

Legal Perspective

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Justin will provide a legal perspective regarding the WOTUS rule and how each state may be impacted differently, as well as provide a brief update on the Clean Water Act §401 water quality certification rule and recent Executive Orders pertaining to the development industry and regulated public for affordable housing, energy prov, data centers).



WSSI & DRG

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Justin W. Curtis

AQUALAW



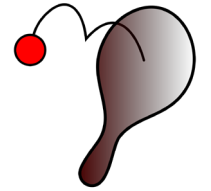
Waters of the United States



“Waters of the US” Through the Years*

- ◆ ↓↓↓↓ 1972 – 1975 (EPA/Corps Rule - Nixon)
 - ~ Only **navigable in fact** waters
- ◆ ↑↑↑↑ 1975 – 1986 (Rule - Ford)
 - ~ Rule adds tributaries, non-navigable intrastate waters that may “affect” **interstate commerce**, wetlands
- ◆ ↑ 1986 (Rule - Reagan)
 - ~ Migratory Bird Rule adds isolated waters
- ◆ ↓↓ 2001 (SCOTUS)
 - ~ *SWANCC v. USACE* – Isolated waters & interstate commerce out
- ◆ ↑↑ 2006-2018 (SCOTUS + Rule - Obama)
 - ~ *Rapanos v. US* – (1) Relatively permanent waters with continuous surface water connection; or (2) **significant nexus**
 - ~ 2015 Clean Water Rule effectively codifies *Rapanos* tests

- ◆ ↓ 2018-2020 (Rule - Trump)
 - ~ 1986 rule/*Rapanos* reinstated
- ◆ ↓↓ 2020-2021 (Rule - Trump)
 - ~ Navigable Waters Protection Rule deletes significant nexus test, ephemeral waters, some adjacent wetlands
- ◆ ↑↑ 2021-2023 (Rule - Biden)
 - ~ 1986 rule/*Rapanos* reinstated (*again*)
- ◆ ↑↑↑ January 2023 – May 2023 - Biden)
 - ~ *Rapanos*+
- ◆ ↓↓↓ May 2023 (SCOTUS))
 - ~ *Sackett v. EPA* – **Relatively permanent waters** only
- ◆ ??? September 2023 (Rule - Biden)
 - ~ Codifies *Sackett v. EPA* without commentary
- ◆ ??? Pending (Rule - Trump)



**Partial List*

How Did We Get Here?



Clean Water Act

“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”

-33 U.S.C. § 1362(7)*

*Unchanged since 1972

So Long, Chevron!

Justice Kavanaugh at oral argument for *Relentless v. Dep't of Commerce**:

“*Chevron* . . . ushers in shocks to the system every four or eight years when a new administration comes in, whether it's communications law or securities law or competition law or environmental law”



*Argued and decided concurrently with *Loper Bright v. Raimondo*

Loper Bright v. Raimondo

Quotes from Court's Opinion:*

“Courts instead understand that such statutes, no matter how impenetrable, do— in fact, must—have a single, best meaning. That is the whole point of having written statutes; ‘every statute’s meaning is fixed at the time of enactment.’”

“It therefore makes no sense to speak of a ‘permissible’ interpretation that is not the one the court . . . concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.”



*603 U.S. 369 (2024)

The Best? You Be the Judge

Sackett v. EPA, 598 U.S. 651 (2023):

“[T]he CWA extends to only those [wetlands](#) that are ‘as a practical matter indistinguishable from waters of the United States.’ This requires the party asserting jurisdiction over [adjacent wetlands](#) to establish ‘first, that the adjacent [body of water constitutes] ... water[s] 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.’”



A golden chalice with a decorative band around its middle and a cross-like emblem. The text 'Regulatory Certainty' is written in white serif font on the cup. The background features golden rays emanating from behind the chalice and golden clouds at the bottom.

Regulatory
Certainty

Where Does this Leave States?

