

## In Too Deep — Clean Water Regulations Can Make You Sink or Swim

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While everyone agrees that clean water is paramount to a healthy, prosperous future, no one agrees on the scope of federal involvement in protecting our waters.

The term “waters of the United States” (WOTUS) determines whether a particular water body or wetland falls under the jurisdiction of the federal government pursuant to the Clean Water Act (CWA). The definition of WOTUS determines federal jurisdiction for 11 different CWA programs, including dredge and fill into wetlands, discharge and prevention of oil pollution, and reporting of hazardous substances.

In Florida, which is, by any definition, a “wet” state, regulation of waterways and wetlands touches a broad segment of our population and our economy. Florida governments, tribes, farmers, ranchers, developers, businesses, environmental organizations, and even individual homeowners will find themselves impacted by the way WOTUS is ultimately defined.

The Supreme Court of the United States (SCOTUS) has not addressed WOTUS directly since a case known as *Rapanos* was decided in 2006 which resulted in no clear majority opinion. Instead, two different tests for determining WOTUS were discussed in the case and later incorporated into federal agency guidance.

The Barack Obama, Donald Trump, and now Joe Biden administrations have since proposed rule changes to the definition of WOTUS. Volatility as to the definition of such a pivotal term has resulted in severe regulatory whiplash.

In a nutshell, Obama’s definition created a case-by-case analysis of whether a water body or wetland has a “significant nexus” to WOTUS. The subsequent Trump definition narrowed the scope of what waters and wetlands were WOTUS based on whether there is an easily identifiable, “relatively permanent” connection to navigable water. As we write, the Biden administration is in a two-phase rulemaking intended to enact a more “durable” definition.

The first phase proposed rule adds both *Rapanos* legal standards to the definition of WOTUS, meaning that wetlands could be jurisdictional under either the “relatively permanent” or “significant nexus” tests.

And if this wasn’t confusing enough, SCOTUS has just agreed to hear the *Sackett II* case dealing with whether the significant nexus test was the appropriate jurisdictional standard for Environmental Protection Agency (EPA) to apply. Florida recently provided comments that the Biden rulemaking should be postponed until the resolution of *Sackett II*.





States and Tribes have the option under the CWA to assume the wetland dredge and fill program from the EPA. In December 2020, Florida became one of only three states to assume such authority. Florida and EPA are currently disagreeing over which definition of WOTUS applies to Florida's assumed program.

Florida maintains that the Trump rule has not been vacated nationwide, and if it is that they have one year from the vacatur of the rule to update the definition of WOTUS in the Florida dredge and fill program. However, EPA has halted implementation of the Trump rule nationwide because of an Arizona U.S. District Court opinion and is applying the pre-2015 rule and guidance as the legal standard. As a result, EPA has objected to Florida's notices of proposed assumed dredge and fill permits that were reviewed using the Trump definition of WOTUS. This issue has not yet been resolved between Florida and EPA.

This wave of change and uncertainty as to the definition of WOTUS has wide-ranging impacts both nationally and in Florida. Looking ahead, we hope for predictability and consistency for the rules governing the regulation of our nation's waters. In the meantime, stay tuned, get comfortable swimming in the deep waters of WOTUS, and cling on to a life raft.

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