

**Agriculture and the Clean Water Act: WOTUS, Groundwater and More**  
**WOTUS and Agriculture**  
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**I. Introduction**

The meaning of the phrase “waters of the United States” has been debated in the legislature, federal agencies, and courtrooms across the country since the Clean Water Act was passed in 1972. Section 404 of the Clean Water Act prohibits discharge of dredged or fill material into the “navigable waters”. 33 U.S.C.A. § 1344. “Navigable waters” means the “waters of the United States, including the territorial seas”. 33 U.S.C.A. § 1362(7). The term “waters of the United States,” as used in the Clean Water Act, was not further defined.

This outline provides a brief overview of the case law interpreting the meaning of “waters of the United States,” the applicable regulations prior to the 2015 WOTUS definition, the 2015 Obama Rule”, the 2019 “Trump Rule”, and the current status of the law as of publication.

**II. Pre- Obama Rule Regulation**

Prior to the “Obama Rule” being passed in 2015, the 1993 regulation was in place to define the meaning of “waters of the United States” under the Clean Water Act.<sup>1</sup> These regulations listed seven categories of WOTUS:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
  
- (2) All interstate waters including interstate wetlands;
  
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;  
or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;  
or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

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<sup>1</sup> Due to injunctions in three courts around the country, this Pre-Obama Rule Regulation is currently in place in 28 states. *See* Section IV below.

- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 CFR § 328.3(a)(1)-(7).

WOTUS does not include prior converted cropland or water treatment systems. 33 CFR § 328.3(a)(8).

33 CFR § 328.3(b) provides that

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

“Adjacent” is defined as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”” 33 CFR § 328.3(c). The regulations also define “ordinary high water mark” and “tidal waters”. 33 CFR § 328.3(e), (f).

### **III. Case Law**

Although there have been countless cases addressing the meaning and scope of “waters of the United States,” there are a handful of key United States Supreme Court cases addressing this issue.

#### *A. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The question presented in this case was whether the Clean Water Act authorizes the United States Army Corps of Engineers to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. The wetlands at issue lie “near” the shores of Lake St. Clair in Michigan. The United States Court of Appeals for the Sixth Circuit held that wetlands are not subject to CWA jurisdiction where, as here, the wetlands were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The Sixth Circuit, troubled by its belief that a different reading would implicate the takings clause of the United States Constitution, did not grant deference to the Corps’ interpretation. The United States Supreme Court summarily dismissed concerns about regulatory takings and, in a unanimous decision, reversed.

The main issue in this case was whether the wetland at issue was “adjacent”. Without discussion, the Supreme Court found that the wetland was adjacent given that “the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [the] property to Black Creek, a navigable waterway”. Later in the opinion, the Court noted that the wetland at issue “actually butts on a navigable waterway” *Riverside Bayview*, 474 U.S. at 135. The majority opinion in *SWANCC* (see below) characterized the holding as a finding that the Corps has jurisdiction over “wetlands that actually abutted on a navigable waterway”. *SWANCC*, 531 US. at 167.

The bulk of the opinion involves discussion of whether the Corps' inclusion of adjacent wetlands as WOTUS was reasonable. The Court applied *Chevron* deference (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), but glossed over the first step, presumably finding that Congress had not spoken clearly on the issue. Given the ambiguity, the Court held that the Corps' interpretation was reasonable. *Riverside Bayview*, 474 U.S. at 131.

Reasoning that the Corps "must necessarily choose at some point at which water ends and land begins", the Court found that defining adjacent wetlands as "waters" under the CWA was reasonable. *Id.*, at 132. Although finding that the term "navigable" is of "limited import" in the Act, the Court noted that including wetlands as "waters" entailed a more nuanced analysis. *Id.* at 133. However, the Corps' conclusion that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality" was reasonable. *Id.*

B. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC").

