

## C O M M E N T S

# STATE PROTECTION OF NONFEDERAL WATERS: TURBIDITY CONTINUES

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Judicial or administrative changes in the regulatory scope of the 1972 Clean Water Act (CWA)<sup>1</sup> are not merely theoretical, but directly affect members of the public who rely on the services that waters provide to ecosystems and the health of communities. Changes also affect entities that discharge pollutants to waters, and state regulators that are responsible for protection of waters. State regulators, in particular, are faced with difficult and complex decisions, often constrained by state administrative laws.

This Comment examines the legal framework for state protection of nonfederal waters and its implications for cooperative federalism. After a brief overview and legal background, it identifies some recent state actions in North Carolina, Arizona, and Ohio that attempt to fill gaps in coverage created by changes in federal interpretations of the CWA. North Carolina's experience illustrates a particularly difficult regulatory impediment. Next, it summarizes the current scope of state regulation of waters in every state, in order to discern the likely impact of changes at the federal level on the status of waters in the states. Finally, updating an analysis done by the Environmental Law Institute (ELI) in 2013, it examines legal constraints on the ability of state agencies to engage in gap-filling regulations; and discusses the implications of impending changes that may result from federal court decisions, including the U.S. Supreme Court's pending consideration of *Sackett v. Environmental Protection Agency* in its October 2022 term.

## I. Overview

A body of water such as a river, stream, wetland, lake, pond, tidal water, or other surface water is covered by the CWA only if it is a "water of the United States" (sometimes referred to as WOTUS).<sup>2</sup> The scope of the definition of "WOTUS" defines a host of protections of such waters under federal law and under state laws that implement federal requirements.

The CWA protections include the prescription of water quality standards,<sup>3</sup> the assessment of waters to determine whether they are impaired and the preparation of plans to restore their health,<sup>4</sup> the regulation by permit of discharges of pollutants from point sources into such waters,<sup>5</sup> the regulation of the placement of dredge and fill material into such waters,<sup>6</sup> the applicability of requirements to prevent, report, and correct spills of oil and hazardous substances (and liability for such spills),<sup>7</sup> and state review of federal licensing and permitting activities that may result in discharges.<sup>8</sup> In contrast, non-WOTUS waters are protected from discharges of pollutants and disposal of dredge and fill material only by the laws of the state within which they are located.

Therefore, changes in the interpretation of WOTUS resulting from judicial decisions or federal rulemaking place a substantial burden upon state regulators and legislators. States must determine whether, and how, to keep up with shifting federal coverage by adopting and implementing state legal protections for waters that were formerly, but are no longer, protected by federal law.

Issues have arisen with many types of waters, including wetlands, that are or have been WOTUS but that may drop from coverage via re-interpretation of the scope of the CWA. Among the waters of concern are intermittent or ephemeral streams that flow into the nation's rivers and lakes, wetlands such as bogs and peatlands that do not have a continuous surface connection with other waters, other wetlands that lack a continuous surface connection to a continuously flowing river or stream, desert arroyos that flow only during several months of the year and not at all in years without rainfall, complexes of prairie potholes and vernal pools, and many other types of waters and wetlands that affect the chemical, physical, and biological integrity of the nation's waters.<sup>9</sup>

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

2. 33 U.S.C. §1362(7). See also Oil Pollution Act, 33 U.S.C. §2701(21), ELR STAT. OPA §1001(21).

3. *Id.* §§1311, 1313(c).

4. *Id.* §1313(d).

5. *Id.* §1342.

6. *Id.* §1344.

7. *Id.* §§1321, 2702.

8. *Id.* §1341.

9. See generally U.S. ENVIRONMENTAL PROTECTION AGENCY, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE (2015) (scientific review of the rela-

The analysis of state programs in this Comment focuses on nontidal (freshwater) wetlands, and headwater streams, and chiefly examines the states' ability under existing laws to regulate dredge and fill activities in these waters. These are the most likely to be affected by definitional changes. In contrast, marine and tidal waters and wetlands are nearly always WOTUS, as are traditionally navigable waters such as rivers, lakes, and perennial streams.<sup>10</sup>

## II. Legal Background

Enacted in 1972, the CWA established regulatory programs for protection of the chemical, physical, and biological integrity of the nation's "navigable waters."<sup>11</sup> This term is defined in the CWA as "waters of the United States."<sup>12</sup> The U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (EPA) have further defined this term by regulation, starting in the 1970s and 1980s.<sup>13</sup> The 1980s definition has substantially governed practice under the Act for most of the next 35 years, until recent rulemaking activities.

The Supreme Court has also weighed in. In 1985, a unanimous Supreme Court, ruling in *United States v. Riverside Bayview Homes, Inc.*, made it clear that wetlands immediately adjacent to traditionally navigable waters are within the scope of the CWA, even if the wetlands themselves are not navigable in fact.<sup>14</sup> In 2001, the Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* that the term WOTUS excludes "isolated ponds, some only seasonal" located entirely within one state, where the asserted basis for federal jurisdiction was their use by migratory birds.<sup>15</sup>

In 2006, in *Rapanos v. United States*,<sup>16</sup> the Court addressed the scope of the CWA again, resulting in a fractured opinion. Four Justices, in an opinion by Justice Antonin Scalia, concluded the CWA covers a wetland only

where the wetland has a "continuous surface connection" with a "relatively permanent" body of water that is connected to traditional interstate navigable waters.<sup>17</sup> Justice Anthony Kennedy's concurring opinion found this plurality interpretation too narrow, and would have upheld CWA jurisdiction over wetlands and similar waters where they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>18</sup> The four remaining Justices would have found even broader coverage of waters under the Act, citing agency precedent and the relationship of waters to the goals of the CWA.<sup>19</sup> Given the 4-1-4 split, following *Rapanos*, the federal courts have found that the CWA applies to waters when they meet either the plurality's test or Justice Kennedy's "significant nexus" test.<sup>20</sup>

Citing a need for clarity, the Barack Obama Administration engaged in rulemaking, producing a definition of "WOTUS" that it finalized in 2015.<sup>21</sup> Then, the Donald Trump Administration undertook a contrary rulemaking that it completed in 2020. This "navigable waters rule" revoked President Obama's rule and adopted a more restrictive definition based on Justice Scalia's narrower opinion in *Rapanos*.<sup>22</sup> Each of these rulemakings was met with litigation, and resulted in court orders and injunctions that limited or entirely foreclosed their application.<sup>23</sup>

In 2021, the Joe Biden Administration proposed to roll back the Trump Administration rule and revert to the 1980s-era definitional rules as subsequently interpreted by Justice Kennedy's "significant nexus" text.<sup>24</sup> The Biden Administration has also announced rulemaking intended to develop a new definition for "waters of the United States."<sup>25</sup> In the meantime, the Supreme Court granted review in *Sackett v. Environmental Protection Agency*,<sup>26</sup> to

relationships among waters and wetlands in various landscapes to downstream waters that are traditionally navigable).

10. While various states regulate groundwater, groundwater itself is not defined as WOTUS. However, it may convey pollutants to WOTUS. See *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 50 ELR 20102 (2020).
11. 33 U.S.C. §1251(a). See also *id.* §1313(c)(2) (water quality standards for navigable waters), *id.* §1342(a) (permits for discharges into navigable waters), *id.* §1344(a) (permits for discharge of dredge or fill material into navigable waters).
12. *Id.* §1362(7).
13. The most recent definition is codified at 33 C.F.R. §328.3 and 40 C.F.R. §§120.1, 120.2. Prior definitions were also codified at 40 C.F.R. §§110.1, 112.1, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 300 (app. E, 1.5), 302.3, 401.11 (2019), reflecting the many programs dependent on the WOTUS definition. The term "waters of the United States" was initially defined by the Corps in 1974 for purposes of the §404 dredge and fill program, 39 Fed. Reg. 12115 (Apr. 3, 1974); but the definition was substantially revised and expanded by EPA and the Corps in 1977, 1986, and 1988, to reflect both case law and improvement in scientific understanding, 42 Fed. Reg. 37122 (July 19, 1977), 51 Fed. Reg. 41206 (Nov. 13, 1986), 53 Fed. Reg. 20764 (June 6, 1988). More substantial, and contested, revisions were promulgated in 2015 and 2020, and are currently being reconsidered in pending rulemakings. See discussion *infra* notes 21-25.
14. 474 U.S. 121, 16 ELR 20086 (1985).
15. 531 U.S. 159, 31 ELR 20382 (2001).
16. 547 U.S. 715, 36 ELR 20116 (2006). "Waters of the United States" does not include "nonnavigable, isolated, intrastate waters."

