

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
January 14, 2022

The Road to WOTUS

In case you missed it in one of our [previous newsletters](#), EPA proposed a new rule to define WOTUS, and surely, everyone has had the time to peruse all 79 pages of the Federal Register and are all experts on exactly what is a “water of the United States,” right? ...Wait, you’re not? Never fear! Your friendly neighborhood newsletter is here to give you the lowdown on all this water stuff. With their new proposed definition, EPA is returning to the pre-2015 definition of WOTUS—with a few amendments. *Freeze frame* Wait. How did we get here? [Well...this is a story all about how WOTUS got flipped turned upside down. So if y’all can take a minute and read right on, we’ll tell you all about why it’s taking so long.](#)

When Congress enacted the Clean Water Act in 1948 (and then amended it in 1972), they intended for it to apply to the “waters of the United States,” but then inexplicably forgot to define exactly what that is. Since then, that role has fallen to the courts and agencies. During the Bush Administration, it was determined on a case-by-case basis, partly because the court in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* placed limits on how broad the Corps could define jurisdictional waters. Then came *Rapanos v. United States*, from which came two different tests for defining whether a body of water is part of WOTUS. Justice Scalia’s plurality opinion argued for a narrow definition that required water bodies to be “relatively permanent.” In contrast, Justice Kennedy called for a definition that would cover waters if they shared a “significant nexus” to traditionally navigable waters. The Obama Administration attempted to define it via the “[Clean Water Rule](#),” which opted to follow Justice Kennedy’s *Rapanos* opinion, but it never made it past some of the courts and left the nation in a state of confusion about what the heck the law was. Next up was the Trump Administration, which repealed the CWR and released the “[Navigable Waters Protection Rule](#),” which followed Justice Scalia’s opinion and limited WOTUS to 4 categories: (1) territorial seas and traditional navigable waters; (2) tributaries; (3) lakes, ponds, and impoundments of jurisdictional waters; and (4) adjacent wetlands. Aside from 12 listed exemptions, any waters that don’t meet one of those categories weren’t considered part of WOTUS. This brings us to present-day. If you want a deeper dive, we wrote a [paper](#) on this [not too long ago](#).

Now that you’re all caught up, let’s talk about what’s in the new proposed rule. Well, here’s the thing: it’s not actually “new,” because, as we mentioned, it’s a return to the pre-2015 definition and essentially codifies *Rapanos* and [repeals the NWPR \(that was already thrown out by a federal judge\)](#). Under the proposed rule, the usual suspects (waters that fall under the 4 categories) are considered

The **Tulane Institute on Water Resources Law and Policy** is a program of the Tulane University Law School.

The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and legal stewardship of water.

Coming up:

[EPA WOTUS Public Hearing](#), Jan. 18

[WOTUS Rule Comments Due](#), Feb. 7

[UF Water Institute Symposium](#), February 22-23

[Tulane Environmental Law Summit](#), March 11-12

[Coastal Law in Louisiana \(CLE\)](#), April 21- 22

Water jobs:

[Assistant General Counsel & Policy Researcher](#); The Water Institute of the Gulf; Baton Rouge, LA

Louisiana Bucket Brigade; [Campaign Director](#), New Orleans, LA; [Economic Development Manager](#), River Parishes, LA;

[Sustainability/ESG Director](#); PwC; multiple locations

[Research Associate](#); University of New Orleans; New Orleans, LA

[Communications Specialist](#); Environmental Defense Fund; Multiple

[Research Associate 1](#); University of Louisiana Lafayette; Lafayette, LA

[Organizing Representative](#); Sierra Club; New Orleans, LA

[Staff Attorney](#); Save Our Springs Alliance; Austin, TX

[Attorney](#); State Water Resources Control Board; Sacramento, CA

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jurisdictional waters, as well impoundments of tributaries and adjacent wetlands that meet the “relatively permanent” or “significant nexus” standards. “Relatively permanent” waters are waters that are “relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.” Waters that have a significant nexus means those that “. . . significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.” What this means is that there would be two avenues for a body of water to be considered part of WOTUS, which makes for a broader approach—and a still-confusing one. This time around, the Corps is emphasizing the importance of using science in making WOTUS determinations. Still, science is a double-edged sword, and you’re going to be [called a moron](#) by *someone*. If you like this, don’t get too comfortable with this interpretation; and if you hate it, good news! We’re only in the first step of EPA’s [multistep process](#) to define WOTUS. Last week, [the Corps announced](#) that it would no longer be implementing the NWPR and will be using the pre-2015 definition until the proposed WOTUS definition is finalized. Even then, it’s not over. The current proposed rule acts as a sort of stop gap until EPA and the Corps can come up with a more refined definition [later in the year](#). Until then, we’re stuck in WOTUS purgatory. Meanwhile, EPA and the Corps are holding some [public hearings](#) about the current proposed rule.

[If You Got Water, You Gotta Protect It](#)

Nebraska and Colorado are [beefing again](#). This time, it’s about water. Nebraska [Governor Pete Ricketts announced](#) that the state is planning to construct a canal and reservoir system to [capture water from South Platte River](#). This is in response to Colorado’s projects, which will likely restrict the amount of water that flows into Nebraska. While it certainly raises eyebrows, the action has grounds in the [South Platte River Compact](#), a water-sharing agreement between the two states that guarantees Nebraska and Colorado a certain amount of water via the operation of canal systems. It also grants both states the right to acquire lands as necessary to maintain their respective systems. Recently, Colorado, in anticipation of a population boom and the pursuit of happiness for that population, identified over 280 projects intended to divert water out of the river, which flows northeast from Park County, Colorado into Nebraska, where it feeds into the Platte River. Therefore, any diversions from Colorado will affect the water in Nebraska. The latter is estimating a 90% decline in water if those projects happen. Interstate compacts can provide a way to resolution when states [disagree on what belongs to which](#). The actions Nebraska plans to take in order to construct the proposed system, including acquiring land via eminent domain and purchasing, will likely be federal actions and land both states in federal court because we all know Colorado isn’t going to take this lying down.

[Well, Well, Well](#)

Louisiana is one of 26 states that expressed interest in federal [funding to plug up orphan wells](#). Honestly, it only makes sense. We have 4,605 abandoned oil and gas wells that need to be addressed. And like [Oliver Twist](#), these wells just keep on giving; the longer they are left alone, the more greenhouse gases they release into the atmosphere and hinder climate change efforts. The funding would come in the form of grants provided for in the Infrastructure Investment and Jobs Act, which we’ve previously heard about, and it seems like the details are starting to be worked out. While Louisiana doesn’t hold the title for the most orphan wells (congratulations, [Pennsylvania](#)), it’s likely that our number is a lowball estimate. Following the closure of several oil and gas facilities in the past year, there have been more orphan wells and fewer jobs. The state is hoping that the effort to plug the wells would create more jobs as well as reduce methane emissions. What you would call a win-win. Keep an eye on the Department of Interior. They should be announcing in the next few weeks how much money each state gets.