Clean Water Act § 101 - Congressional Declaration of Policy*

“It is the policy of the Congress to recognize, preserve, and protect the **primary responsibilities and rights of States** to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of **land and water resources.**”

*33 U.S.C. § 1251



State Responses to Sackett*



💧 New or Expanded Regulation of Waters

- ~ CO: 2024 law establishes dredge and fill permit program; amends “state waters” to include wetlands
- ~ NY: 2023 rule reduces 12.4-acre threshold for regulating wetlands
- ~ MD: 2024 law allows citizen suits for impacts to non-WOTUS waters

💧 No Change

- ~ VA: Existing program broader than CWA 404
- ~ WV: No regulation before or after

💧 Reduced Regulation of Waters

- ~ NC: 2023 law prohibits state regulation of non-WOTUS wetlands
- ~ IN: 2024 law reduces regulation of certain isolated wetlands

**List not comprehensive; some examples pre-date Sackett*

Maybe Congress Will Fix It?



Clean Water Act § 101 -
Congressional Declaration of Policy*

“It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”

*33 U.S.C. § 1251

Other Implications WOTUS Rule

- ESA and NHPA Consultation
- Trigger for CWA 401 Certification
- Regulation of “Discharges” Under CWA 402
- Need for SPCC Plans
- Enforcement of Unpermitted Fill

But don't forget about...

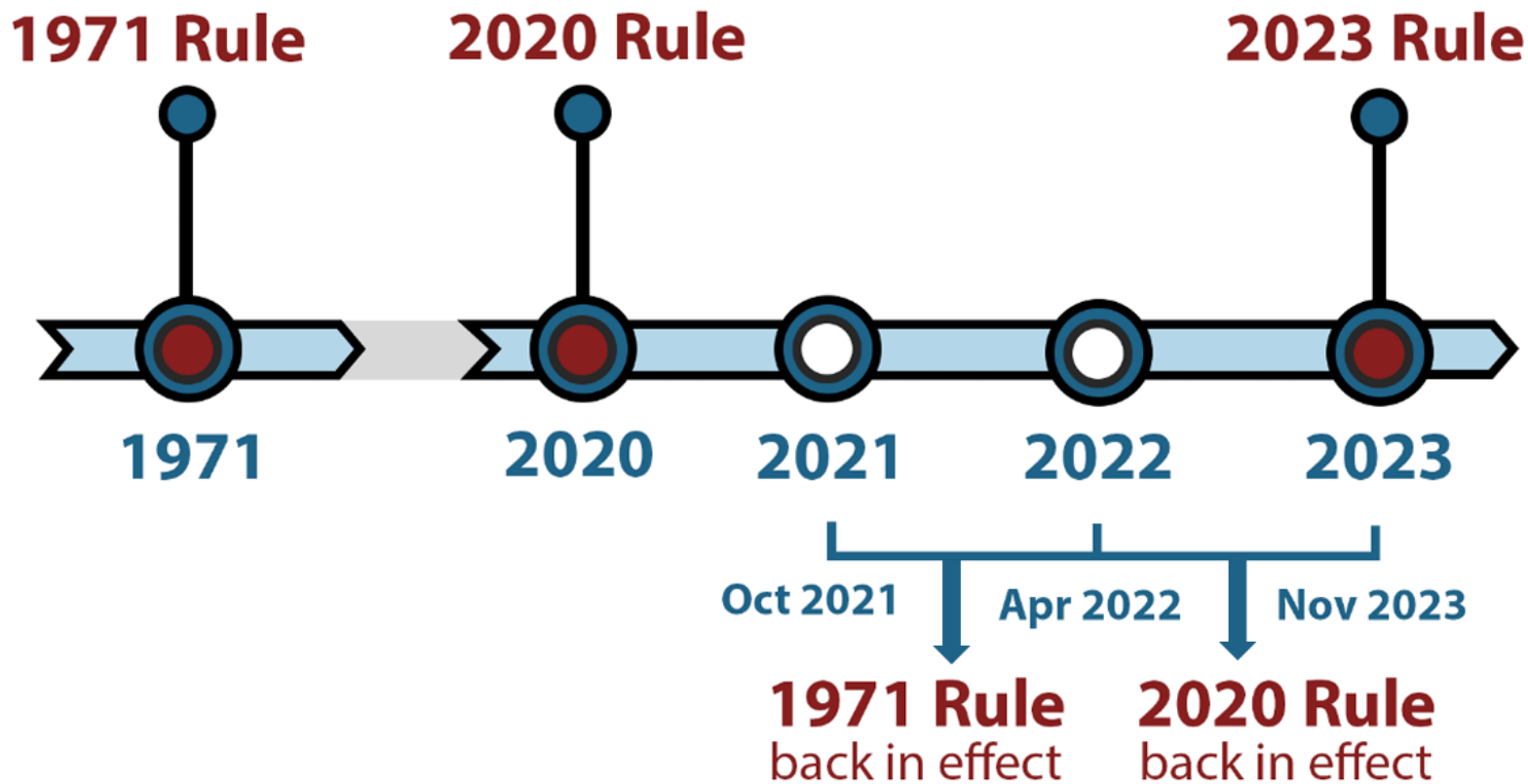
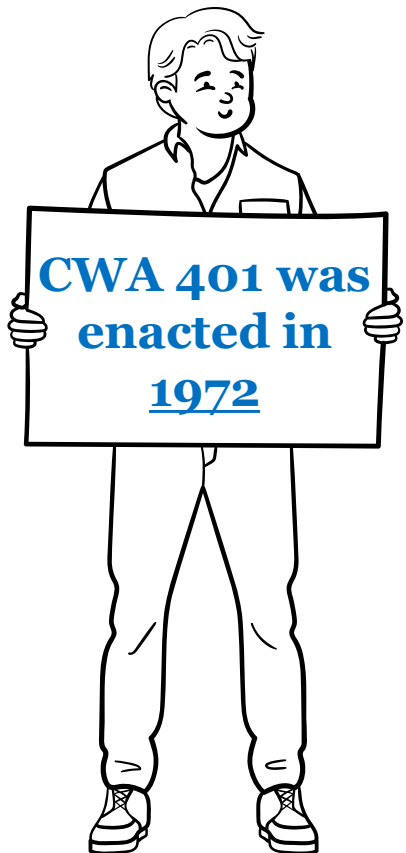
County of Maui v. Hawaii Wildlife Fund, 590 U.S. 165 (2020)