17. This plurality opinion does not "necessarily exclude" from "relatively permanent" bodies of waters those that are seasonal or that dry up under extraordinary circumstances such as drought. *Id.* at 733 n.5.
18. *Id.* at 780 (Kennedy, J., concurring).
19. *Id.* at 788 (Stevens, J., dissenting). See also *id.* at 811 (Breyer, J., dissenting) (coverage of the CWA extends "to the limits of congressional power to regulate interstate commerce").
20. *E.g.*, *United States v. Donovan*, 661 F.3d 174, 183-84, 41 ELR 20328 (3d Cir. 2011), *cert. denied*, 566 U.S. 990 (2012); *United States v. Bailey*, 571 F.3d 791, 799, 39 ELR 20148 (8th Cir. 2009); *United States v. Robison*, 505 F.3d 1208, 1221-22, 37 ELR 20265 (11th Cir. 2007), *cert. denied*, 555 U.S. 1045 (2008); *Northern Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999, 37 ELR 20202 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008); *United States v. Johnson*, 467 F.3d 56, 64-66, 36 ELR 20218 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25, 36 ELR 20200 (7th Cir. 2006), *cert. denied*, 552 U.S. 810 (2007); *cf.* *United States v. Cundiff*, 555 F.3d 200, 210-13, 39 ELR 20025 (6th Cir. 2009) (juris proper under both tests), *cert. denied*, 558 U.S. 818 (2009); *United States v. Lucas*, 516 F.3d 316, 327, 38 ELR 20041 (5th Cir. 2008), *cert. denied*, 555 U.S. 822 (2008).
21. 80 Fed. Reg. 37054 (June 29, 2015).
22. 85 Fed. Reg. 22250 (Apr. 21, 2020).
23. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 49 ELR 20138 (S.D. Ga. 2019); *Texas v. Environmental Prot. Agency*, 389 F. Supp. 3d 497, 49 ELR 20089 (S.D. Tex. 2019) (enjoining 2015 rules); *Pascua Yaqui Tribe v. Environmental Prot. Agency*, No. 20-00266, 51 ELR 20167 (D. Ariz. Aug. 30, 2021) (vacating 2020 rules).
24. 86 Fed. Reg. 69372 (Dec. 7, 2021).
25. *Id.*
26. 142 S. Ct. 896 (2022) (*cert. granted*).

determine whether lower courts correctly interpreted the CWA in a case reviewing the filling of an intrastate wetland. The Court is expected to reevaluate the *Rapanos* jurisdictional tests.<sup>27</sup>

All this activity means that the scope of regulation provided by the CWA is less certain than it has been in the years since *SWANCC*. And states are in the hot seat.

### A. Federalism and Protection of Nontidal Waters and Wetlands

The CWA specifically preserves the powers of state governments to continue to regulate water quality under their own laws.<sup>28</sup> It further provides for the delegation of federal permitting programs to states that meet requirements for consistency with federal programs regulating discharges to WOTUS.<sup>29</sup>

The chief delegated permit program is the CWA §402 program (national pollutant discharge elimination system), which regulates discharges of pollutants from point sources into WOTUS. Forty-seven states have been delegated such authority by EPA.<sup>30</sup> In addition, a few states have also sought and achieved approval to administer the Corps' §404 permit program, regulating placement of dredge and fill material into WOTUS. To date, only New Jersey, Michigan, and Florida have received this latter authorization, known as “assumption.”<sup>31</sup>

Section 401 of the CWA provides an additional opportunity for states to protect WOTUS.<sup>32</sup> It provides that with respect to applications for federal licenses or permits to conduct “any activity which may result in any discharge” to WOTUS, states may grant, deny, or condition a certification that the federally permitted activity will meet state water quality standards. The state certification, if granted, becomes an element of the federal permit or license. Section 401 certification most often applies to state evaluation of decisions by the Corps to permit the placement of dredge or fill material into WOTUS.<sup>33</sup>

Apart from the CWA, and so long as not preempted by federal law or inconsistent with such law, states retain their powers under state constitutions and state legislation to adopt regulatory programs for the protection of any of their waters. However, many states have not adopted regulatory programs to protect non-WOTUS waters, instead tailoring their regulations to the CWA.

Every state has enacted its own definition of “waters of the state.” At a minimum, these state definitions typically encompass WOTUS, as they must to support delegation of federal permitting authority over such waters. But state definitions also include many additional waters, such as groundwater, springs, wetlands, watercourses, and others. “Waters of the state” definitions do not mean that all of these waters are covered by state regulatory programs. Rather, they identify waters of interest to the states often for both regulatory and nonregulatory purposes—including not only water quality, but also resource planning, water quantity, conservation, or recreation.

For example, Nebraska has a very broad “waters of the state” definition.<sup>34</sup> It has even adopted water quality standards for isolated wetlands.<sup>35</sup> But it has not enacted a permitting program for activities in such waters. Colorado defines “state waters” as “any and all surface and subsurface waters which are contained in or flow in or through this state,” but excluding waters “in sewage systems, waters in treatment works of disposal systems, waters in potable water distribution systems, and all water withdrawn for use until use and treatment have been completed.”<sup>36</sup> This definition encompasses, for example, non-WOTUS, such as intermittent or ephemeral streams, seasonal ponds, and isolated wetlands. But the state has not adopted programs to protect these waters.<sup>37</sup> For dredge and fill activities in waters, Colorado limits its regulation to WOTUS, relying on its §401 certification authority to review Corps permits.

In the decades since the *SWANCC* decision, the scope of coverage of the CWA has been contested. Thus, if a reinterpretation or change in federal coverage means that fewer waters are WOTUS, states without comprehensive programs may need to act after considering whether their existing laws can provide adequate protection for the excluded waters.

27. In its grant of certiorari, the Court framed the question presented as “Whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act, 33 U.S.C. §1362(7).” *Id.* The U.S. Court of Appeals for the Ninth Circuit had applied the “significant nexus” test in finding the wetlands subject to regulation as waters of the United States. *Sackett v. Environmental Prot. Agency*, 8 F.4th 1075, 51 ELR 20159 (9th Cir. 2021).

28. 33 U.S.C. §1370.

29. *Id.* §1342(b) (delegation of national pollutant discharge elimination system—the NPDES permit program); *id.* §1344(g), (h) (state assumption of dredge and fill permit program).

30. Massachusetts, New Hampshire, New Mexico, and the District of Columbia do not have delegated NPDES programs. U.S. EPA, *NPDES State Program Authority*, <https://www.epa.gov/npdes/npdes-state-program-authority> (last updated May 17, 2022).

31. U.S. EPA, *U.S. Interactive Map of State and Tribal Assumption Under CWA Section 404*, <https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404> (last updated Mar. 10, 2022).

32. 33 U.S.C. §1341.

33. Section 401 applies to certain other decisions, such as federal NPDES permitting of discharges of pollutants in those states where EPA is the permitting authority. It also applies to dam relicensing, natural gas pipeline certificates, and certain other federally authorized activities.

34. NEB. REV. STAT. §81-1502(21) (2020):

Waters of the state shall mean all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state.

35. 117 NEB. ADMIN. CODE §003.02 (2022).

36. COLO. REV. STAT. §25-8-103(19) (2022).

37. Colorado has been delegated NPDES authority for WOTUS. *Id.* §§25-8-501 et seq. It also has a state law authorizing its regulatory agency to adopt additional control regulations if needed to prevent anticipated violations of applicable “water quality standards” for any classes of state waters for which it has adopted standards. *Id.* §25-8-205.

### III. Recent State Responses to Changes in WOTUS Interpretations

Fluctuating interpretations of WOTUS threaten to create an unstable regulatory situation for states and for entities that need to know whether and how to seek permits. It is not that easy to protect waters that suddenly fall between previous regulatory regimes. But failing to do so can leave applicants, the public, and regulators to puzzle out what rules, if any, can apply. Three recent examples illustrate states attempting to deal with the problem in different ways.

#### A. North Carolina Gap-Filling

For decades, North Carolina has relied chiefly on §401 certifications linked to federal §404 permitting of activities in WOTUS to manage dredge and fill activities in its freshwater wetlands and waters. However, after the 2001 *SWANCC* decision, North Carolina's Environmental Management Commission adopted rules under the state water pollution law to provide a state permitting regime for activities in "isolated" waters not subject to §404.<sup>38</sup>

Nearly 20 years later, the Trump Administration's "navigable waters protection rule" upset this arrangement by further limiting the scope of WOTUS. The 2020 rule specifically removed CWA coverage of, among others, wetlands that are not isolated but that lack a *continuous surface connection* to traditionally navigable waters. North Carolina regulators realized that this federal redefinition would result in creating a class of wetlands that were covered by state water quality standards, but that would be subject neither to CWA §404 permitting (with state water quality certification) nor to the permitting requirements of North Carolina's isolated wetlands law. The 2020 federal rule change had created a "permitting gap" for the state's waters.

