



# The House Committee on Transportation & Infrastructure

Chairman Peter A. DeFazio  
Ranking Member Sam Graves

## FACT SHEET: REPEAL OF TRUMP DIRTY WATER RULE

Subcommittee on Water Resources and Environment | Prepared by T&I Democratic Staff

### FACTS & FIGURES

#### **117 million Americans.**

According to EPA, about 117 million Americans—or 1-in-3 people, get their drinking water from waterbodies placed at risk of pollution under the Dirty Water Rule.

**70+ percent of streams lose protection.** In leaked documents, EPA initially estimated that up to 70 percent of streams could lose federal protections under the Dirty Water Rule.

**50 percent of wetlands lose protections.** Leaked EPA documents also showed that 50 percent of wetlands would lose federal protections under the Dirty Water Rule.

**16,000 permitted facilities lose discharge requirements.** EPA estimated that 16,000 permitted facilities are located on waterbody types no longer subject to federal protections under the Dirty Water Rule, meaning prior pollution discharge limits may no longer apply.

**Key Message:** In a blatant giveaway to polluters, the Trump administration ignored the science and the law in overturning decades of *Clean Water Act* protections over the nation's streams, lakes, rivers, and wetlands through its Dirty Water Rule. This illegal rule was quickly suspended by federal court action which found the rule would result in "serious environmental harm." In December, the Biden administration issued a proposed rule to formally repeal the Dirty Water Rule and reinstate the definition of "waters of the United States" originally established by the Reagan administration and that governed the scope of the *Clean Water Act* for decades. Reinstatement of the "1986 regulations" provide a known and familiar framework for both regulators and stakeholders, and are consistent with the science, recent court decisions, and congressional intent of the *Act* to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

### FEDERAL COURT RULES THAT DIRTY WATER RULE RESULTS IN "SERIOUS ENVIRONMENTAL HARM"

In August 2021, a federal district court vacated and remanded the Trump Dirty Water Rule to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), finding this illegal rule was based on "fundamental, substantive flaws that cannot be cured" and must be suspended to avoid "serious environmental harm."<sup>1</sup>

In striking down this illegal rule, the court highlighted how, in just 11 months, the Corps' implementation of the Dirty Water Rule resulted in:

- Over 76 percent of applications found no *Clean Water Act* jurisdiction over local waterbodies (e.g., rivers, streams, lakes, and wetlands);
- 333 projects that previously required a federal *Clean Water Act* permit prior to the Dirty Water Rule no longer did; and
- In arid states, such as Arizona and New Mexico, nearly every one of the 1,500 streams assessed under the Dirty Water Rule were "found to be non-jurisdictional"—meaning the *Clean Water Act* did not apply.

According to the court, these initial impacts represented "a significant shift" from their jurisdictional status under the 1986 regulations—demonstrating, again, the magnitude of the adverse impacts caused by the Trump Dirty Water Rule.

<sup>1</sup> *Pascua Yaqui Tribe, et. al. v. EPA*, No. CV-20-00266 (D. Ariz. Aug. 30, 2021).

## CONGRESSIONAL OPPOSITION TO TRUMP DIRTY WATER RULE

Under the leadership of Transportation and Infrastructure Committee Chair, Peter DeFazio, and Subcommittee on Water Resources and Environment Chair, Grace Napolitano, committee Democrats fought against efforts by the Trump administration to weaken the *Clean Water Act*, including through its Dirty Water Rule.

In April 2019, Chairs DeFazio and Napolitano joined in a [letter](#) to the Corps and EPA documenting how the Dirty Water Rule represented the “single-largest rollback in clean water protections in history” and will result in “greater regulatory confusion and increased costs for average American families, as well as the likely degradation or destruction of our Nation’s precious natural resources.”

In February 2021, Chairs DeFazio and Napolitano joined in a [letter](#) to President Biden urging the *immediate repeal* the Trump Dirty Water Rule before “this unconscionable proposal causes lasting damage to the health of our families, our environment, and our vital water resources.”

In the summer of 2021, Chairs DeFazio and Napolitano issued two press releases ([6/2021 Press Release](#) and [8/2021 Press Release](#)) applauding both the Biden administration and federal courts for immediately halting the draconian impacts of the Dirty Water Rule.

In September 2021, Chairs DeFazio and Napolitano led a [letter](#) of over 130 House Democrats urging the Biden administration to expeditiously put in place “an enduring, scientifically-based, and protective standard for ensuring the protection of our critical waters and wetlands.”

## BIDEN ADMINISTRATION PROPOSES TO PERMANENTLY REPEAL DIRTY WATER RULE

On December 7, 2021, the Biden administration [issued a proposed rulemaking](#) to formally repeal the Dirty Water Rule.<sup>2</sup> This critical action is necessary to restore common-sense protections to our nation’s waters and wetlands as well as provide some regulatory certainty to regulators and stakeholders in the implementation of the *Clean Water Act*.

