

KEY POINTS

- ▶ The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) issued a [joint final rule](#) in December 2022 that revised the definition of “waters of the United States” (WOTUS) for purposes of determining jurisdiction under the Clean Water Act.
- ▶ Different WOTUS tests arising from two Supreme Court opinions, numerous versions of regulations, and litigation have resulted in confusion and delay in WOTUS determinations.
- ▶ The Supreme Court is expected to render a decision in June on [Sackett v. EPA](#), a case involving the definition of WOTUS. The decision is sure to impact the legality of the EPA’s final WOTUS rule.
- ▶ The Securities and Exchange Commission (SEC) proposed a [climate-related disclosure rule](#) in March 2022 to require public companies to disclose greenhouse gas (GHG) emissions and risks related to real estate.
- ▶ The SEC rule would require many real estate businesses to report indirect GHG emissions arising from activities up and down their supply chains, including from the activities of their tenants (Scope 3 emissions), information which may not be available to landlords and owners of commercial real estate.

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REGULATORY POLICY

OUR POSITION

The commercial real estate industry supports properly structured and reasonable efforts to protect our nation’s wetlands and address the negative impact of climate change. Regulations proposed by the EPA, Army Corps of Engineers, and the SEC should set forth applicable standards of compliance clear enough that the regulated community and regulators can ensure timely, predictable and consistent outcomes across the nation and be consistent with Supreme Court opinions governing agency regulations.

- The EPA and the Corps are responsible for determining whether a property is subject to federal jurisdiction under the Clean Water Act due to the presence of streams, rivers or wetlands. Ambiguous legal standards as to what constitutes “waters of the United States” and conflicting court opinions among federal jurisdictions have led to inconsistent, unpredictable and seemingly arbitrary determinations.
- The joint EPA and Corps final rule subjects the regulated public to the fourth definition of WOTUS in the past seven years. Despite the claims of the issuing agencies, the rule does not provide a clear and durable definition, eliminating specific exemptions from prior versions that had provided additional guidance and clarity.
- [NAIOP comments](#) to the rule proposed in 2022 urged delay until after the Supreme Court issued its decision in *Sackett*, which could provide a legal test that would impact the WOTUS regulation and complicate current agency project reviews. The lack of clarity of the rule coupled with staffing shortages at Corps offices have led to long, costly delays in agency reviews of wetlands determinations.
- Commercial real estate has aggressively pursued increased energy-efficiency strategies that will result in reduced GHG emissions. The SEC’s proposed climate disclosure rule as currently drafted, however, requires disclosures of GHG emissions measurements from tenants, vendors and suppliers that may not be available to landlords, and could subject disclosure filers to civil liability for inadvertently providing incorrect information.
- NAIOP and a coalition of real estate organizations provided comments to the SEC detailing industry concerns and urged a delay in the implementation of the rule so that issues with obtaining the needed GHG data can be identified, with revisions made as needed to improve the regulation. However, the SEC has stated its intent to publish the rule in final form by June 2023.