CWA 401: Water Quality Certification

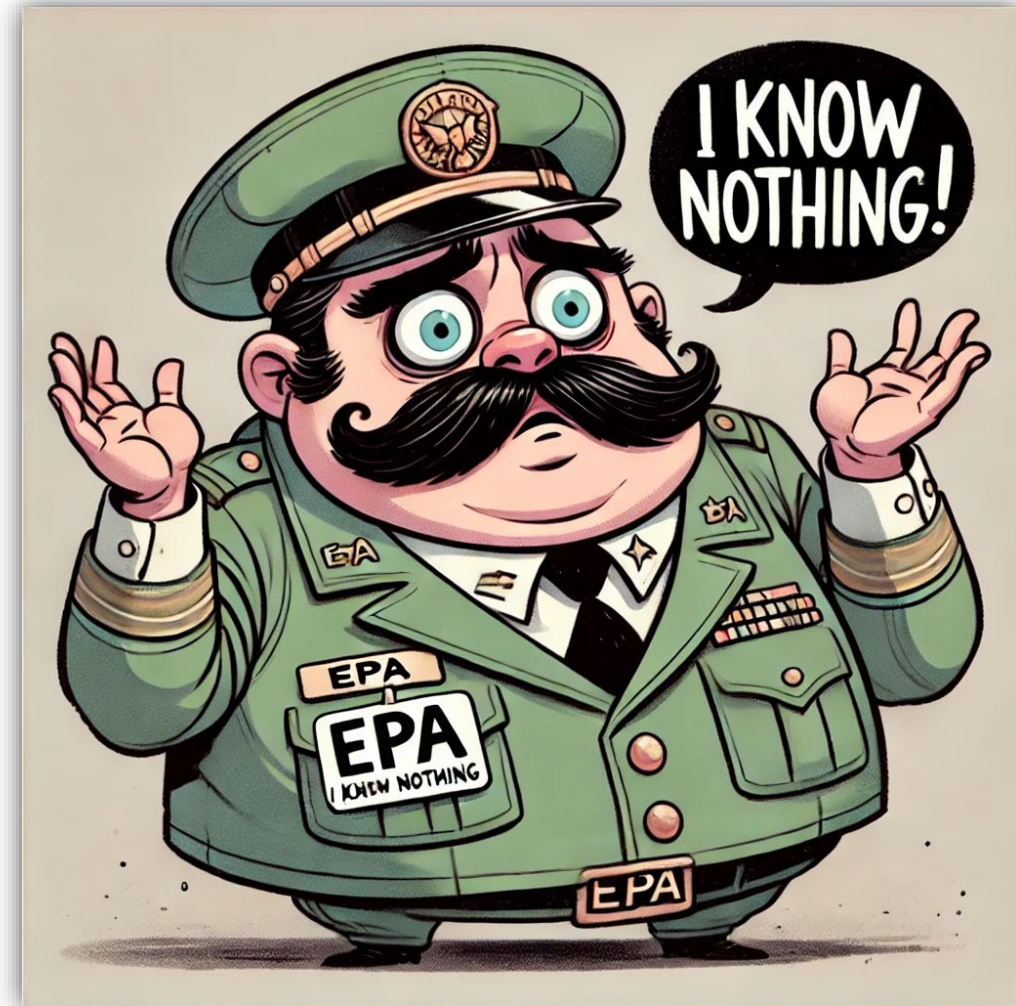


BACKGROUND: PREVIOUS REGULATORY ACTIONS



Many Unanswered Questions...

- ◆ Application?
 - ~ How does applicant request 401 certification?
 - ~ What information must be submitted by applicant?
- ◆ Timeline?
 - ~ Who determines the “reasonable period of time”? Fed agency or State?
 - ~ When does clock start? On request? Complete application?
 - ~ Can applicant reset the clock? Can State deny to reset?



And the Tougher Issues...

- ◆ Scope of Certification?
 - ~ Can State base decision on impacts **other than water quality**?
 - ~ Any limit on information State can request?
 - ~ Can federal agency reject certification or conditions?
- ◆ What kind of “discharge”?
 - ~ Point source, non-point source, other?
- ◆ Does 401 give State ongoing role in federal permit?
 - ~ Can State amend or revoke certification?
 - ~ Can State enforce 401 certification conditions?
- ◆ Does CWA 401 give States a **veto** over federal permits?

