharge” of dredged or fill material into “navigable waters.” While this statutory language has not changed since the enactment of the CWA, the federal rule that specifically defines “Waters of the United States” (WOTUS) has changed significantly over recent years. The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) share authority to implement this section of the CWA, the regulation of wetlands and WOTUS. The scope has sometimes extended beyond typical marshes and tributaries and been applied to roadside ditches, stormwater retention ponds, ephemeral streams (which are generally dry except during rain events) and isolated wetlands without a clear connection to other waters.

Regulatory Actions

On December 30, 2022, the EPA and Corps released the pre-publication version of a final rule revising the definition of WOTUS applicable to all CWA programs. The final rule repeals the Navigable Waters Protection Rule (NWPR) and codifies a definition that the agencies claim is “generally consistent with the pre-2015 regulatory regime.” The final rule defines “significantly affect” to mean “a material influence on the chemical, physical, or biological integrity of waters;” the rule does not define or quantify what constitutes “relatively permanent” flow. The rule merely says “relatively permanent” includes features that have flowing or standing water year-round or continuously during certain times of the year.

Court Review

A series of court decisions beginning in 2001 began to narrow the scope of the CWA’s application. The 2005 U.S. Supreme Court decision in *Rapanos v. United States* dealt with the question “Does the phrase ‘waters of the United States’ in the CWA include a wetland that at least occasionally empties into a tributary of a traditionally navigable water?” In 2022, the Supreme Court announced that it would hear another case (*Sackett v. Environmental Protection Agency*) that again addresses the scope of the CWA’s jurisdiction. ICSC has been an active party in the history of WOTUS cases, submitting amicus briefs in both *Rapanos* and *Sackett* when they first came before the Supreme Court and will likely submit additional briefs in the future. A decision on *Sackett* by the Supreme Court is expected in Spring 2023; until then it is unclear if the verdict will impact the December 2022 rule.

Position

ICSC supports a streamlined procedure for identifying environmentally important wetland areas and economically appropriate methods to mitigate adverse impacts to those areas. It also supports limiting the definition of WOTUS to navigable waters that meet the language and intent of the CWA and not expanding the reach beyond what the statute intended. Importantly, state environmental programs will still maintain regulatory oversight over many aspects of wetland permitting regardless of the scope of federal regulation, thus ensuring continued environmental safeguards.

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