The Biden administration rulemaking proposes to reinstate the definition of “waters of the United States” that was originally established by the Reagan administration (the “1986 regulations”) that governed the scope of the *Clean Water Act* for decades. Contrary to Republicans’ misleading efforts to suggest otherwise, **this rulemaking would not reinstate the Clean Water Rule that was promulgated by the Obama administration in 2015** but repealed by the Trump administration in 2019. In fact, the Biden proposal, ironically, mirrors the text of the regulations used by the Trump administration to repeal the Clean Water Rule<sup>3</sup> —again, **reverting back to the 1986 regulations that have governed the *Clean Water Act*’s protections for decades**, have been codified several times, and have been **“implemented by every [presidential] Administration for the last 35 years, from that of Ronald Reagan through Donald Trump.”**<sup>4</sup>

The Biden administration states this proposal “would solidify the rules of the road for a stable implementation of ‘waters of the United States’ while the agencies continue to consult with stakeholders to refine the definition .... in both implementation and future regulatory actions.” The proposed rule reinstates longstanding exclusions and exemptions from *Clean Water Act* jurisdiction (e.g., prior converted croplands) on which the agricultural community has come to rely. EPA and the Corps conducted extensive pre-proposal engagement to help inform the content of the proposed rule and the public comment period on the proposal concludes on February 7, 2022. Final action on the rule is expected in the coming months.

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<sup>2</sup> See 86 Fed. Reg. 69372 (Dec. 7, 2021).

<sup>3</sup> See 84 Fed. Reg. 56626 (Oct. 22, 2019).

<sup>4</sup> See 86 Fed. Reg. 69372, 69373 (Dec. 7, 2021).

## SUPREME COURT TAKES UP SACKETT V. EPA

On January 25, 2022, the U.S. Supreme Court agreed to consider an appeal from the U.S. Court of Appeals for the Ninth Circuit that could, again, interpret the scope of federal *Clean Water Act* authority over waters and wetlands.<sup>5</sup> While this case centers on the development of a specific property that had been classified by the Corps and EPA as a protected wetland, the court could reopen its earlier decision in *Rapanos v. United States*.

The *Rapanos* decision in 2006 outlined two potential tests for determining what constitutes a “water of the United States” under the *Clean Water Act*—the plurality opinion of Justice Scalia that requires a “relatively permanent” or “continuous surface connection” to establish jurisdiction, or the opinion of Justice Kennedy that requires a “significant nexus” between a wetland or other non-navigable waterbody and navigable waters for jurisdiction. Following the *Rapanos* decision, both the Bush and Obama administrations utilized the “relatively permanent” and “significant nexus” tests as a potential basis for asserting *Clean Water Act* protections over waters and wetlands. However, the Trump Dirty Water Rule rejected the “significant nexus” test and relied exclusively on the “relatively permanent” test as the sole basis for asserting *Clean Water Act* protections—and the result was the dramatic loss of federal protections over waters and wetlands described above. The Biden administration’s efforts to replace the Dirty Water Rule with the 1986 regulations would, again, rely on both the “relatively permanent” and “significant nexus” tests.

The Biden administration had formally requested that the Court reject the case,<sup>6</sup> urging that EPA’s currently ongoing rulemaking should be completed prior to any Supreme Court challenge; however, the Court rejected this argument. The case will be heard in the next term, which begins in October and ends in June 2023.

There are several potential outcomes to this case. The Court could narrowly address the immediate question of jurisdiction of the property in the case and remand it back to the Ninth Circuit for further consideration. The Court’s conservative majority could also completely reopen the *Rapanos* tests or put in place a new, even more narrow test. Should the Biden administration finalize the repeal of the Trump Dirty Water Rule before the case is heard, the Biden administration could request the Court dismiss the case or refocus the analysis on whether the revised 1986 regulations are consistent with the *Clean Water Act*.

This will be a closely watched case, with some potential outcomes severely limiting the scope of *Clean Water Act* protections permanently. If that happens Congress may need to amend the *Clean Water Act* to reassert federal protections on waters and wetlands that might be otherwise lost.

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<sup>5</sup> [https://www.supremecourt.gov/orders/courtorders/012422zor\\_m6io.pdf](https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf).

<sup>6</sup> [https://www.supremecourt.gov/DocketPDF/21/21-454/201324/20211124133353006\\_21-454%20Sackett%20Opp.%20-%20final.pdf](https://www.supremecourt.gov/DocketPDF/21/21-454/201324/20211124133353006_21-454%20Sackett%20Opp.%20-%20final.pdf).