The question presented was whether the Corps had jurisdiction over an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds. The Corps asserted jurisdiction under the "Migratory Bird Rule", which stated that WOTUS includes intrastate waters that, *inter alia*, provide habitat for migratory birds. The United States Court of Appeals for the Seventh Circuit held that Migratory Bird Rule was a reasonable interpretation of the Clean Water Act and that the Commerce Clause gave Congress authority to regulate such waters based on the cumulative impact theory. The United States Supreme Court reversed in a 5-4 decision, with Chief Justice Rehnquist writing the majority opinion.

The Supreme Court found that, in applying step 1 of *Chevron* deference, Congress spoke clearly in Section 404 of the CWA- waters are not considered WOTUS if the only link to navigable waterways is migratory birds. "We find § 404(a) to be clear..." SWANCC, 531 U.S. at 172. The Court went on to state that even if Congress had not spoken clearly, *Chevron* deference would not uphold the Migratory Bird Rule as the basis for jurisdiction. The arguments supporting the jurisdiction based on the Migratory Bird Rule "raise significant constitutional questions". Upholding jurisdiction based on the Rule would "result in serious impingement of the States' traditional and primary power over land and water use". Therefore, deference is not given, and the rule is rejected.

The Court explained that "the significant nexus between the wetlands and "navigable waters" ... informed [the Court's] reading of the CWA in *Riverside Bayview Homes*." SWANCC, 531 U.S. at 167. *Riverside Bayview* did not address the "question of authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water..." *Id.* The Court found that the text of the CWA "will not allow" a holding "that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." *Id.* (emphasis in original). The majority opinion in SWANCC can reasonably be interpreted as holding that ONLY waters that are adjacent, or have tributaries that are adjacent, to navigable waters are WOTUS.

The dissenting opinion characterized the majority as "draw[ing] a new jurisdictional line [that] invalidates the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each". *Id.* at 176, Stevens dissenting.

### C. Spawn of SWANCC

In *Rapanos* (see below), Justice Scalia, writing for the plurality noted that cases between *SWANCC* and *Rapanos* had interpreted “tributary” and “adjacent” very broadly. These interpretations set the stage for *Rapanos*.

Excerpts from the opinion illustrate Justice Scalia’s point:

Even after *SWANCC*, the lower courts continued to uphold the Corps’ sweeping assertions of jurisdiction over ephemeral channels and drains as “tributaries.” For example, courts have held that jurisdictional “tributaries” include the “intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64),” *Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (4<sup>th</sup> Cir. 2003); a “roadside ditch” whose water took “a winding, thirty-two mile path to the Chesapeake Bay,” *United States v. Deaton*, 332 F.3d 698, 702 (4<sup>th</sup> Cir. 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954–955 (9<sup>th</sup> Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9<sup>th</sup> Cir. 2001); and (most implausibly of all) the “washes and arroyos” of an “arid development site,” located in the middle of the desert, through which “water courses ... during periods of heavy rain,” *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9<sup>th</sup> Cir. 2005).<sup>2</sup>

*Rapanos*, 5477 U.S. at 726-727.

In addition to “tributaries,” the Corps and the lower courts have also continued to define “adjacent” wetlands broadly after *SWANCC*. For example, some of the Corps’ district offices have concluded that wetlands are “adjacent” to covered waters if they are hydrologically connected “through directional sheet flow during storm events,” GAO Report 18, or if they lie within the “100-year floodplain” of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years, *id.*, at 17, and n.16. Others have concluded that presence within 200 feet of a tributary automatically renders a wetland “adjacent” and jurisdictional. *Id.* at 19. And the Corps has successfully defended such theories of “adjacency” in the courts, even after *SWANCC*’s excision of “isolated” waters and wetlands from the Act’s coverage. One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a “significant nexus” to covered waters because, *inter alia*, they lay “within the 100-year floodplain of tidal waters.” *Baccarat Fremont Developers, LLC v. Army Corps of Engineers*, 425 F.3d 1150, 1152, 1157 (9<sup>th</sup> Cir. 2005). In one of the cases before us today, the Sixth Circuit held, in agreement with “[t]he majority of courts,” that “while a hydrological connection between the non-navigable and navigable waters is required, there is no ‘direct abutment’ requirement” under *SWANCC* for “ ‘adjacency.’ ” 376 F.3d 629, 639 (2004) (*Rapanos II*). And even the most insubstantial hydrologic connection may be held to constitute a “significant nexus.” One court distinguished *SWANCC* on the ground that “a molecule of water residing in one of these pits or ponds [in *SWANCC* ] could not mix with molecules from other bodies of water”—whereas, in the case before it, “water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies,” and “[a] drop of rainwater landing in the Site is certain to intermingle with water from the [nearby river].” *United States v. Rueth Development Co.*, 189 F.Supp.2d 874, 877–878 (N.D. Ind. 2002).

