

## Talking Points - Final Rulemaking and NAR Litigation, Waters of the U.S.

- On Dec. 30, 2022, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) announced a final rule revising the definition of “waters of the United States” (WOTUS). The rule will be effective 60 days after publication in the Federal Register.
- In 2021, the Biden Administration announced its plans for a two-step rulemaking approach to revise the WOTUS definition. The final rule aims to restore the pre-2015 WOTUS definition while adhering to U.S. Supreme Court decisions and the agencies’ previous implementation experience. A second forthcoming rulemaking is expected to further refine and build upon that regulatory foundation.
- The final rule applies federal protections to traditional navigable waters, the territorial seas, interstate waters, as well as upstream water resources that significantly affect those waters. Adjacent wetlands could receive protection if they meet either the “relatively permanent” or “significant nexus” tests set forth in the 2006 U.S. Supreme Court case *Rapanos v. United States*.
- Rather than providing clarity and certainty for property owners and other regulated stakeholders, this definition of WOTUS adds uncertainty and confusion to the regulatory process, raises housing costs and increases federal overreach in the permitting process.
- The rule makes it unclear whether the federal government will regulate certain roadside ditches, isolated ponds and channels while continuing its reliance on the significant nexus test and gives significant leeway to the EPA and the Corps to make ad hoc jurisdictional determinations.
- In the midst of a housing affordability crisis, this regulation will make it more difficult and expensive for developers to produce new affordable housing units.
- A potential complication for the agencies will be the forthcoming U.S. Supreme Court ruling on the *Sackett v. EPA* case, which will determine the scope of EPA’s power to define WOTUS, expected this summer.
- NAR will be participating in litigation with other regulated stakeholders to fight this regulation and bring clarity and certainty to the regulatory process.