

# EPA's Waters of the U.S. Rule

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## PRO POINTS

- **In January 2023, the Biden administration finalized a new rule defining the Clean Water Act's** phrase "Waters of the U.S.," which determines which streams and wetlands are subject to the law and has inspired decades of political wrangling.
- **The rule has major implications for a broad swath of industries, from oil and gas to homebuilding,** that must seek Clean Water Act permits from EPA and the Army Corps of Engineers to fill waterways or discharge pollution into streams and wetlands protected under the law.
- **The Biden rule cuts a middle path between the sweeping approach enacted by the Obama** administration and the narrow rule finalized by the Trump administration – but leaves most decisions to regulators in the field. Industry groups and their Republican allies in Congress have come out staunchly opposed to the latest version.
- **The Supreme Court is currently weighing a case that centers on the federal government's reach** under the Clean Water Act. A ruling is expected by June and could force EPA to update its new rule or rewrite it altogether.

## HOW WE GOT HERE

The Clean Water Act aims to "restore and maintain" the health of the nation's waterways and gives EPA a series of powerful regulatory authorities to do so. But ever since the law was passed in 1972, industries, federal agencies and environmental groups have been brawling over which streams and wetlands fall under the law's protections.

## A visual glossary of waters

Below is a simplified landscape that includes some of the features listed in the CWA and the Waters of the U.S. rule. Not all are regarded as Waters of the U.S., as some are expressly excluded from protection. Labels may appear to be clear, but determining which category a feature on the landscape falls into is often a subjective judgment call.



Sources: EPA, POLITICO reporting

The extent of the law's reach has major financial implications for industries ranging from housing development to mining to oil and gas production. Among the Clean Water Act's permitting programs is one governing the filling in of wetlands, and obtaining such a permit can be a time-consuming and expensive process for developers. It is also a key federal decision point that environmental and community groups have leveraged to challenge projects that they oppose.

The Supreme Court has weighed in on the scope of the water law three times. In the last major decision, in 2006, the court issued a splintered 4-1-4 decision throwing into question the status of millions of miles of streams, particularly those in the arid West, and roughly half the nation's wetlands.

In that case, the justices urged EPA to promulgate a regulation clarifying the topic, and for almost a decade, EPA has been issuing a steady whipsaw of rules depending on the party in power. The Obama administration crafted a sweeping rule in 2015 that cemented protections for broad categories of waters. The Trump administration repealed that rule and put in place a far narrower definition of protected waterways in 2020, which was later overturned by the courts.

When the Biden administration took office, EPA officials said they wanted to cut a middle path, but before they could lay out their plans the Supreme Court jumped into the fray once more, agreeing to hear a fourth major wetlands case in the fall of 2022.

Given the court's timing, the Biden EPA opted to take a multi-pronged approach to regulation, first crafting the rule that was finalized in January 2023 to formally repeal the Trump rule and put back in place a modified version of the longstanding 1986 regulations that predated the past decade of regulatory ping-pong. With the court expected to rule by June 2023, the agency is preparing to craft a second rule on the topic.

## How “Waters of the U.S.” has changed over time

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- 1986** U.S. Army Corps of Engineers issues a Waters of the U.S. regulation that allows broad federal authority over streams and wetlands.
  - 2001** The Supreme Court invalidates the approach the Army Corps had used to assert jurisdiction over isolated ponds and wetlands. The ruling throws into question federal authority over wetlands that aren't connected to the broader tributary network.
  - 2006** The Supreme Court issues a muddled decision in the wetlands case *Rapanos v. United States* that created two competing tests for jurisdiction:
    - The court's four conservatives ruled that only “relatively permanent” waters should get federal protection.
    - Then-Justice Anthony Kennedy concurred, but set a separate test giving jurisdiction to any water with a “significant nexus.”
  - 2015** The Obama administration finalizes its “Clean Water Rule” based on Kennedy's “significant nexus test” cementing federal jurisdiction over a broad swath of waters that include some desert washes that are dry much of the year.
  - 2019** The Trump administration repeals Obama’s “Clean Water Rule.”
  - 2020** The Trump administration finalizes its “Navigable Waters Protection Rule” based on the “relatively permanent” test. The rule removes federal protections from thousands of miles of streams, including most waterways in the arid southwest and roughly half the nation’s wetlands.
  - 2021** The Biden administration halts enforcement of the “Navigable Waters Protection Rule” nationwide after a federal district court overturns it.
  - 2022** The Supreme Court hears oral arguments in the wetlands case *Sackett v. EPA*, during which several justices contemplate crafting a new test for federal jurisdiction. A ruling is expected before the 2023 term ends in June.
  - 2023** The Biden administration issues a new definition of “Waters of the U.S.” based on the 1986 regulation, allowing regulators to assert jurisdiction over streams and wetlands based on either the “significant nexus” or “relatively permanent” tests.

Sources: EPA, POLITICO reporting

### WHAT'S NEXT

The Supreme Court’s ruling stands to be the most significant action on the issue in a decade and a half. The case, *Sackett v. EPA*, centers on a patch of wetlands on an Idaho couple’s property near Priest Lake, and what test EPA and the Army Corps of Engineers should have used when evaluating whether they were subject to Clean Water Act permitting requirements.

During oral arguments in October, justices wrestled with questions about how close to the tributary network a wetland needs to be in order to be covered under the law. They floated the possibility of crafting a new test – different from the two previous ones in the Supreme Court’s 2006 decision, around which the past 17 years of water law and practice have been built.

The Biden administration has laid the groundwork for a second regulation that would modify the January 2023 rule based on the Supreme Court’s ruling in *Sackett*. The agency is aiming to propose that rule this fall and finalize it in July 2024.

At the same time, industry and red states are challenging the first Biden rule, with the main court battle teed up to occur in federal district court in Texas. Plaintiffs have asked the judge to issue an injunction to prevent the rule from going into effect in March.

Republicans on Capitol Hill are also expressing their opposition to the rule. House Republicans have signaled plans to make the topic a top target for oversight, and resolutions of disapproval against the Biden rule have been filed in both chambers.

That resolution will almost certainly come up for a vote in the Senate, where every GOP member signed on, despite Democratic control there. That’s because the Congressional Review Act allows for expedited consideration and a simple majority threshold for approval in the upper chamber. Although President Biden is expected to veto the resolution, should it reach his desk, the move offers the GOP an opportunity to force farm state Democrats to take a stance on a rule unpopular in their home districts.



## POWER PLAYERS

- **Radhika Fox, assistant administrator for EPA's office of water:** Fox is the Biden administration's point person for the Clean Water Act fight.
- **Damien Schiff, senior attorney at the Pacific Legal Foundation:** Schiff leads environmental work for the property rights group, which has had an outsized impact on Clean Water Act issues. Schiff argued the *Sackett* case before the Supreme Court in October.
- **Kelly Moser, senior attorney, Southern Environmental Law Center:** The Southern Environmental Law Center has notched a series of high-profile wins in water cases. Moser led the litigation strategy against the Trump rule.
- **Timothy Bishop, Partner Mayer Brown LLP:** Bishop, who argued and won a major 2001 wetlands case before the Supreme Court, is litigating industry's challenge to the new Biden rule.