*Rapanos*, at pp. 728-729.

D. *Rapanos v. United States*, 547 U.S. 715 (2006).

In a 4-4-1 decision, Justice Scalia, writing for the plurality, held that WOTUS includes “only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinance parlance as “streams,” “oceans, rivers, [and] lakes,” Webster’s New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage or rainfall.” *Rapanos*, 547 U.S. at 732-33. Justice Scalia found that Congress had not spoken clearly on the matter and, applying Step 2 of *Chevron*, found that “[t]he plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction.” *Id.* at 734.

The language of the statute indicates that “navigable waters” differ from “point source” and that a point source is therefore not a navigable water. *Id.* at 735. Many of the conduits classified by the Corps and lower courts as tributaries are actually point sources. *Id.* and see “Spawn of *SWANCC*” section, above.

In addition, Justice Scalia set out, in the plurality’s view, the correct standard to determine “adjacency”. To be “adjacent”, wetlands must “[possess] a continuous surface connection that creates the boundary-drawing problem...addressed in *Riverside Bayview*”. *Rapanos*, 547 U.S. at 757. When Justice Scalia referred to “surface connection”, he presumably intended to articulate the fact that the wetland extended to the boundary (abutted) the navigable water in *Riverside Bayview*. Note that Justice Scalia did not say “surface water connection”, which some commentators seem to infer. A groundwater connection existed in *Riverside Bayview*, another fact that indicates that Justice Scalia was referring to actual abutment.

Justice Scalia explained that deference to the agency under *Riverside Bayview* arose, at least in part from the difficulty in drawing the line between where land ends and water begins, and that *Riverside Bayview* presented that case with an abutting wetland. *Id.* at 740. No such difficulty exists with respect to “isolated” wetlands. *Id.* at 741. Therefore, the plurality held that only adjacent wetlands are jurisdictional. Actual abutment serves as a proxy for “significant nexus”. Justice Kennedy’s significant nexus test is therefore misplaced, as it applies to isolated wetlands, which are not jurisdictional under the plurality view. The plurality bemoaned the lack of clear definitions for “tributary” and “adjacent”.

From the plurality opinion:

Therefore, *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC*, 531 U.S. at 167, 121 S. Ct. 675. Thus, establishing that wetlands such as those at the *Rapanos* and *Carabell* sites are covered by the Act requires two findings: first, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

*Rapanos*, at p. 742.

Justice Kennedy's concurrence sets out the test that is most often used after *Rapanos*, and the test that has generated the most uncertainty. The "significant nexus" test (drawn from *SWANCC*) grants the Corps jurisdiction over "wetlands" (and presumably other "waters") where a significant nexus exists between the wetlands and "navigable waters in a traditional sense". *Rapanos*, 547 U.S. at 779 (Kennedy concurring). Wetlands possess this nexus where the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable"". The plurality opinion characterized Justice Kennedy's concurrence as resting upon "an interpretation of the phrase "significant nexus"...which appears in one of our opinions. *Rapanos*, 547 U.S. at 753.

Justice Kennedy appears to find that the Corps' standard for jurisdiction over adjacent wetlands is based upon a reasonable interpretation of the statute under the *Chevron* test. *Rapanos*, 547 U.S. at 780 (Kennedy concurring) (relying on *Riverside Bayview*). However, the concurrence finds that the definition of "tributary" is too broad and interpreting the statute in this way is not reasonable. *See id.* at 780-82. Therefore, a case-by-case analysis is necessary in making jurisdictional determinations for non-adjacent wetlands. *Id.* at 782.

