

2019 rule repealing the CWR and reinstating the text of the Pre-2015 Regulatory Definition along with new, unsupportable and unexplained reinterpretations of that longstanding rule.<sup>28</sup>

The agencies' third redefinition, the Navigable Waters Protection Rule ("NWPR"), was proposed a few months later and became effective on June 22, 2020.<sup>29</sup> Contrary to more than 40 years of legal precedent and longstanding, well-settled agency interpretations of the Clean Water Act, in the NWPR, the agencies concocted unsupportable legal theories and utilized arbitrary, unscientific line drawing and undisclosed "policy choices" to attempt to justify their unprecedentedly narrow definition of "waters of the United States." Claiming their first-of-its-kind interpretation of the Clean Water Act was so clear the agencies lacked discretion to protect important rivers, streams, lakes, and other waters across the country, the agencies also refused to consider scientific information in the record demonstrating that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity of the nation's waters and endangered drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the nation.<sup>30</sup> This regulatory definition was vacated by two federal district courts in 2021, resulting in restoration of the longstanding Pre-2015 Regulatory Definition.<sup>31</sup>

The agencies' fourth redefinition was proposed on December 4, 2021 ("2021 Proposed Definition"), and published as a final rule on January 18, 2023.<sup>32</sup> This regulatory definition rejected the legal approach taken under the NWPR and maintained or restored protections to many categories of the nation's waters that had long been jurisdictional under the Clean Water Act and the Pre-2015 Regulatory Definition consistent with longstanding legal interpretations and science. However, it also adopted yet another set of novel legal theories that resulted in exclusion of many longstanding definitional categories and previously jurisdictional waters. This regulatory definition was amended on August 29, 2023, to conform it to the *Sackett* decision, and this definition became effective on September 8, 2023.<sup>33</sup>

---

<sup>28</sup> Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019) ("Repeal Rule").

<sup>29</sup> The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020) ("NWPR").

<sup>30</sup> See, e.g., EPA, THE NAVIGABLE WATERS PROTECTION RULE—PUBLIC COMMENT SUMMARY DOCUMENT, RESPONSE TO COMMENTS, EPA DOCKET ID No. EPA-HQ-OW-2018-0149-11574, TOPIC 11, at 3, 8-9, 13, 16 (2020), <https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574> ("NWPR RTC").

<sup>31</sup> On August 30, 2021, the U.S. District Court for the District of Arizona in *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. Aug. 30, 2021), vacated the NWPR, which had the effect of restoring the Pre-2015 Regulatory Definition. Less than one month later, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the NWPR. See *generally* Navajo Nation v. Regan, 563 F. Supp. 3d 1165 (D.N.M. Sept. 27, 2021).

<sup>32</sup> See, e.g., Revised Definition of "Waters of the United States," 86 Fed. Reg. 69372 (proposed Dec. 7, 2021) ("2021 Proposed Definition"); Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023) ("January 2023 Definition").

<sup>33</sup> Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023) (codified at 33 C.F.R. § 328.3 (U.S. Army Corps of Engineers) and 40 C.F.R. § 120.2 (EPA)) ("September 2023 Definition").