



Waters of the United States

April 12, 2023

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April 12, 2023



Where Are We?

- 2020 – Navigable Waters Protection Rule (April 21, 2020)
- 2021 – Vacated by two District Courts (August & Sept. 2021)
- 2021 – USACE & USEPA announced Revision/Replacement
- 2023 – Final Rule Published (January 18, 2023)
- 2023 – Final Rule Effective (March 20, 2023)
- 2023 – Biden Veto of Congressional Resolution to Rescind Reg's (April 7, 2023)

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What is the Impact?

- Gone from “Black and White” (2020 NWPR)
- Back to “Shades of Grey” (Think Rapanos procedures)
- It will require hashing out in the field, w/ District
- Do you have an existing JD?
 - If from recent regulatory regime – remains valid for its duration
 - If from NWPR regulatory regime – not valid for permitting

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Things that Have Not Changed

- “(a)(1) waters”: Traditional Navigable Waters
 - Navigable waters, territorial seas and interstate waters
- “(a)(2) waters”: Impoundments of various waters
- Definition of “Wetlands”

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Things that Have Changed

- Tributaries
- Adjacent Wetlands
- Additional Waters
- Exclusions
- “Significant Nexus” – “significantly affect”

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Things that Have Changed –“Tributaries/Streams”

- “(a)(3) waters”: Tributaries to (a)(1) and (a)(2) waters when –
 - They are “Relatively Permanent” standing or continuously flowing
 - Have a “Significant Nexus”
 - Alone or in combination w similarly situated waters in the region, **significantly affect** chemical, physical or biological integrity of (a)(1) waters
- (a)(5) Intrastate streams –
 - Must meet same test, and have “a continuous surface connection” to a Tributary or (a)(1) waters, and have an OHWM

Things that Have Changed – “Additional Waters”

- Intrastate lakes, ponds, stream or wetlands – when they meet:
 - “Relatively Permanent”* standard, or
 - “Significantly affect...”* standard

* Note: Page 3097 of Final Rule says these standards are “... substantially narrower than the 1986 regulations” because they don’t rely on the Commerce Clause for jurisdiction

Exclusion – for some “Ditches”

- Excluded (even roadside ditches) if:
 - Excavated Wholly in Uplands
 - Drain only uplands
 - Do not carry a relatively permanent flow of water
 - Carry less than seasonal flow

Other “Ditches” are Jurisdictional

- Ditches that are Jurisdictional*
 - Cut through or drainage from wetlands
 - Tidally influenced
 - All those with “Relatively Permanent Flow” and OHWM

*Note: “Maintenance”- does not require a permit

And on the Horizon ...

- Norfolk District USACE Public Notice Pending –
 - All requests for Jurisdictional Determinations (PJD/AJD) will be further de-emphasized (there is no regulatory timeline)
 - Only way to keep them moving – submit them as part of a permit application (NWP, SPGP, RP, IP)
- Congress' Attempt to over-ride Presidential Veto of the Congressional Review Act resolution to overturn the WOTUS Rule
- Supreme Court Decision – Sackett v. EPA (early 2023?)

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There's no
one better
in the field!

Thank You!