Therefore, Justice Kennedy's concurrence differs from the plurality opinion, inter alia, by interpreting the significant nexus test as applying to isolated wetlands, or to isolated wetlands and wetlands adjacent to some types of tributaries, whereas the plurality found that the actual abutment itself formed the significant nexus. Under the plurality's opinion, isolated waters are not jurisdictional. Period.

Justice Kennedy appears to misinterpret the plurality when he states that "when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority." *Id.*, at p. 776. Both Justice Kennedy and the Court of Appeals decision in *Carabell*, which examined whether a hydrologic connection is required to establish a significant nexus, also appear to mischaracterize the plurality opinion. *Rapanos*, 547 U.S. at 786.

The plurality opinion states that if a "surface connection" exists with navigable water, the wetland is jurisdictional. Justice Scalia used "surface connection" interchangeably with "abuts". So, Justice Scalia (the plurality rule) states that if the wetland abuts, the wetland is WOTUS. Justice Scalia never uses the term "surface-water connection" except in referring to the lower court opinions. If some hydrologic connection exists, but there is no physical abutment, Justice Scalia would appear to say no WOTUS. Justice Kennedy uses "surface-water connection" and "surface connection" interchangeably. Scalia uses "surface connection" and "abut" interchangeably. A real disconnect exists.

The dissenting opinion would apply Step 2 of *Chevron* and find that the Corps' interpretation is a reasonable one. *Rapanos*, 547 U.S. at 788 (Stevens dissenting). Justice Stevens finds the analysis "straightforward"- the Corps "has determined that wetlands adjacent to tributaries of traditionally navigable water preserve the quality of our Nation's waters...", a "quintessential example of the Executive's reasonable interpretation of a statutory provision". *Id.* The plurality opinion describes the dissent as aspiring that ""the waters of the United States" include any wetlands "adjacent" (no matter how broadly defined) to "tributaries" (again, no matter how broadly defined) of traditional navigable waters." *Id.* at 746. Meanwhile, Justice Kennedy objects to the dissent reading the term "navigable waters" completely out of the CWA, and giving too much deference to the Corps. *Id.* at 778-79.

Chief Justice Roberts wrote a separate concurring opinion, mainly to chide the Corps for failing to enact rules to clarify the meaning of WOTUS. The Chief Justice noted that the Court rejected the Corps' position that its authority was "essentially limitless" in this respect in *SWANCC. Rapanos*, 574 U.S. at 757 (Roberts concurring). Such rules, conceded Roberts, would be subject to *Chevron* deference. Although the Corps and EPA initiated a rulemaking, the "proposed rulemaking went nowhere". *Id.* at 758. Chief Justice Roberts bemoans how easily the fractured opinion in *Rapanos* could have been avoided by rulemaking. *Id.*

#### IV. The "Obama Rule"

In the absence of a statutory definition of "waters of the United States," in light of the decades of legal debate over the meaning of this term, and perhaps in response to the chiding of Chief Justice Roberts in his *Rapanos* concurrence, the Environmental Protection Agency and the US Army Corps of Engineers issued a proposed definition of WOTUS in 2014. *See* Army Corps of Engineers and EPA, "Definition of Waters of the United States Under the Clean Water Act, 79 FR 22188 (April 21, 2014). Numerous stakeholder groups had requested this action as well. *See* EPA Web Archive, Persons and Organizations Requesting Clarification of "Waters of the United States by Rulemaking," available at [https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](https://archive.epa.gov/epa/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf) (last accessed July 9, 2019). The agency received over 1 million comments on the proposed rule and published the final rule in June 2015 with an effective date of August 28, 2015. *See* Army Corps of Engineers and EPA, "Clean Water Rule: Definition of 'Waters of the United States'; Final Rule," 80 FR 37054 (June 29, 2015) (the "Obama Rule").