North Carolina's Environmental Management Commission adopted temporary rules in 2021 to allow the state to review and regulate impacts affecting these wetlands. Under North Carolina law, temporary rules expire 270 days from the date of publication unless a permanent rule is adopted by the Environmental Management Commission and submitted to the state's Rules Review Commission.<sup>39</sup> Given the continuing uncertainty over both the legality of the 2020 federal rule and the fate of the Biden Administration's proposal to restore coverage, the Environmental Management Commission approved permanent regulations in early 2022 and submitted them to the Rules Review Commission.

The regulations would create a permitting mechanism for impacts to "federally non-jurisdictional wet-

lands and federally non-jurisdictional classified surface waters."<sup>40</sup> Specifically:

If the USACE [U.S. Army Corps of Engineers] or its designee determines that a particular stream or open water or wetland is not regulated under Section 404 of the Clean Water Act, and the particular stream or open water or wetland is not an isolated wetland or isolated water as defined in Rule .1301 of this Subchapter, then impacts to that stream or open water or wetland shall be covered by this Section.<sup>41</sup>

Shifting federal definitions have thus required action by North Carolina to fill first one gap in 2001, and then another 20 years later.

However, the authority of the Environmental Management Commission to fill this gap absent new legislation is contested, because of a North Carolina law limiting the authority of the Commission to impose a more restrictive requirement than that imposed by federal law. A 2011 state statute provides that, with limited exceptions,

[a]n agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted.<sup>42</sup>

In its review of the final rule adopted by the Environmental Management Commission, the Rules Review Commission objected to the final rule, preventing it from going into effect.

The Rules Review Commission, whose members are selected by the leadership of the state legislature, "found the agency lacked statutory authority" to adopt the rule on the grounds that it would violate this prohibition.<sup>43</sup> The supporting staff report offers the opinion that where the North Carolina final rule requires a permit for waters that the federal government no longer regulates (by virtue of the 2020 navigable waters protection rule), then the state rule is barred as more restrictive, because it "seeks to implement a permitting process which the federal government has decided not to impose." On the other hand, says the same report, if the 2020 federal rule is no longer in effect because of court decisions and regulatory action restoring federal CWA coverage, then the North Carolina rule

38. See 15A N.C. ADMIN. CODE 02H.1300 (2001) (discharges to isolated wetlands and isolated waters).

39. N.C. GEN. STAT. §150B-21.1(d)(5) (2021).

40. Pending before Rules Review Commission, adding 15A N.C. ADMIN. CODE 02H.1400, Impacts to Federally Non-Jurisdictional Wetlands and Federally Non-Jurisdictional Classified Surface Waters (.1401 through .1405), and amending 15A N.C. ADMIN. CODE 02H.1301, Discharges to Isolated Wetlands and Isolated Waters: Purpose and Scope.

41. Pending before Rules Review Commission, *id.* 02H.1401(b).

42. N.C. GEN. STAT. §150B-19.3(a) (2011).

43. Letter from Brian Liebman, Commission Counsel, Rules Review Commission, to Jennifer Everett, Rulemaking Coordinator, Environmental Management Commission, Objection to 15A NCAC 02H.1301, .1401, .1402, .1403, .1404, .1405 (May 20, 2022), <https://www.oah.nc.gov/media/13303/open>.

would still be barred as more restrictive, because it would impose a redundant permitting requirement on “those waters which have been returned to federal jurisdiction.”<sup>44</sup> The Rules Review Commission’s objection thus concludes that the Environmental Management Commission lacks statutory authority to act.<sup>45</sup>

The Environmental Management Commission has an opportunity to respond to the objection.<sup>46</sup> But if the Rules Review Commission holds to its view of the lack of authority, then the next step for environmental regulators is to seek “return” of the rule and to file a declaratory judgment action in the Wake County Superior Court to determine whose view is correct.<sup>47</sup> Alternatively, the Environmental Management Commission can ask the Rules Review Commission for a declaratory ruling as to whether the latter commission actually has authority to apply the “no more restrictive” provision, and then seek review of that determination while the final rule remains on the docket.<sup>48</sup> The status of the “gap” waters and wetlands remains uncertain.

### B. Arizona Regulates Some Discharges to Some Non-WOTUS

In response to the shrinkage of CWA jurisdiction by the “navigable waters protection rule,” Arizona enacted legislation in May 2021 to create the Arizona Surface Water Protection Program (SWPP). The law offers some protection to some non-WOTUS from discharges of pollutants from point sources.<sup>49</sup>

The legislation directed the Arizona Department of Environmental Quality (ADEQ) to identify non-WOTUS surface waters deemed important for drinking water, fishing, or recreation, and to publish a draft list and final list identifying these “protected surface waters.”<sup>50</sup> ADEQ is required to complete rulemaking for the final list of protected waters and any applicable water quality standards no later than December 31, 2022.

Non-WOTUS wetlands and waters that are *not listed* by ADEQ will not be protected by the legislation. The legislation directs ADEQ to list specifically named rivers and water bodies; WOTUS<sup>51</sup>; and non-WOTUS perennial or

intermittent water bodies, wetlands, or tributaries used for recreation, fishing, or drinking water. While most of the law’s coverage is for “public waters,” defined as “waters of the state open to or managed for use by members of the general public,” it also encompasses certain perennial and intermittent tributaries to listed public waters.<sup>52</sup> Wetlands adjacent to waters on the protected surface waters list, and waters that cross state or tribal or international boundaries, are also to be listed. The law authorizes ADEQ to add other waters upon finding that the economic, environmental, and social benefits outweigh the costs of excluding the waters from the list.<sup>53</sup>

This gap-filling law limits the role that the state is willing to play in addressing waters that fall out of federal coverage. ADEQ is authorized to issue discharge permits for listed non-WOTUS waters, but “shall not” implement provisions of the CWA with respect to such waters.<sup>54</sup> It is noteworthy that the law does not authorize ADEQ to exercise permitting authority over the discharge of dredge or fill material to these non-WOTUS waters. The “gap” being filled is only a pollutant-discharge gap.<sup>55</sup>

### C. Ohio Deregulation of Some Streams

Like the majority of states, Ohio does not have a state permitting program for most of its wetlands. It relies on its §401 certification authority over §404 Corps permits that affect activities in WOTUS. However, in 2001, following the *SWANCC* decision, the Ohio Legislature enacted a state gap-filling permit program to address dredge and fill activities in “isolated” wetlands. The statute defined an “isolated wetland” as a wetland that is not subject to regulation under the CWA; it prohibited filling or disposing of dredged materials in an isolated wetland without a permit from Ohio EPA.<sup>56</sup>

In 2020, the “navigable waters protection rule” further limited the scope of WOTUS, not only as to wetlands, but as to streams. The 2020 federal rule expressly excluded “ephemeral features” from WOTUS; this meant that ephemeral tributaries to traditionally navigable waters would not be subject to regulation.<sup>57</sup> Ohio regulators concluded that the new federal exclusion had left Ohio developers without a means to permit their activities in

44. BRIAN LIEBMAN, RULES REVIEW COMMISSION, RRC STAFF OPINION (2022), <https://www.oah.nc.gov/media/13283/open>.

45. The objection also includes additional grounds, citing a change between the proposed and final rule and an asserted ambiguity in the activities regulated (“impact” versus “discharge”). *Id.*

46. N.C. GEN. STAT. §150B-21.12 (2021).

47. *Id.* §§150B-21.12, 150B-21.8(d).

48. There is some question as to whether the Rules Review Commission’s authority extends to enforcement of North Carolina General Statutes §150B-19.3 under its review authority as defined by North Carolina General Statutes §150B-9(a). Also, there is a lively dispute as to whether the 2011 law applies to a rule providing permit authority to enforce state water quality standards adopted in the 1990s. See discussion *infra* notes 127-28. The temporary rule remains in effect so long as the Rules Review Commission still has the final rule under review.

49. H.B. 2691, enacted as ch. 325, 55th Leg., 1st Sess. (Ariz. 2021).

50. ARIZ. REV. STAT. §49-221(G) (2022).

51. Presumably the legislation directs ADEQ to list WOTUS waters in order to assure that these retain state protection in the event that such waters cease to be WOTUS in the future.

52. ARIZ. REV. STAT. §49-201(39) (2022).

53. *Id.* §49-221(G). Such discretionary findings are subject to judicial review. The law excludes certain waters from coverage—such as ephemeral waters that are not within river basins identified by name in the legislation. *Id.* §49-221(G)(2)(l).

