BACK TO THE DRAWING BOARD ON WOTUS: FEDERAL COURT VACATES TRUMP ADMINISTRATION'S NAVIGABLE WATERS PROTECTION RULE

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On 30 August 2021, Judge Rosemary Márquez, a federal district judge in the District of Arizona, ordered the remand and vacatur of the Trump administration's Navigable Waters Protection Rule[1] (NWPR) defining "waters of the United States" (WOTUS) under the Clean Water Act (CWA).[2] The vacatur means that the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) must "return to the pre-2015 regulatory regime" to determine the scope of the CWA's regulatory jurisdiction.[3] The court's order will have significant impacts on regulators and the regulated community alike, including for project proponents currently seeking CWA permits from the Corps, EPA, and states administering CWA permitting programs.

NWPR AND THE VACATUR ORDER IN CONTEXT

The CWA's regulatory protections (e.g., the requirement to obtain a permit to discharge pollutants) extend to "navigable waters," which the CWA defines as WOTUS.[4] The ambiguity of what waters fall within the scope of WOTUS has led to a long history of shifting interpretations and legal challenges.[5] While it is clear that WOTUS is broader than waters that are "navigable in fact," for decades now, regulators and courts have struggled with where precisely to draw the line of federal authority under the CWA—particularly for wetlands and intermittent and ephemeral streams.

The NWPR, effective as of June 2020, significantly narrowed the definition of what waterbodies were subject to the CWA compared to the EPA's and the Corps' prior rules. The NWPR came on the heels of a separate rulemaking, finalized in 2019, that repealed the Obama administration's expansive 2015 Clean Water Rule. Notably, the NWPR excluded certain wetland areas and ephemeral streams that were covered under both the Clean Water Rule and the pre-2015 regulations and agency guidance. While certain industry groups praised the NWPR as providing much needed regulatory certainty, the NWPR was widely criticized by environmental groups, a number of states and Indian Tribes, and—most recently—the Biden-era EPA and Corps, as insufficiently protective of the nation's water resources.

The vacatur order by Judge Márquez was issued in the context of a lawsuit brought by several Indian Tribes from across the country against the EPA and the Corps seeking to invalidate the NWPR. Rather than defend the NWPR, the EPA and the Corps moved for voluntary remand without vacatur. In vacating the rule, Judge Márquez found that the NWPR contained "fundamental, substantive flaws that cannot be cured without revising or

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replacing the NWPR's definition of 'waters of the United States,'" and that "remanding without vacatur would risk serious environmental harm," noting that the EPA and the Corps "identified indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices."[6]

IMPACTS OF THE VACATUR

With the NWPR vacated, the EPA and the Corps confirmed on September 3rd that they would halt implementation of the NWPR nationwide and are now interpreting "waters of the United States" consistent with the pre-2015 WOTUS regulatory regime, including the agencies' 2008 guidance interpreting the U.S. Supreme Court's decision in *U.S. v. Rapanos*.[7] However, serious questions remain, including on the scope of vacatur order, the outcome of an all but certain appeal of the order, and how the order may impact the agencies' efforts to propose and finalize a durable replacement WOTUS definition that can withstand judicial scrutiny.

For example, Defendant intervenors to the Arizona litigation—a collection of industry associations, including Arizona Farm Bureau—will likely attempt to stay the court's vacatur order pending appeal and, at minimum, limit the application of the vacatur to Arizona and to prospective actions by the agencies. Additionally, the order is unclear on whether the vacatur applies only prospectively (affecting projects in development stages) or if it also operates retrospectively (potentially affecting permitted projects yet to commence construction).[8] Further, it is unclear whether the order will cause the agencies to rethink their previously stated plan to pursue a two-step rulemaking to replace the NWPR.[9] The vacatur of NWPR more or less accomplishes the Biden administration's goal for step one: repeal the NWPR and replace it with the pre-2015 regulatory definition of WOTUS.

Perhaps the most intriguing question is what comes next. Vacatur of the NWPR and a return to the 2015 regulatory regime is, to quote the court's order, an "interim change."[10] Judge Márquez ordered the parties to submit proposals for further proceedings on the plaintiffs' challenge to the 2019 "Repeal Rule," potentially opening the door for a return to the Clean Water Rule.[11] Meanwhile, the EPA and the Corps are embarking on another rulemaking process to redefine WOTUS, which, in all likelihood, will be broader in scope than the NWPR.[12]

The confusion over the WOTUS definition has prompted many stakeholders to call for action by Congress to amend the CWA and resolve the ongoing ambiguity that courts and the executive branch have failed to do. The pre-2015 regulatory definition was itself subject to differing interpretations by the Supreme Court, hence prompting both the Obama administration, and then the Trump administration, to adopt rules to clarify its scope. Now it is the Biden administration's turn.

If history is any indication, we can expect lots of controversy and, eventually, litigation. In the interim, those project proponents seeking permits under the CWA are encouraged to keep appraised of legislative, judicial, and regulatory developments that may affect whether or not a project has impacts on WOTUS, however that term comes to be defined.

FOOTNOTES

[1] 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[2] Pasqua Yaqui Tribe v. U.S. EPA, No. CV-20-00266-TUC-RM (Aug. 30, 2021).

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[3] *Id*. Order at 10.

[4] *See* 33 U.S.C. §§ 1311(a), 1362(7).

[5] For a detailed accounting of the history of WOTUS rulemaking, guidance, and litigation, see our prior Alerts: Ankur Tohan et al., Finally Finality? The Trump Administration's Answer to One of Environmental Law's Most Contested Questions: what are "Waters of the United States"?, K&L GATES LLP (Feb. 20, 2020), Ankur Tohan et al., Trump Administration Begins "Round 4" in the Battle Over Clean Water Act Jurisdiction, K&L GATES LLP (Jan. 14, 2019).

[6] Order at 9, Pasqua Yaqui Tribe v. U.S. EPA, No. CV-20-00266-TUC-RM (Aug. 30, 2021).

[7] *Current Implementation of Waters of the United States*, EPA, https://www.epa.gov/wotus/current-implementation-waters-united-states.

[8] Courts have been less than clear on their interpretation of how vacatur of regulations impacts permitted projects that have yet to commence construction. The Supreme Court has found that recently promulgated *statutes* are applicable retroactively to projects already in the construction phase, but no clear consensus exists as to how and if regulations should be applied retroactively. *See generally Daniel H. Conrad, Filling the Gap: The Retroactive Effect of Vacating Agency Regulations*, 29 PACE ENVTL. L. REV. 1 (2011), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1682&context=pelr.

[9] Notice of Public Meetings Regarding "Waters of the United States," 86 Fed. Reg. 41,911 (Aug. 4, 2021).

[10] Order at 10, Pasqua Yaqui Tribe v. U.S. EPA, No. CV-20-00266-TUC-RM (Aug. 30, 2021)

[11] Prior to its repeal, the Clean Water Rule was subject to ongoing litigation that resulted in a patchwork of injunctions applicable at the state level. As of 2018, the rule was in effect in slightly fewer than half of all U.S. states. *See "Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule*, EVERYCRSREPORT.COM (Dec. 6, 2018), https://www.everycrsreport.com/reports/R45424.html#_Toc532385807.

[12] 86 Fed. Reg. 41,911 (Aug. 4, 2021).

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