##### A. The Text of the Rule

The agencies attempted to interpret the scope of WOTUS "using the goals, objectives and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience as support." *Id.* In particular, the rule cites the "significant nexus standard" as "an important element of the agencies' interpretation" of the Clean Water Act. *Id.*

This rule essentially provides seven categories of jurisdictional waters:

##### 1. Categorically Jurisdictional Waters

First, there are certain waters that are categorically jurisdictional: traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and impoundments of waters identified as WOTUS. *See* 33 CFR § 328.3(a)(1)-(4). The definitions of these three categories did not change from the prior regulations/interpretations to the Obama Rule. These categories have not been subject to much of the controversy surrounding the Obama Rule.

## 2. Definitionally Jurisdictional Waters

Second, there are two categories where waters are jurisdictional if they meet the definitions included in the Obama rule. Much of the controversy and legal debate surrounding the Obama Rule focuses on the definition of tributaries and adjacent waters.

### a. *Tributaries*

The Obama Rule provides that all “tributaries” of traditional navigable waters, interstate waters, and the territorial seas are considered a WOTUS. *See* 33 CFR § 328.3(a)(5). The Obama rule defines “tributaries” as “water that contributes flow, either directly or through another water,” to a traditional navigable water, interstate water, or territorial sea “that is characterized by the presence of the physical indicators of a bed and banks and ordinary high water mark.” *Id.* §328.3(c)(3). Further, the tributary can be natural, man-made, or man altered and includes waters such as “rivers, streams canals, and ditches not otherwise excluded by the Obama Rule. *Id.* A water qualifying as tributary under the Rule does not lose its tributary status if there are one or more natural or constructed breaks so long as the bed and banks and ordinary high water mark can be identified upstream of the break. *Id.* Finally, a water qualifying as a tributary does not lose its status as such if it continues through a water of the US that does not meet the definition of tributary or through a non-jurisdictional water. *Id.* The statute also defines “ordinary high water mark” as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in character of the soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. *Id.* § 328.3(c)(6).

### b. *Adjacent Waters*

The Obama Rule also provides that “all waters adjacent” to traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries, including wetlands, ponds, lakes, oxbows, impoundments and similar waters are jurisdictional. *See id.* § 328.3(6). The term “wetlands” is defined as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted or life in saturated soil conditions” including “swamps, marshes, bogs, and similarly areas.” 33 CFR § 328.3(c)(4).

The term “adjacent” means “bordering, contiguous, neighboring” and includes waters separated by dikes or barriers, natural river berms, and beach dunes. *Id.* § 328.3(c)(1). “Neighboring” waters are defined in the Rule as “all waters located within 100 feet of the ordinary high water mark” of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries; all waters located within the 100-year floodplain” of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries; and all waters within 1,500 feet of the high tide line” of a traditional navigable water, interstate water, or the territorial seas. *Id.* § 328.3(c)(2). The “ high tide line” is the intersection of the land within the water’s surface at the maximum height reached by a rising tide.” *Id.* § 328.3(c)(7). If any portion of a water is located within these bounds, the entire water is considered “neighboring.”



With regard to ponds or lakes, this “adjacent” waters include any wetlands within or abutting the ordinary high water mark. *Id.* Adjacent waters include all waters that connect segments of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries. *Id.*

Expressly not included in the definition of “adjacent” are “waters being used for established normal farming, ranching, and silviculture activities.” *Id.* The Obama Rule cites to the Section 404 exception defining normal farming, silviculture, and ranching activities “such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.” *Id.*; 33 USC § 1344(f)(1)(a).

### 3. Case-by-Case Evaluation

Certain waters would be subject to a case-by-case, factual evaluation of whether nor not they are a WOTUS based on the existence of a significant nexus to a jurisdictional water.