54. *Id.* §49-255.04. While standards may be the same, the legislation is intended to avoid an interpretation that the CWA applies to these waters in any way, such as providing for citizen enforcement or EPA review. Moreover, as to point source discharges to non-WOTUS waters, ADEQ “shall not include any requirement that is more stringent than requirements of the Clean Water Act.” *Id.* §49-255.04(E).

55. *Id.* §49-255(2) (“Discharge” (a) Means any addition of any pollutant to protected surface waters from any point source. (b) Does not include the addition of dredged material or fill material to non-WOTUS protected surface waters.”).

56. See OHIO REV. CODE ANN. §§6111.02 to 6111.28 (2022).

57. 33 C.F.R. §328.3(b)(3), (c) (2021) (as adopted, 85 Fed. Reg. 22250, 22251 (Apr. 21, 2020)).

these non-WOTUS waters under federal law, while the state had no means to review these activities under state law—as these were not isolated wetlands subject to state permitting. In response, Ohio EPA issued a combined general permit, applicable to both isolated wetlands (previously regulated under the state isolated wetlands law) and ephemeral streams (newly defined by the agency), to “help ensure the continued oversight of these resources that are not determined to be under federal jurisdiction.”<sup>58</sup>

In 2022, the Ohio Legislature rejected this response. It amended the state’s definition of “waters of the state” to exclude “ephemeral features” such as the streams covered by the general permit. Now, any “ephemeral feature for which the United States Army Corps of Engineers *lacks* the authority to issue a permit” is no longer subject to state regulation.<sup>59</sup> The new state law preserves Ohio EPA regulation of isolated wetlands.<sup>60</sup> It also preserves other state authority over the placement of solid waste, demolition debris, or certain other materials into ephemeral features—but only under laws (such as waste disposal laws) that are not Ohio’s water quality laws.<sup>61</sup>

#### IV. Current State Regulatory Coverage of Non-WOTUS

Although state laws differ, it is possible to discern the extent to which state protections of freshwater resources and nontidal wetlands depend upon the scope of WOTUS.

Only about half the states regulate activities in surface waters beyond the scope of WOTUS.<sup>62</sup> Some states including, for example, Minnesota, California, Washington, Maryland, Virginia, Pennsylvania, and the New England states, have comprehensive state regulatory programs for the relevant waters. Others, like Arizona, have some capacity to regulate point source discharges of pollutants to at least some non-WOTUS waters. But nearly half of the states rely on the federal WOTUS definitions and on §401 to define the scope of their authority.

This section identifies the general scope of state regulation, as of 2022, of nontidal wetlands and other freshwater resources, some of which may lose their status as WOTUS based on changes in federal regulatory definitions or litigation, including possible outcomes in *Sackett v. Environmental Protection Agency*.

58. Ohio EPA, *Water Quality Certification and Isolated Wetland Permits*, <https://epa.ohio.gov/divisions-and-offices/surface-water/permitting/water-quality-certification-and-isolated-wetland-permits> (last visited June 30, 2022). See OHIO EPA, OHIO GENERAL PERMIT FOR FILLING CATEGORY 1 AND CATEGORY 2 ISOLATED WETLANDS AND EPHEMERAL STREAMS (2020).

59. H.B. 175, 134th Gen. Assemb., as enacted (Ohio 2022).

60. OHIO REV. CODE ANN. §6111.01(H) (emphasis added), §6111.01(V) (2022) (as added and amended by H.B. 175 (2022)) (excluding “isolated wetlands” from the definition of “ephemeral feature”).

61. *Id.* §6111.011 (as added by H.B. 175 (2022)).

62. See, e.g., U.S. EPA & DEPARTMENT OF THE ARMY, ECONOMIC ANALYSIS FOR THE PROPOSED “REVISED DEFINITION OF ‘WATERS OF THE UNITED STATES’” RULE 45-51, tbl.II-1 (2021) (25 states regulate more broadly than pre-2015 WOTUS coverage). Compare ELI, STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT (2013) (23 states regulate more broadly than WOTUS coverage).

The first group of states listed below, nearly half, currently rely on §401 authority for their protection of these waters from dredge and fill activities, and do not have supplemental state authority for regulatory review and permitting of activities in these waters.<sup>63</sup>

The second group—seven states plus the District of Columbia—rely on various gap-filling mechanisms to protect certain waters and wetlands that are not WOTUS.

The third group, 19 states, operate their own permitting programs that comprehensively or broadly regulate activities in many or most non-WOTUS waters. This last group is least vulnerable to changes in federal definitions or judicial interpretations of WOTUS.

##### A. WOTUS-Dependent State Programs

In 24 states, §401 certification of federal decisions affecting WOTUS provides the primary, or sole, mechanism for state review of dredge and fill activities in the state’s freshwater resources and nontidal wetlands.<sup>64</sup> These states have not enacted state permitting programs applicable to non-WOTUS waters (although some have permitting programs for stream diversions, obstructions, or encroachments on floodways—mostly navigable waters and hence WOTUS). The stream alteration/encroachment permits are listed in the footnotes.

These states that rely primarily on §401 certification will thus see their authority expand or contract with changes in the scope of federal definitions of WOTUS. If they want to restore coverage for any waters that cease to be WOTUS, they will need to enact legislation, or if authorized by existing state law, to adopt regulations. The WOTUS-dependent state programs are in Alabama, Alaska, Arkansas,

63. We identify the 24 states that rely on §401 and WOTUS definitions for their authority over freshwater resources and nontidal wetlands below. A prior study by the Association of State Wetland Managers focusing on wetlands protection identified 28 such states. BRENDA ZOLLITSCH & JEANNE CHRISTIE, ASSOCIATION OF STATE WETLAND MANAGERS, STATUS AND TRENDS REPORT ON STATE WETLAND PROGRAMS IN THE UNITED STATES 27 (map) (2016), <https://bit.ly/3M7hF3S> (map is accurate count). However, we note that both Wyoming and Arizona have adopted state protections from point source discharges to certain of their non-WOTUS waters; and that California adopted a regulatory program for the state’s nontidal wetlands since that study’s date. We also class Illinois among states with some regulatory authority over its nontidal wetlands.

64. It is worth noting that §401’s utility may be diminished from its nearly five decades of use. In July 2020, the Trump Administration adopted a final rule limiting the scope of state §401 review to direct discharges of pollutants to WOTUS and narrowing the range of state conditions. 85 Fed. Reg. 42210 (July 13, 2020). While a federal district court vacated this rule, *In re Clean Water Act Rulemaking*, No. C 20-04636 WHA (N.D. Cal. Oct. 21, 2021), the Supreme Court has stayed the order pending resolution of all appeals, including any potential petition for certiorari. *Louisiana v. American Rivers*, No. 21A539, 52 ELR 20043 (Apr. 6, 2022) (granting stay). In June 2022, the Biden Administration proposed to revise and replace the Trump Administration’s §401 rule and return to the broader scope that had characterized state §401 review for most of the past 50 years. 87 Fed. Reg. 35318 (June 9, 2022).

Colorado, Delaware,<sup>65</sup> Georgia, Hawaii,<sup>66</sup> Idaho,<sup>67</sup> Iowa,<sup>68</sup> Kansas,<sup>69</sup> Kentucky,<sup>70</sup> Louisiana,<sup>71</sup> Mississippi, Missouri, Montana,<sup>72</sup> Nebraska,<sup>73</sup> Nevada, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota,<sup>74</sup> Texas, and Utah.<sup>75</sup>

## B Gap-Filling Programs for Certain Non-WOTUS Waters

An additional seven states plus the District of Columbia have enacted limited coverage of certain non-WOTUS waters. These jurisdictions have, among other approaches, adopted programs for “isolated waters,” provided for state jurisdiction over other non-WOTUS waters, designated specific waters or state activities for coverage, or in one instance engaged in case-by-case assertions of state regulatory authority.