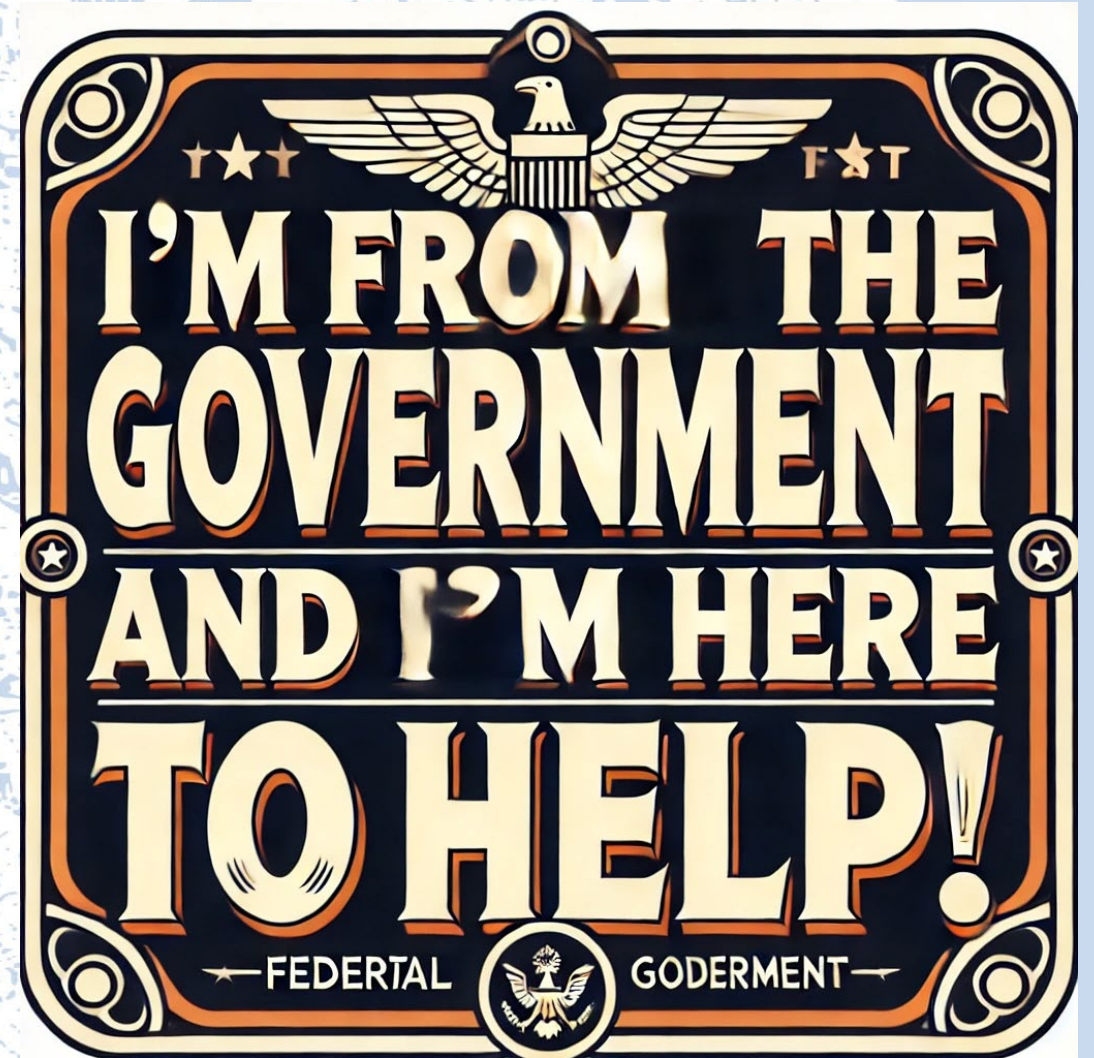


Proposed Changes to CWA 401 Rule

	Current Rule (2023)	Proposed Rule (2026)*
State Water Quality Laws That May Be Incl. in Cert	Applicable to point source and non-point sources	Applicable to point sources only
Application Requirements	Federal permit application + water quality-related info + any other state requirements	Defined list of information – but state may request more info
Reasonable Period of Time (Not to Exceed One Year)	6 months; extendable by agm't of federal agency & state	6 months; extendable by agm't of federal agency, state, & applicant
Scope of Certification	The “ activity ”	The “ discharge ”
Modification of 401s	Upon agreement of federal agency & state	Upon agreement of federal agency, state, & applicant

*91 Fed. Reg. 2008 (Jan. 15, 2026)

Executive Orders



EO 14156: Declaring a National Energy Emergency

- ◆ Issued January 20, 2025; extended on January 12, 2026
- ◆ Declares National Emergency due to “insufficient energy production, transportation, refining, and generation”
- ◆ Key Provisions
 - ~ Directs federal agencies to use emergency authorities to identify and expedite energy projects
 - ~ Directs USACE to identify energy projects subject to “emergency treatment”
 - ~ Expedites ESA reviews for energy projects

EO 14260: Protecting American Energy from State Overreach

- ◆ Issued April 8, 2025
- ◆ “[Certain] State laws and policies weaken our national security and devastate Americans by driving up energy costs”