#### *a. Regional water features with a significant nexus.*

All of the following regional water features listed below will be jurisdictional if they have a “significant nexus” to traditional navigable waters, interstate waters, or the territorial seas. *See* 33 CFR § 328.3(a)(7). For purposes of the significant nexus analysis, all waters “similarly situated” within the watershed that drains into the jurisdictional water will be aggregated. *Id.* The waters included under this category are: (i) prairie potholes (a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest); (ii) Carolina and Delmarva bays (ponded, depressional wetlands that occur along the Atlantic coastal plain); (iii) Pocosins (evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic Coastal plain); (iv) Western vernal pools (seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers); and (v) Texas coastal prairie wetlands (freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast). *Id.*

Importantly, the Rule defines “significant nexus” as a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or territorial seas. *Id.* 33 CFR 328.3(c)(5). The effect must be more than speculative or insubstantial. *Id.* The Obama Rule lists several functions relevant to analyzing significant nexus. *Id.*

#### *b. Proximity to flood plain or high tide line with a significant nexus.*

The Rule includes in the definition of WOTUS all waters located within the 100-year floodplain of a traditional navigable waters, interstate waters, or territorial sea or within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable waters, interstate waters, territorial sea, impoundment of jurisdictional water, or tributary. *See* 33 CFR 328.3(a)(8) that is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or territorial sea. *Id.* Any water determined to have a significant nexus that is only partially within the floodplain or within 4,000 feet of the high tide line shall be entirely deemed a WOTUS. *Id.*

#### 4. Categorical Exclusions

The Obama Rule lists a number of waters that are categorically not considered WOTUS, even if they meet the terms of the definitions in the Rule. These include waste treatment systems; prior converted cropland; ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands; ditches that do not flow either directly or through another water into traditional navigable waters, interstate waters, or territorial sea; artificially irrigated areas that would revert to dry land should application of water to that area cease; artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; artificial reflecting pools or swimming pools on dry land; small ornamental waters created on dry land; water-filled depressions created in dry land incidental to mining or construction; erosional features such as gullies, rills, or other ephemeral features that do not meet the definition of a tributary, non-wetland swale, and lawfully constructed grassed waterways; puddles; groundwater (including groundwater drained through subsurface drainage systems); stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and wastewater recycling structures constructed on dry land, groundwater recharge basins, percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling. *Id.* § 33 CFR S 328.3(b).

#### B. Litigation

Upon publication of the Obama Rule, lawsuits were filed across the country by 31 states and 53 non-state parties including environmental groups and industry groups representing agriculture, forestry, and recreational interests. *See* 84 FR 4161. These cases were filed in both federal district courts and federal appellate courts across the country. *Id.* There have been numerous court decisions related to the Obama Rule. *See, e.g., North Dakota v. EPA*, 127 F. Supp. 1047 (D.N.D. 2015) (issuing injunction in 13 states); *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6<sup>th</sup> Cir. 2015) (issuing nationwide stay of Obama Rule); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 137 S. Ct. 811 (2017) (holding proper venue for legal challenges to WOTUS definition is district court); *In re Dep't of Def. & EPA Final Rule*, 713 Fed. App. 489 (6<sup>th</sup> Cir. 2018) (lifting nationwide stay of Obama Rule); *Georgia v. Pruitt*, No. 15-cv-79, slip op. at 10 (S.D. Ga. June 8, 2018) (issuing 11-state injunction); *Texas v. EPA*, No. 3:15-cv-162, 2018 U.S. Dist. LEXIS 160443, at \*4 (S.D. Tex. Sept. 12, 2018) (entering injunction in 3 states); *Texas v. US EPA*, No. 3:15-cv-00162, Memorandum Opinion and Order (S.D. Tex. May 28, 2019) (holding EPA violated APA in passing final Obama Rule based upon significant differences between proposed and final rules); *Oklahoma v. Chamber of Commerce of the United States of America*, No. 15-CV-0381-CVE-FHM, *Opinion and Order* (May 29, 2019) (denying motion for preliminary injunction to prevent enforcement of Obama Rule in Oklahoma upon finding no proof of irreparable harm).

Additionally, the EPA issued a final rule in February 2018 that set the applicability date of the Obama Rule as February 6, 2020. *See* 83 FR 5200 (Feb. 6, 2018). This rule was challenged in a number of district courts by various states and environmental groups. Two federal courts have ruled in favor of the challengers and vacated the rule nationwide. *See South Carolina Coastal Conservation League v. Pruitt*, No. 2-18-cv-330-DCN, 2018 U.S. LEXIS 138595 (D.S.C. Aug 16, 2018); *Puget Soundkeeper Alliance v. Wheeler*, No. C15-1342-JCC (W.D. Wash. Nov. 26, 2018). The EPA has said it will not challenge these rulings, instead choosing to focus on the new proposed WOTUS definition discussed in Section V below.