### 1. Isolated Waters Permitting

As noted above, Ohio enacted a permitting program for isolated wetlands to address the loss of federal coverage about 20 years ago. However, its legislature recently eliminated Ohio EPA regulation of the state’s non-WOTUS ephemeral streams, reverting to the federal scope for coverage of those waters.<sup>76</sup>

Indiana’s Department of Environmental Management administers a state permitting program for activities in iso-

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65. Delaware’s Tidal Wetlands Act, DEL. CODE tit. 7, §§6601 et seq. (2022), includes a provision making it applicable to nontidal, nonagricultural wetlands of “400 or more contiguous acres,” but this extremely large theoretical jurisdiction has never been found applicable to any actual nontidal wetlands in the state. *Id.* §6603(h).
66. Hawaii can issue stream diversion/alteration permits. HAW. REV. STAT. §§174C-91 et seq. (2021).
67. Idaho requires permits for alterations of streams, and for “encroachments” on navigable lakes. IDAHO CODE ANN. §§42-3801 et seq., §§58-3801 et seq. (2022).
68. Iowa requires permits for construction of diversions or structures in floodways. IOWA CODE §455B.275(3) (2021).
69. Kansas requires permits for construction of levees or fills in streams and floodways, and for obstructions in designated streams. KAN. STAT. ANN. §§24-126, 82a-301 (2022).
70. Kentucky requires permits for construction of structures or fills in streams and floodways. KY. REV. STAT. §151.250 (2022).
71. Louisiana does require permits for dredge and fill activities in the coastal zone. LA. REV. STAT. ANN. §49:214.25 (2021).
72. Montana does require permits for streambed alterations, MONT. CODE ANN. §§75-7-101 to 75-7-125 (2021), floodplain development, *id.* §§76-5-101 to 76-5-406 (2021), and lakeshore alterations, *id.* §§75-7-204 (2021). A stream is defined by Mont. Code Ann. §75-7-103 as “a natural, perennial-flowing stream or river,” which would be a WOTUS under virtually any interpretation.
73. Isolated wetlands are subject to Nebraska’s water quality standards. There is, however, no state permitting program that covers them. The Nebraska Department of Environment and Energy (NDEE) “encourage[s] project proponents to join us in working together to conserve these valuable resources through consulting with NDEE.” NDEE, *Section 401 Water Quality Certification*, <http://dee.ne.gov/NDEEQProg.nsf/OnWeb/S401> (last visited June 30, 2022).
74. South Dakota requires a permit for alteration to certain “meandered waters” and other waters. S.D. CODIFIED LAWS §41-2-18(5) (2022); S.D. ADMIN. R. 41:04:03:05 (2022).
75. Utah requires a permit for stream relocation. UTAH CODE §73-3-29 (2022).
76. OHIO REV. CODE ANN. §§6111.01 to 6111.28 (2022).

lated wetlands.<sup>77</sup> This program, enacted in 2003 in response to SWANCC, was intended to “promote a net gain in high quality isolated wetlands; and . . . assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program.”<sup>78</sup>

Indiana divided its isolated wetlands for regulatory purposes into three classes: those that are disturbed and have minimal habitat and hydrologic function (Class I); those with moderate habitat and hydrologic function but generally not habitat for rare, threatened, or endangered species (Class II); and those that are undisturbed or minimally disturbed and support more than minimal habitat or hydrologic function, or that are an ecologically important wetland type (Class III).<sup>79</sup> In 2021, the legislature amended this law to reduce the scope of state regulation. Indiana now *excludes* from state regulation and permitting all of its Class I wetlands, and all Class II wetlands that are not more than three-fourths of an acre if located within an incorporated municipality, and three-eighths of an acre if outside a municipality.<sup>80</sup>

Wyoming has, by regulation, adopted state requirements for “[p]oint source discharges of dredged or fill material into isolated wetlands which are . . . [n]ot subject to regulation by the Army Corps of Engineers under Section 404.”<sup>81</sup>

### 2. Permitting Program for Most Non-WOTUS State Waters

As noted above, North Carolina, which like the states above has an isolated wetlands permitting program, is seeking to adopt final regulations to cover its other wetlands and other nonfederal surface waters that may fall between its existing isolated wetlands program, and redefinitions of WOTUS.<sup>82</sup> Its temporary regulations, adopted in 2021, have required permits for activities in these waters.

The District of Columbia adopted emergency and final rules, in 2020 and 2021, in response to the 2020 “navigable waters protection rule.” The rules identify the District’s wetlands and streams as “critical areas” in need of protection, and make them subject to permitting under a new “wetland and stream protection permit” that applies whenever they are not WOTUS.<sup>83</sup> The definitions explicitly include numerous types of potentially non-WOTUS waters in the permitting regime, for example defining “stream” as

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77. IND. CODE §§13-18-22-1 to 13-18-22-11 (2022); 327 IND. ADMIN. CODE 17-1-1 (2022). “Exempt isolated wetlands” are defined at IND. CODE §13-11-2-74.5 (2022) and 327 IND. ADMIN. CODE 17-1-3(7) (2022).
78. IND. CODE §13-18-22-1 (2022).
79. *Id.* §13-11-2-25.8 (definitions of Class I, Class II, and Class III wetlands).
80. Indiana Legis. 2021 (Senate Enrolled Act 389); codified at IND. CODE §13-11-2-74.5(a)(5) (2022), *id.* §13-11-2-48.5(a)(6), (d), *id.* §13-18-22-11(b)(7), (c). Thus, it provides less protection to isolated wetlands within municipalities than those in rural areas.
81. 020-2 WYO. CODE R. §2-2(a)(iii) (2022).
82. Pending review, 15A N.C. ADMIN. CODE 02H.1401(b) (2022), the temporary rules are currently in effect as of this writing.
83. 68 D.C. Reg. 5254 (May 14, 2021) (adopting D.C. Mun. Regs. tit. 21, §§2500-2505, 2599, 2600-2699).

“a channel or conveyance of surface water with perennial, intermittent, or ephemeral flow.”<sup>84</sup>

### 3. Permitting for Designated State Non-WOTUS Waters or Activities

Arizona enacted its SWPP in 2021 to protect some of its surface waters and wetlands using statutory criteria, primarily based on their value for drinking water, fishing, and recreation.<sup>85</sup> The SWPP applies only to the non-WOTUS waters that are named on the state’s list. While the SWPP includes development of water quality standards and provides for approval of discharge permits for pollutants, the state program does not regulate dredge or fill activities in non-WOTUS waters or wetlands.

Illinois, for its part, has wetland laws that protect certain of its wetland resources, including non-WOTUS wetlands from adverse impacts that are caused by *state-funded* activities.<sup>86</sup> A separate law provides for state permitting of activities in floodways.<sup>87</sup> However, Illinois does not have a comprehensive wetlands protection law for all of its non-WOTUS waters.

### 4. Case-by-Case Regulation

West Virginia does not routinely regulate discharges to its non-WOTUS waters. However, its wetlands are waters of the state.<sup>88</sup> The West Virginia Department of Environmental Protection asserts authority on a case-by-case basis to review and decide whether to allow filling of isolated waters and wetlands, based on the potential of the activity to violate water quality standards.<sup>89</sup>

#### C. Comprehensive State Regulation

Nineteen states have enacted and implemented comprehensive, or nearly comprehensive, nontidal wetlands and freshwater resources permitting programs, enabling them to regulate waters of the state that are not WOTUS.

These are California,<sup>90</sup> Connecticut,<sup>91</sup> Florida,<sup>92</sup> Maine,<sup>93</sup> Maryland,<sup>94</sup> Massachusetts,<sup>95</sup> Michigan,<sup>96</sup> Minnesota,<sup>97</sup> New Hampshire,<sup>98</sup> New Jersey,<sup>99</sup> New York,<sup>100</sup> Oregon,<sup>101</sup> Pennsylvania,<sup>102</sup> Rhode Island,<sup>103</sup> Tennessee,<sup>104</sup> Vermont,<sup>105</sup> Virginia,<sup>106</sup> Washington,<sup>107</sup> and Wisconsin.<sup>108</sup>