 - ~ Cites New York, Vermont, and California
- ◆ Key Provisions
 - ~ Directs Attorney General (AG) to identify state and local laws, practices, and “causes of action” that “burden” energy development
 - ~ AG to take legal action to against laws or “continuation of civil actions” deemed “illegal”

EO 14318:

Accelerating Federal Permitting of Data Center Infrastructure

- ◆ Issued July 23, 2025
- ◆ Measures to facilitate data center development
- ◆ Key Provisions
 - ~ Directs agencies to identify NEPA categorical exclusions that may apply to data centers
 - ~ Makes energy and manufacturing projects supporting data centers eligible for streamlined permitting under FAST-41
 - ~ Orders EPA to modify regs under CWA, CAA, CERCLA, TSCA, etc. to facilitate data centers
 - ~ Directs USACE to determine if a new NWP is needed for data centers

Other Relevant EOs

- ◆ EO 14192: Unleashing Prosperity Through Deregulation
 - ~ Repeal 10 regs for every 1 new reg
- ◆ EO 14394: Removing Regulatory Barriers to Affordable Home Construction
 - ~ Directs agencies to streamline permitting for housing
- ◆ EO 14261: Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241
 - ~ Identify NEPA categorical exclusions to “further the production and export of coal”
- ◆ EO 14241: Immediate Measures to Increase American Mineral Production
 - ~ Expedite mineral production permitting

A Note of Caution...

Beware of the
Appearance of “Cutting
Corners” If Permit
Appeals Are Possible





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