### C. Current Status

Currently, the Obama Rule is the default rule in the United States and is in place unless there has been some legal action to prevent its applicability in a certain jurisdiction. Twenty-three states and the District of Columbia are currently governed by the Obama Rule: CA, CO CT, DE, HA, IL, ME, MD, MA, MI, MN, NH, NJ, NY, OH, OK, OR, PA, RI, TN, VT, VA, and WA. For the remaining twenty-seven states, three courts have entered injunctions courts that have prevented the Obama Rule from being enforced at this point in these states. *See North Dakota v. EPA*, 127 F. Supp. 1047 (D.N.D. 2015); *Georgia v. Pruitt*, No. 15-cv-79, slip op. at 10 (S.D. Ga. June 8, 2018); *Texas v. EPA*, No. 3:15-cv-162, 2018 U.S. Dist. LEXIS 160443, at \*4 (S.D. Tex. Sept. 12, 2018). Those states are: AL, AK, AR, AZ, FL, GA, IA, IN, ID, KS, KY, LA, MO, MS, MT, NC, NE, NV, NM,<sup>2</sup> ND, SC, SD, TX, UT, WV, WI and WY. *See* 84 FR 4161-62. In these 27 states, the pre-Obama rule common law and regulatory structure discussed above in Section III remains the applicable law.

### V. The “Trump Rule”

In February 2017, President Trump issued an Executive Order requiring the EPA and COE to either rescind or revise the Obama Rule and to consider interpreting the term WOTUS in a manner consistent with Justice Scalia’s opinion in *Rapanos*. *See* Executive Order 13778 (Feb. 28, 2017). The EPA announced it would undertake this review utilizing a two-step process.

In July 2017, the EPA published a proposed rule referred to as the “step-one rule” that would rescind the Obama Rule and essentially re-codify the regulatory definition of WOTUS that existed prior to the Obama Rule’s enactment. *See* 82 FR 34899 (July 27, 2017); Section II, above. A year later, on July 12, 2018, the agencies published a supplemental notice of public rulemaking to clarify, supplement, and seek additional comment on the Step One notice of proposed rulemaking. *See* 83 FR 32227. A final “step-one rule” has yet to be published.

On December 11, 2018, the EPA and COE issued a proposed “step-two” rule that would revise the definition of WOTUS. *See* 84 FR 4154 (the “Trump Rule”). Public comment was allowed from February 14, 2019 through April 15, 2019. To date, a final rule has not been published.

#### A. Text of Proposed Rule

In accordance with the instructions given by President Trump’s Executive Order, the EPA and COE sought to “increase Clean Water Act program predictability and consistency by increasing clarity as to the scope of ‘waters of the United States’ federally regulated under the Act.” *See* 84 FR 4154.

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<sup>2</sup> Initially, New Mexico was part of the thirteen-state injunction issued by the North Dakota federal court. In March 2019, New Mexico filed a motion to leave the case, which was granted by the court. In granting that motion, the court stated the injunction would be lifted, but said that it would remain in effect as to Intervenor -Plaintiff Coalition of Arizona/New Mexico Counties for Stable Economic Growth, which represents New Mexicans across the state. Both attorneys for the Coalition and New Mexico state officials have said they believe the court’s order preserves the injunction in New Mexico, meaning the Obama Rule does not apply at this time. *See* Ellen M. Gilmer & Ariel Wittenberg, *Court sides with WOTUS foes as legal fight gets messier*, E&E News (May 29, 2019).

The Trump Rule creates the following categories of jurisdictional waters:

1. Waters Used in Interstate Commerce (“Category 1”)

The first category included in the Trump rule provides that waters that are “currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.” *See* 84 FR 4203.