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90. CAL. WATER CODE §§13000 et seq. (2021) (dredging and filling constitutes a discharge of waste to waters of the state); CAL. PUB. RES. CODE §§30000 et seq. (2022) (protection of coastal wetlands from dredged and fill activities). See CALIFORNIA WATER RESOURCES CONTROL BOARD, STATE POLICY FOR WATER QUALITY CONTROL: STATE WETLAND DEFINITION AND PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE (2019), [https://www.waterboards.ca.gov/water\\_issues/programs/cwa401/docs/2021/procedures.pdf](https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/2021/procedures.pdf).
91. CONN. GEN. STAT. §§22a-36 et seq. (2021), §§22a-90 et seq., §§22a-359 et seq.
92. FLA. STAT. §§373.413 et seq. (2021), §§161.011 et seq.
93. ME. STAT. tit. 38, §§480-A et seq. (2021). Permitting is for wetlands of at least 20,000 square feet of aquatic vegetation, or peatlands of any size. So, certain freshwater wetlands may not be included in the state program. Municipalities may adopt ordinances to protect shorelands, including of freshwater wetlands. *Id.* §§435 et seq. (2021).
94. MD. CODE ANN., ENV’T §9-101(1) (2022), §§5-901 et seq.
95. MASS. GEN. LAWS ch. 131, §40 (2022); 310 MASS. CODE REGS. 10.00 to 10.60 (2017).
96. MICH. COMP. LAWS §§324.30301 to 324.30329 (2022).
97. MINN. STAT. ANN. §§103G.201, 103G.222 to 103G.2372, 103G.222(1a) (2021).
98. N.H. REV. STAT. ANN. §482-A (2021).
99. N.J. STAT. ANN. tit. 13, ch. 9B (2022).
100. Although New York law does not cover all of these nontidal resources, it will cover a substantial amount of them, and so is grouped with these states. Except for wetlands located within the boundaries of the Adirondack Park (where the park authority regulates wetlands of one acre or more), freshwater wetlands are regulated by the Department of Environmental Conservation under the Freshwater Wetlands Act. N.Y. ENV’T CONSERV. LAW ch. 43B, §§24-0101 et seq. (2022). Permits are required for dredging, filling, draining, and other activities. *Id.* §24-0507. The agency’s jurisdiction extends to freshwater wetlands of 12.4 acres or more in size, as well as those that are smaller than 12.4 acres if of “unusual importance.” The law also protects a 100-foot buffer from the margin of the wetland. All such covered wetlands are to be included on a state wetlands map. *Id.* §24-0301. Jurisdiction over freshwater wetlands smaller than 12.4 acres in size and not of “unusual importance” is delegated to the local municipality within which they are located. However, the commissioner may reserve the right to regulate such wetlands or classes of wetlands by rule. *Id.* §24-0505.
- The statute was amended by the legislature in April 2022 to provide successively more protective and stringent provisions taking effect in 2025, providing definitions of “unusual importance” and allowing protection of wetlands not mapped, with further provisions taking effect in 2028, including reduction of the size for required regulation to 7.4 or more acres. *Id.* §24-0107 (2022).
101. OR. REV. STAT. §§196.800(3) & (12)(a), 196.810, 196.850 (2021).
102. 32 PA. CONS. STAT. §§693.1 to 693.27 (2022); 25 PA. CODE ch. 105 (2022).
103. 2 R.I. GEN. LAWS §§2-1-18 to 2-1-25 (2022).
104. TENN. CODE ANN. §69-3-108 (2022); TENN. COMP. R. & REGS. 1200-4-7, 1200-4-7-.01(4) (2022).
105. VT. STAT. ANN. tit. 10, ch. 37, §902 (2021); Vermont Wetland Rules (12 VT. CODE R. §12 004 056 (2020)).
106. VA. CODE ANN. §§62.1-44.5, 62.1-44.15 (2022); 9 VA. ADMIN. CODE §§25-210-10 to 25-210-260 (2022).
107. WASH. REV. CODE chs. 90.48, 77.55 (2022); WASH. ADMIN. CODE ch. 173-201A (2022). In addition to the state’s water quality laws, much of the protection for nontidal wetlands and buffers is provided by local governments in accordance with the state’s Growth Management Act. WASH. REV. CODE ch. 36.70A (2022), especially 36.70A.170 (designating critical areas) and 36.70A.172 (use of best available science); WASH. ADMIN. CODE chs. 365-190-080, 365-190-090, 365-195-900 (2022).
108. WIS. STAT. ANN. chs. 30, 31, §281.36 (2022). However, in 2018, Wisconsin enacted exemptions from state wetland permit requirements for certain non-WOTUS wetlands. Exemptions are available with submission of appropriate documentation prepared by a qualified professional showing that, for discharges to wetlands in urban areas, the proposed discharge does not affect more than one acre, is compliant with stormwater management re-

84. D.C. Mun. Regs. tit. 21, §2699. Its wetland definition “[i]ncludes a marsh, swamp, pond, or vernal pool.” *Id.*

85. H.B. 2691, 55th Leg., 1st Sess. (Ariz. 2021).

86. 20 ILL. COMP. STAT. 830 (state-supported activities). Otherwise, Illinois substantially relies on its §401 certifications, linked to WOTUS, for most purposes.

87. 615 ILL. COMP. STAT. 5/4.9-5/35 (2022).

88. W. VA. CODE §22-11-3(23) (2022).

89. Application for West Virginia State Waters Permit for Federally Non-Jurisdictional Waters, <https://dep.wv.gov/WWE/Programs/wqs/Documents/401%20Program/Isolated%20Waters%20Application%20090315.pdf>.

For these states, the expansion or contraction of WOTUS coverage chiefly creates a federal-state coordination burden, but not a potential shift in whether their waters are protected or not. Changes in the application of WOTUS may also affect state resources and administrative requirements, as these states often have agreements and/or joint permit applications with the Corps.

## V. Legal Constraints on Gap-Filling

Nearly a decade ago, ELI catalogued state legal constraints on their ability to protect non-WOTUS waters.<sup>109</sup> Such laws expressly limit the actions that state regulatory agencies may take to protect these waters. State legislatures may, of course, enact regulatory programs of any scope permitted by state constitutions.

In a substantial number of instances, ELI identified statutes providing that state agencies may not adopt regulations that are “more stringent than” the corresponding federal law. Another type of statutory limitation (qualified stringency limitation) allows such agencies to adopt more stringent regulations, but only after completing additional procedural steps, making findings, providing justifications, and/or undergoing legislative review. Such qualified stringency limitations typically require that a state agency or board proposing to regulate in a manner more stringent than federal requirements do one or more of the following: (1) identify the provisions of the proposal that are more restrictive or stringent and provide specific public notice; (2) prepare written justifications, including scientific and economic analysis, of the need for such provisions; (3) make specific findings; and (4) subject the actions to legislative or executive panel review for approval or rejection.<sup>110</sup>

In 2013, ELI identified a total of 28 states that had stringency limitations: 13 states with “no more stringent than” prohibitions, and 23 states with qualified stringency limitations.<sup>111</sup> (Some states have both types of limitations.) The 2013 ELI report observed:

ELI’s research did not identify any state law definitions of the term “stringent” or “strict” that provide meaningful guidance in interpreting these provisions. In its common usage, “stringent” means “marked by rigor, strictness, or severity[,] especially with regard to [a] rule or standard.”<sup>112</sup> A common-sense reading of the term suggests that a state regulation applying permitting requirements to, for example, activities that pollute or otherwise disturb a

geographically isolated wetland, is more “stringent” than corresponding federal regulation under Clean Water Act §§402 and 404, federal provisions that afford no protection to this type of water . . . . ELI’s research identified no means of excluding, with confidence, the *possibility* that most state stringency limitations *could* reasonably be applied to block state agency efforts to protect additional waters beyond the scope of the federal Clean Water Act. The definitive meaning—and reach—of the word “stringent” with respect to additional categories of waters is ultimately one that has to be determined in each instance under state law, and probably by state courts. In the meantime, most state agencies weighing the merits of protecting new classes of waters—faced with political pressure and budgetary constraints—seem unlikely to gamble that a state court will eventually interpret a potentially applicable statutory stringency limitation in the agency’s favor.<sup>113</sup>

In 2022, we have examined the current status of state program limitations, and now find 27 states with relevant provisions (resulting from some changes in administrative law, legislation, or interpretation). As in 2013, we determined that each stringency limitation identified has the potential to constrain state agency rulemaking to protect state waters outside the federal WOTUS definition.

The broadest state stringency prohibitions almost certainly bar a state agency from adopting regulations to protect, say, ephemeral stream reaches or geographically isolated wetlands, without explicit statutory authorization. Even the narrower or qualified limitations create the possibility that if the *Rapanos* “significant nexus” test is ended by Supreme Court action in *Sackett*, state regulatory agencies may find it difficult or impossible to address “similarly situated” nonadjacent waters within their existing authority.

### A. Stringency Prohibitions

Stringency prohibitions provide a substantial constraint on administrative or regulatory action. These prohibitions can be quite broad, as in South Dakota: “No rule that has been promulgated pursuant to Title 34A [Environmental Protection], 45 [Mining, Oil, and Gas], 46 [Water Rights], or 46A [Water Management] may be more stringent than any corresponding federal law, rule, or regulation *governing an essentially similar subject or issue*.”<sup>114</sup> North Carolina’s stringency prohibition provides:

An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by

quirements, and does not affect a “rare and high-quality wetland” as defined in the law. In non-urban areas, documented exemptions are available for discharges to wetlands that affect not more than three acres, relate to a structure that has an agricultural purpose, and do not affect a rare and high-quality wetland. The definition of “rare and high-quality wetland” includes 11 types of nontidal wetlands, as well as wetlands contiguous to trout streams. *Id.* §281.36(4n).

109. ELI, *supra* note 62.

110. *Id.* at 14-15.

111. *Id.* The same report examined state “private property rights” laws and private-property impact laws and orders, which are not the subject of this Comment.

