

**“Waters of the U.S.”
CIBO Virtual SWG Committee Meetings
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Waters of the United States (WOTUS)

33 U.S.C. § 1362(7)

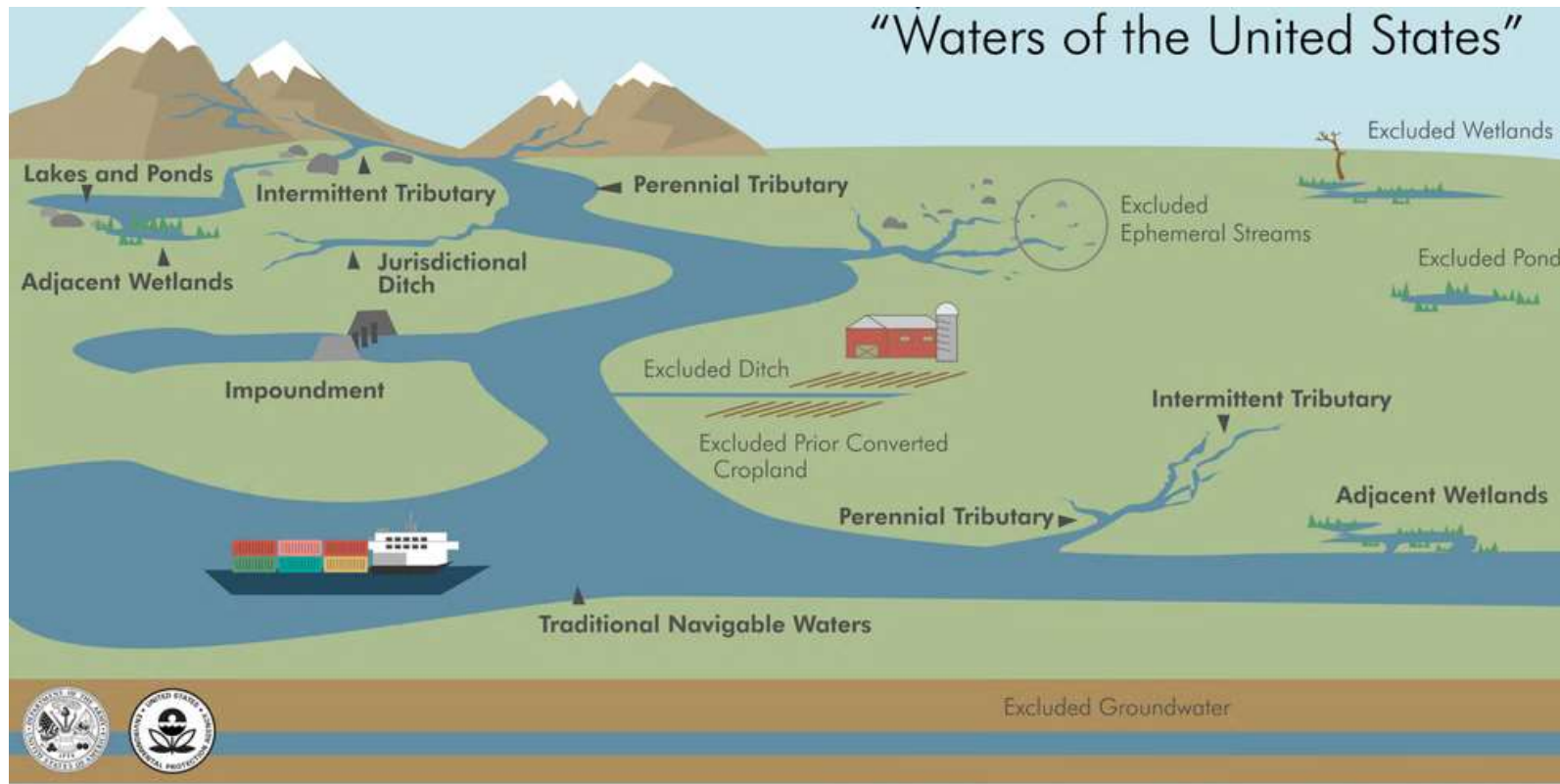
“‘Navigable waters’ means the waters of the United States, including the territorial seas”

Definition of WOTUS

Why does this matter?

- Section 404 permitting
- Section 401 water quality certifications
- Section 402 (NPDES) permitting
- Section 311 spill prevention, control, and countermeasures
- Water quality standards, total maximum daily loads, and related requirements (Section 303, 304, and 305)

What might be jurisdictional?



Regulatory and Litigation Background

How did we get here?

- Pre-2015: three Supreme Court decisions addressing the 1980s rules, the last of which (*Rapanos*) raised as many questions as it answered
- June 2015: Clean Water Rule published in *Federal Register*
- 2015-2018: Clean Water Rule preliminarily enjoined or stayed by numerous federal courts in over half of the country
- Dec. 2019: Repeal Rule published in *Federal Register*
 - Pre-2015 definitions reinstated
- Apr. 2020: Navigable Waters Protection Rule published in *Federal Register*
- Aug 2021: NWPR vacated by a court in AZ; Agencies apply the ruling nationwide and reinstate the pre-2015 definitions

Fate of the NWPR

Repeal & replace, revise, or something else?

- June 9 announcement: return to a two-part rulemaking process
 - Agencies expressed “concerns” about defensibility/legality
 - Agencies claimed the rule was causing significant environmental harm
- Agencies requested voluntary remand *without* vacatur in several courts
 - District of South Carolina granted the request
 - **District of Arizona** granted the remand request, but **vacated** the NWPR
 - No merits adjudication
 - Court credited the Agencies’ claims of ongoing harm and did not address contrary arguments by intervenors
 - Geographic scope unclear, but the Agencies announced on Sept. 3 that they have “halted” NWPR implementation and gone back to the pre-2015 definition

Biden WOTUS Rulemaking(s)

What happens next?

- Rulemaking (expedited?) to repeal the NWPR
- Regional roundtables
- Replacement definition rulemaking
- More litigation...

An aerial photograph of a braided river system in a valley. The river consists of multiple channels that split and rejoin, creating a complex, maze-like pattern. The surrounding landscape is a mix of brownish-yellow earth and sparse vegetation. In the background, there are rolling hills and mountains under a sky with scattered clouds, illuminated by the warm light of a sunset or sunrise.

Questions?

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