2. Tributaries of Waters Used in Interstate Commerce

Tributaries of waters identified in Category 1, above, are also considered to be jurisdictional. Importantly, the rule defines “tributary” as a river, stream, or other naturally occurring surface water channel that “contributes perennial or intermittent flow” to a water identified in Category 1 in a typical year either directly or indirectly through a water identified as a WOTUS by this definition. *See id.* at 4204 “Perennial” means surface water flowing continuously year-round during a typical year. “Intermittent” means surface water flowing continuously during certain times of year and more than in direct response to precipitation. *Id.* A “typical year” means the normal range of precipitation over a rolling thirty-year period for a particular geographic area.” *Id.*

3. Certain Ditches

Also labeled jurisdictional under the Trump Rule are the following ditches: (a) that satisfy the conditions identified in Category 1; (b) ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the definition of tributary; (c) ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition. A “ditch” is defined as an artificial channel used to convey water.

4. Certain Lakes and Ponds

There are also certain lakes and ponds that would qualify as a WOTUS under this rule: (a) those meeting the requirements of Category 1; (b) those contributing perennial or intermittent flow to a water identified in Category 1 in a typical year either directly or indirectly through a jurisdictional tributary, ditch, impoundment, or adjacent wetland or through water features that convey perennial or intermittent flow downstream; and (c) those that are flooded by jurisdictional waters from Category 1, tributaries, ditches, or impoundments. *Id.*

5. Impoundments

Any impoundment of waters identified as jurisdictional are considered WOTUS. *Id.* There is no definition of the term “impoundment” in the proposed rule.

## 6. Adjacent Wetlands

The final category includes any adjacent wetlands to waters identified as jurisdictional. *Id.* The proposed rule defined “adjacent wetland” as wetlands that abut or have a direct hydrologic surface connection to a jurisdictional water in a typical year. *Id.* The rule further defines “wetland” as meaning areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. *Id.* It further states that wetlands generally include swamps, marshes, bogs, and similar areas. *Id.* “Abut” means to touch at least one point or side. A “direct hydrologic or surface connection” occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland or a jurisdictional water. *Id.* The definition does provide that wetlands physically separated from a jurisdictional water by upland or by dikes, barriers, or other structures and lacking a surface connection are not considered adjacent. *Id.*

## 7. Exclusions

Like the Obama Rule, the proposed Trump rule contains a number of exclusions. *Id.* The following waters are not jurisdictional:

- a. Waters or water features not identified in the definition of WOTUS;
- b. Groundwater, including groundwater drained through subsurface drainage systems;
- c. Ephemeral features and diffuse stormwater runoff, including directional sheet flow over upland;
- d. Ditches not identified in section 3;
- e. Prior converted cropland;
- f. Artificially irrigated areas including fields flooded for rice or cranberries that would revert to upland should application of irrigation water cease;
- g. Artificial lakes and ponds constructed in uplands including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds, not identified in section 4.
- h. Waterfilled depressions created in upland incidental to mining or construction activity;
- i. Stormwater control features constructed in upland
- j. Waste water treatment systems. *Id.*

“Upland,” a term used in a number of these exceptions, is defined as any land area that under normal circumstances does not satisfy all three wetland delineation criteria (hydrology, hydrophytic vegetation, hydric soils) and does not lie below that ordinary high water mark or high tide line of a jurisdictional water. *Id.* The statute also defines the terms ordinary high water mark and ordinary high tide line as the line on the shore established by fluctuations of water and indicated by physical characteristics such as clear, natural lines impressed on the bank, shelving, changes in the character of soil, destruction of vegetation, the presence of litter and debris and as the line of the intersection of the land with the water’s surface at the maximum height reached by a rising tide, respectively. *Id.*

## **VI. Conclusion**

The definition of WOTUS under the Clean Water Act remains both unclear and contentious. Both the Obama Rule and the Trump Rule clearly exclude groundwater from the definition, but much remains to be determined. Particularly contentious issues include the definitions of “adjacency” and “tributary”. Ephemeral streams have also been the focus of much debate.

As the existing litigation continues, more litigation is likely after the Trump Rule is finalized. Short of unlikely Congressional action, the issue will likely not be resolved, if ever, until after years of litigation.