112. MERRIAM-WEBSTER ONLINE DICTIONARY (2013).

113. ELI, *supra* note 62, at 16-17.

114. S.D. CODIFIED LAWS §1-41-3.4 (2022) (emphasis added). *See also id.* §34A-2-34 (Water Management Board rules “may not exceed minimum federal regulations”).

one of the subdivisions of this subsection: (1) A serious and unforeseen threat to the public health, safety, or welfare. (2) An act of the General Assembly or United States Congress that expressly requires the agency to adopt rules. (3) A change in federal or State budgetary policy. (4) A federal regulation required by an act of the United States Congress to be adopted or administered by the State. (5) A court order.<sup>115</sup>

The North Carolina law further provides that if such a rule is “required by” one of the five statutory exceptions, the more restrictive rule must undergo review by the legislature before it may go into effect.<sup>116</sup>

### B. Qualified Stringency Limitations

Qualified stringency provisions vary in the specificity of their requirements and the extent to which they impose more than additional procedural steps on state regulation. As ELI observed in 2013, these tend to fall along a spectrum. Some require an agency proposing a state regulation that is more stringent than a corresponding federal rule to identify the provision as such, and to explain its reasons for deviating from the federal norm.<sup>117</sup>

Others impose rigorous procedural requirements. For example, the Utah Water Quality Board is prohibited from enacting a rule to administer any program under the CWA that is more stringent than a corresponding federal rule unless it (1) takes public comment and holds a hearing; (2) makes a written finding based on record evidence that the existing federal regulations are inadequate to protect public health and the environment in Utah; and (3) issues an opinion that cites and evaluates the public health and environmental information and studies in the record that form the basis for the Board’s conclusion.<sup>118</sup>

For more than a decade, Indiana law has required two public comment-and-review periods for regulations that are more restrictive than federal requirements.<sup>119</sup> The Indiana law expressly covers “any element” of a proposed rule that “applies in a subject area in which federal law does not impose restrictions or requirements.”<sup>120</sup> This qualified stringency limitation clearly would cover regulation of nonfederal waters. In 2016, the Indiana Legislature added two further requirements: the Department of Environmental Management must submit any proposed rule containing elements more stringent than any “restriction or requirement” imposed by federal law to the state Legislative Council, a committee of members of the General Assembly; and such rules are delayed from taking effect until the adjournment of the General Assembly session that begins after the agencies initiate the second notice-and-comment period.<sup>121</sup>

### C. Inventory of State Constraints on Gap-Filling

Our review of current state stringency limitations that may affect states’ ability to respond to changes in the scope of WOTUS found 27 states with such provisions.<sup>122</sup> Tables 1-3 show the current scope of state regulatory authority and whether there are applicable stringency prohibitions or qualified stringency limitations.

#### 1. States Relying on WOTUS

As noted above, 24 states rely on §401 certification review to protect nontidal wetlands and other freshwater resources such as headwater streams. These state programs are vulnerable to changes in WOTUS interpretation. Thirteen of these states also have constraints potentially affecting the authority of their environmental agencies to adopt protective regulations for non-WOTUS waters.

115. N.C. GEN. STAT. §150B-19.3(a) (2022). Because this law applied prospectively, it did not affect North Carolina’s isolated wetland rules. 2011 N.C. Sess. Laws 2011-398 (S.B. 781), §63.

116. N.C. GEN. STAT. §150B-19.3(a) (2022), as amended in 2014, requires such rules to undergo review by the Rules Review Commission and legislative review under N.C. GEN. STAT. §150B-21.3(b1), (b2) (2022). This is, in effect, a qualified stringency limitation for such rules.

117. *E.g.*, MINN. STAT. ANN. §115.03(9)(4) (2022).

118. UTAH CODE ANN. §19-5-105 (2022). This limitation applies to rules adopted “for the purposes of the state administering a program” under the CWA—which may not apply to rules adopted for other purposes (such as to protect non-WOTUS waters). But it may pose a serious obstacle if a rule is adopted to cover types of waters that are sometimes WOTUS and sometimes not, making “gap-filling” a more complex enterprise.

119. IND. CODE ANN. §§13-14-9-3, 13-14-9-4 (2012), as noted in ELI, *supra* note 62, at 89-90.

120. IND. CODE ANN. §13.14-9-4(a)(5)(B), (6)(c), (7) (2022).

121. *Id.* §13-14-9-4(a), (b), (c), as amended. The amended law further provides that annually the Department must submit for review by the Legislative Council: “(1) any administrative rule that has been: (A) proposed by the department; or (B) adopted by the board; (2) any operating policy or procedure that has been instituted or altered by the department; and (3) any nonrule policy or statement that has been proposed or put into effect . . .” that “constitutes a change in the policy previously followed by the department.” *Id.* §13-14-1-11.7.

122. There were few actual changes in law since 2013. The current total reflects the enactment of one new statutory constraint by the state of Michigan, MICH. COMP. LAWS ANN. §§24.232, 24.245(3) (2022); and our removal of two previously ELI-listed constraints based on the conclusion (1) that a New Jersey Executive Order is no longer relevant because of subsequent action, N.J. Exec. Order No. 27 (Gov. Whitman) (Nov. 2, 1994); and (2) that two Minnesota provisions are not actual constraints as one is conditional, and the other is a mere reporting requirement. MINN. REV. STAT. ANN. §103G.127 (2022), *id.* §115.03(9)(4). We note, as discussed in the text, that Indiana strengthened its existing qualified stringency limitation. IND. CODE ANN. §13.14-9-4(a), (b), (c) (2022).

**Table 1. States Relying on WOTUS**

State	Stringency Prohibition	Qualified Stringency Limitation
Alabama		
Alaska		
Arkansas		Arkansas Code Annotated §§8-1-203(b), 8-4-201(b)
Colorado	Colorado Revised Statutes Annotated §25-8-504(1)-(2)*	Colorado Revised Statutes Annotated §25-8-202(8)
Delaware		
Georgia		
Hawaii		
Idaho	Idaho Code Annotated §39-3601	Idaho Code Annotated §39-107D
Iowa	Iowa Code Annotated §455B.173(2)**	Iowa Code Annotated §455B.105(3)
Kansas		
Kentucky	Kentucky Revised Statutes Annotated §§13A.120(1)(a), (4), 224.16-050(4)**	Kentucky Revised Statutes Annotated §13A.245(2)
Louisiana		
Mississippi	Mississippi Code Annotated §49-17-34(2)-(3)	
Missouri		
Montana		Montana Code Annotated §§75-5-203, 75-6-116
Nebraska		
Nevada		Nevada Revised Statutes Annotated §§233B.0603(1)(a)(9), 233B.0609(1)(g), 233B.066(1)(j)
New Mexico		
North Dakota		North Dakota Century Code Annotated §23.1-01-04
Oklahoma		Oklahoma Statutes tit. 27A, §1-1-206
South Carolina		
South Dakota	South Dakota Codified Laws §1-41-3.4	
Texas	Texas Water Code Annotated §26.017(5)**	
Utah		Utah Code Annotated §19-5-105

\* Irrigation water discharge, or any animal or agricultural waste.

\*\* Limited to CWA §402 delegation.

## 2. States Regulating Some Non-WOTUS Waters

The eight jurisdictions listed in Table 2 regulate some non-WOTUS waters. Five of these have constraints potentially affecting their ability to provide additional protections should definitions change.

## 3. States Covering Most Non-WOTUS Waters

As noted above, 19 states currently regulate all or most non-WOTUS waters, including imposing regulations

affecting the dredge and fill of such waters. Nine of these states nevertheless have provisions that may affect their development of future state regulations, if there is a need to respond to changes in federal coverage. Most of the limitations are evaluation or justification-type provisions within the “qualified stringency limitation” category.

Ten states (not shown in Table 3) that regulate WOTUS and non-WOTUS waters have no relevant stringency limitations: California, Connecticut, Massachusetts,

Minnesota,<sup>123</sup> New Hampshire, New Jersey,<sup>124</sup> New York, Rhode Island, Vermont, and Washington.

**Table 2. States Regulating Some Non-WOTUS Waters**

State	Stringency Prohibition	Qualified Stringency Limitation
Arizona	Arizona Revised Statutes Annotated §§41-1052(D)(9), 49-104(A)(16), 49-203(A), 49-255.04(E)*	
District of Columbia		
Illinois		
Indiana		Indiana Code Annotated §§ 13-14-1-11.7, 13-14-9-4, 13-14-9-3**
North Carolina	General Statutes of North Carolina § 150B-19.3(a)	General Statutes of North Carolina § 150B-19.3(a)***
Ohio		Ohio Revised Code Annotated § 121.39****
West Virginia		West Virginia Code Annotated §22-1-3a
Wyoming		

\* State standards for point source discharges to (protected) non-WOTUS may not be more stringent than WOTUS.  
 \*\* Indiana Code § 13-14-9-3 excludes state rules protecting isolated wetlands from these limitations.  
 \*\*\* If a more stringent rule is required by an exception (e.g., "serious or unforeseen threat"), it is subject to Rules Review Commission and legislative disapproval.  
 \*\*\*\* Constraint also applies to proposals for legislation.

