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The Clean Water Act "WOTUS" Rule: A long and winding river

30 January 2020

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) recently announced finalization of their Navigable Waters Protection Rule to define "Waters of the United States" (WOTUS), which marks another chapter in a long-running saga regarding the scope of the Clean Water Act's (CWA) application. The agencies indicated their intent to publish the rule in the Federal Register, with the rule's effective date set for sixty (60) days after publication.

This new rule will impact when the CWA's requirements apply to various projects. In simplest terms, certain CWA permitting and water quality requirements, as well as prohibitions on discharges, apply to "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. § 1362(7). For instance, if a pipeline project, oil and gas operation, or agricultural farm produce discharges or construction-related activities that could impact a water body that qualifies as WOTUS, certain CWA requirements may be triggered, e.g., Section 404 permits issued by the USACE or Section 402 National Pollutant Discharge Elimination System permits issued by EPA.

At the heart of the long-standing debate surrounding this definition is the question of what kinds of water bodies fall within the definition of "navigable waters." It is fairly well-settled that permanent, standing, continuously flowing water bodies are "navigable waters" subject to the CWA; water bodies need not literally be "navigable." The disagreement arises, however, with regard to wetlands and intermittent or ephemeral water bodies. It is this disagreement that the newly-announced rule seeks to resolve.

What has brought us to this juncture on WOTUS?

Since the passage of the CWA in 1972, the scope of the definition of "navigable water" has ebbed and flowed. As a young trial attorney at the United States Department of Justice in the late 1990s, I represented EPA in enforcement actions under the CWA. One of my first cases involved oil and gas operators on the Navajo reservation in Utah. The issue in that case was whether the operators had illegally discharged oil pollutants into "navigable waters" in violation of the CWA. The waters at issue were ephemeral streams that were created during flash flood events in desert arroyos on a periodic basis, especially during the monsoon season. My client, EPA, took the position at the time that the ephemeral streams in arroyos were protected under the CWA. We ended up settling that case. I was also responsible for cases in the mid-west region and inevitably handled cases involving concentrated animal feeding operations (CAFOs). In those cases, the United States adopted a similarly broad interpretation regarding farm ditches.

At that time, the main Supreme Court ruling on "waters of the United States" was the *Riverside Bayview* decision, where the Court upheld the USACE's assertion of jurisdiction over wetlands where they directly abutted a traditional navigable water body. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1984). Central to the Court's reasoning was the interconnected nature of the two water bodies in an ecological sense and the recognition that drawing boundaries between water bodies and land areas can pose challenges that warrant deference to agency interpretation. The Court further addressed the CWA's reach several years later in the *SWANCC* case. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). (SWANCC). In that case, the Court rejected the USACE's assertion that the CWA applied to isolated, non-navigable, intrastate ponds used as part of a sand and gravel pit excavation because they were not connected to traditional navigable waters. The Court also declined to extend federal jurisdiction over such water bodies due to ecological connections with other waters, rejecting the presence of migratory birds as a basis for federal regulation. However, *SWANCC* did not address the full panoply of potential fact scenarios involving various water features.

In 2006, the Court further elaborated on the CWA's reach in a plurality opinion in *Rapanos*. *Rapanos v. United States*, 547 U.S. 715 (2006). In that case, the Court found that wetlands were covered by the CWA if they had a continuous connection to "relatively permanent" water bodies that were connected to traditional forms of navigable waters. The Court also found that wetlands which are physically remote from, and intermittently connected to, navigable waters likely did not fall under the CWA. Justice Kennedy's concurrence attempted to lend clarity through a "significant nexus" test, rejecting the requirement for a continuous surface water connection, and instead, concluding that there must be "a reasonable inference of ecological interconnection" to show linkage to a navigable water body.

But instead of clarity, there was much debate around the edges of the CWA's application in the aftermath of the *Rapanos* decision. Eventually, in 2015, the Obama administration adopted a broad interpretation of the "significant nexus" test that, in certain situations, would include non-adjacent wetlands, and ephemeral or intermittent streams within the term "navigable waters." Given its breadth, the 2015 rule faced litigation in district courts across the country, resulting in injunctions against its enforcement. These cases were slowly making their way through the courts when the Trump administration intervened in late 2019, seeking to repeal the 2015 rule and to reinstate prior agency guidance, thereby triggering more litigation on those administrative actions.

In order to reset the stage and to render moot the litigation regarding the repeal of the 2015 rule, the Trump administration issued its final Navigable Waters Protection Rule on 23 January 2020.

What waters are covered in the new WOTUS rule?

The rule provides protection for four categories of water bodies:

- The territorial seas and traditional navigable waters,
- Perennial and intermittent tributaries to those waters,
- Certain lakes, ponds, and impoundments that contribute surface flow to navigable waters, and
- Wetlands adjacent to jurisdictional waters (in some circumstances even when an artificial or natural barrier exists between the two).

The rule also provides twelve categories of exclusions, which exclude from the definition of WOTUS a variety of features, such as features that only contain water in direct response to rainfall (e.g., ephemeral features); groundwater; diffuse storm water runoff; many road and farm ditches; prior converted cropland; certain artificial features for irrigation, mining, construction, or other activities located upland or in non-jurisdictional areas; and waste treatment systems. Some of these exclusions remove waters that the prior, 2015 rule included within the reach of the CWA.

What lies on the horizon for the new WOTUS rule?

There is no doubt that the Trump administration's new rule, once published, will be the subject of litigation across the country. For starters, opponents of the rule will likely challenge the rule based on alleged violations of the Administrative Procedures Act in the various steps taken leading up to the adoption of the final rule. Opponents of the rule also may assert that the new rule fails to consider regional and geographic differences across the country, such as the fact that there are more ephemeral and intermittent streams in the arid southwest. The rule's survival also depends on whether the Trump administration's rationale for changing the Obama administration's position is defensible. Factors will include how closely the new rule adheres to existing court precedent, such as Justice Kennedy's "significant nexus" test in *Rapanos* and the "adjacency" concept in *Riverside Bayview*, whether the new rule's purpose to respect Congressional preservation of state authority is a sufficient basis to justify the changes from the prior 2015 rule, and whether the scope of the 2015 rule improperly exceeded Congressional intent. For example, the justification for the new rule asserts that the 2015 rule included isolated water bodies akin to the ones that the Court had excluded in the *SWANCC* decision. The new rule also attempts to advance a legal-based argument in support of this rule change as opposed to a science-based rationale, which may limit the nature of claims against the rule in court.

Reversal of this rule under the Congressional Review Act may not be a viable option because the rule may be finalized outside of the time period during which a new Senate could review its content. Of course, if there is a new Chief Executive in the White House, then this rule may once again be revisited and revised by the Executive branch.

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