



Environmental Update

January 2023

Legal Challenges to Just-Published WOTUS Rule Begin

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) published a final rule (2022 Rule) establishing a revised definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA) in the *Federal Register*. [As we previously reported](#), the 2022 Rule resets the regulatory landscape to mirror the pre-2015 definition of the term (commonly referred to as “the 1986 regulations”) and includes protection for traditional navigable waters, the territorial seas, interstate waters and upstream waters that “significantly affect” waters typically viewed as within federal jurisdiction under the Commerce Clause.

The 2022 Rule will become effective on March 20, 2023. Despite the lack of finality, legal challenges from industry and the state of Texas have already begun. As anticipated, the agriculture, housing and oil and gas industries allege that the 2022 Rule is arbitrary and capricious and an attempt to confer CWA jurisdiction over dry land and water features. Texas’s attorney general alleges the rule violates the Fifth and Tenth Amendments to the Constitution as well as the Commerce Clause. Both lawsuits allege violations of the Administrative Procedure Act.

Future plaintiffs may also seek a preliminary injunction to enjoin the rule before it takes effect. If enjoined, the 2022 Rule would be remanded to EPA and the Army for more administrative process and public comment. The pending cases may never reach a determination on the merits, however, especially if the Supreme Court rules on *Sackett II* in the first half of 2023.

We will continue to monitor these developments. Please see our January 18 update, “[EPA and Army Seek to Reset WOTUS Rule Regulatory Framework Before Sackett Ruling](#),” for more information.

FOR MORE INFORMATION

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