**Table 3. States Covering Most Non-WOTUS Waters**

State	Stringency Prohibition	Qualified Stringency Limitation
Florida		Florida Statutes Annotated §§403.061(7), (32), 403.804(2)
Maine		Maine Revised Statutes Annotated tit. 38, §341-H(3)
Maryland		Code of Maryland Regulations 01.01.2017.33, Annotated Code of Maryland, Economic Development art. 3-505
Michigan		Michigan Compiled Laws Annotated §§24.232, 24.245(3)
Oregon	Oregon Revised Statutes §468B.110(2)*	Oregon Revised Statutes §183.332
Pennsylvania		Pennsylvania Code tit. 4, §1.371(5)
Tennessee		Tennessee Code Annotated §4-5-226(k)**
Virginia		Code of Virginia Annotated §62.1-44.15(3a), (10), Virginia Administrative Code tit. 4, §§15-10-30(H)(4)(e), (f), 20-340-0(H)(4)(e), (f)
Wisconsin	Wisconsin Statutes Annotated §283.11(2)***	Wisconsin Administrative Code NR §1.52(3), (5)****

\* Limitations on adoption of effluent standards for nonpoint discharges of pollutants from forest lands.  
 \*\* Review by legislature to terminate state rules that impose environmental requirement on local governments more stringent than federal statutes or rules on the same subject, and that impose costs not paid for by the state.  
 \*\*\* Limited to CWA §402 delegation.  
 \*\*\*\* Must notify and reevaluate state standard if federal standard made more lenient.

123. Minnesota has enacted a provision that authorizes the state to seek to assume the §404 program; it specifies that rules "may not be more restrictive than the [federal] program under section 404, or state law, if it is more restrictive than the federal program." MINN. STAT. ANN. §103G.127 (2022). Minnesota has not assumed administration of the §404 program. Moreover, because of the clause referencing state law, the cited provision is not a meaningful constraint. Another statute requires the Minnesota Pollution Control Agency to *notify* the legislature every other year of any "existing or proposed" water quality standards that are more stringent than "is necessary" to comply with federal law, but it does not prescribe any action. MINN. REV. STAT. ANN. §115.03(9)(4) (2022).  
 124. New Jersey had a qualified limitation under Executive Orders issued by Gov. Christine Todd Whitman (N.J. Exec. Order No. 27 (Nov. 2, 1994)), and Gov. Chris Christie (N.J. Exec. Order No. 2 (Jan. 20, 2010)). The latter was rescinded by Gov. Phil Murphy with Executive Order No. 63 (Apr. 2, 2019), and it is unclear whether the former is still in effect.

## VI. Discussion

States' ability to respond to changes in CWA coverage of the waters within their borders is highly variable. If WOTUS redefinitions shrink the universe of waters and wetlands subject to §401, at least half the states will either have to move quickly to provide protection for these waters or acquiesce in their effective loss of authority to protect these resources.

First, enacting entirely new regulatory programs can be challenging and politically time-consuming. And if there is appetite for gap-filling, recent experiences show that the types of waters and types of protections provided will sometimes be less than what was formerly in place. For example, states may be able to protect only certain highly valued water supplies, or to regulate pollutant discharges, but not dredge and fill activities. This may be better than no protection at all, but is perhaps insufficient in comparison with the robust CWA protections associated with the definition of waters as WOTUS.

Second, there are real constraints in place that affect the ability of state environmental agencies to act. The explicit stringency prohibitions are particularly difficult for state agencies, which may need to obtain new legislation in order to address changes in WOTUS affecting their ability to use §401 certification to protect waters. For example, South Dakota would clearly need legislation to fill regulatory gaps.

In Arizona, ADEQ must ensure that, “unless specifically authorized by the legislature,” all of its rules, standards, permits, variances, and orders are “adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter.”<sup>125</sup> The ability of Arizona to improve on its water quality protections even for its non-WOTUS SWPP waters is likely to be limited by this provision, rendering standards potentially subject to challenge in state court on the grounds that they may not be sufficiently “specifically authorized” by the legislature.<sup>126</sup>

The existence of legal stringency constraints also creates potential problems for states that are prepared to fill newly emerging regulatory gaps. The North Carolina Department of Environmental Quality advanced its final gap-filling regulations before the Environmental Management Commission, despite some pointed public comments maintaining that such regulations would violate the state's stringency prohibition. In its response to comments, the Department stated that the basis for the regulations was a wetland standards program pre-dating the state's stringency prohibition, which was added to the state's administrative law in 2011:

Wetland Standards (15A NCAC 02B.0231) were first promulgated by the EMC [Environmental Management Commission] in 1996. The standards protect all wetlands within North Carolina pursuant to directives of the North Carolina General Assembly for the conservation of the State's water resources and based on the definition of Waters of the State in General Statute (G.S. 143-212). The Wetland Standard rules, and state statutes upon which they are promulgated, predate the language cited in G.S. 150B-19.3(a). The rules being proposed are not “for the protection of the environment or natural resources that impose a more restrictive standard, limitation or requirement imposed by federal law or rule” because they are *permitting rules* which allow for impacts to wetlands which have been protected since 1996.<sup>127</sup>

In its responses to questions from the Rules Review Commission, prior to the latter commission's May 2022 objection to the final rule, the Environmental Management Commission further argued that

the limitations contained in N.C. Gen. Stat. §150B-19.3 do not apply to the rules at issue because there is no “standard, limitation or requirement imposed by a federal law or rule” that applies to the wetlands subject to these rules. The proposed rules provide a permitting mechanism for the regulated community for unavoidable impacts to wetlands that are not subject to Section 404 of the Federal Clean Water Act and are not Isolated Wetlands. In other words, as with the temporary rules approved by the RRC [Rules Review Commission] in 2021, the rules at issue provide regulatory relief by implementing a permitting program for activities that impact wetlands that are neither federally jurisdictional wetlands nor isolated wetlands. Without such a permitting framework, no activities impacting the wetlands subject to these rules can be allowed. . . . Because there is no federal jurisdiction over the wetlands at issue, there can be no applicable federal requirement that can be made more stringent by these rules. By its express language, Section 150B-19.3 does not apply in the absence of a federal standard or jurisdiction. Were it to be applied otherwise, it would effectively prohibit the EMC and any other State “environmental” agency from adopting any rule or regulation not already established by, for example, the US [EPA].<sup>128</sup>

If state agencies are unable to fill gaps in coverage, or are required to engage in complex rulemaking and litigation to establish the applicability or inapplicability of stringency prohibitions and constraints, the nation's waters are cer-

125. ARIZ. REV. STAT. ANN. §49-104(A)(16) (2022).

126. The 2021 surface water protection law does direct ADEQ to adopt water quality standards for non-WOTUS-protected surface waters, but to use the preexisting water quality standards “except as determined necessary in the rulemaking process.” *Id.* §49-221(A)(2). It is unclear what determination would be sufficient to satisfy the “as necessary” limitation in light of the stringency prohibition.

127. NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, HEARING OFFICER'S REPORT OF PROCEEDINGS, PUBLIC HEARING AND COMMENT PERIOD: ADOPTION OF PERMANENT RULES 15A NCAC 02H.1400 DISCHARGES TO FEDERALLY NON-JURISDICTIONAL WETLANDS AND FEDERALLY NON-JURISDICTIONAL CLASSIFIED SURFACE WATERS AND ADOPTION OF AMENDMENT TO RULE 15A NCAC 02H.1301 DISCHARGES TO ISOLATED WETLANDS AND ISOLATED WATERS 6 (2021).

128. Response of Environmental Management Commission to Rules Review Commission (May 12, 2022), <https://www.oah.nc.gov/media/13404/open>.

tainly at risk whenever shifts in federal authority occur. The North Carolina experience shows the very real peril posed by these provisions.

Finally, the resulting patchwork of state gap-filling, state inaction, and state uncertainty is of little benefit to the nation's waters. The interconnected nature of the hydrological, geochemical, and biological regime protected by

the CWA is poorly served if our legal system continues to divide, subdivide, and deregulate waters that scientists can demonstrate are meaningfully part of a whole. The recent churn in WOTUS coverage has produced murky waters indeed. And many states are poorly prepared to deal with losses in coverage, if that is the result of further Supreme Court action expected this fall.