FINALLY FINALITY? THE TRUMP ADMINISTRATION'S ANSWER TO ONE OF ENVIRONMENTAL LAW'S MOST CONTESTED QUESTIONS: WHAT ARE "WATERS OF THE UNITED STATES"?

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On January 23, 2020, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) finalized the Navigable Waters Protection Rule (Rule) to define "waters of the United States" (WOTUS). The Rule fulfills President Trump's Executive Order from nearly three years ago, directing EPA and the Corps to repeal the Obama Administration's Clean Water Rule and to promulgate a new rule.

The Rule will impact land use planning, development, and investment across industry sectors, along with state and local governments, and individuals alike. In simple terms, the Rule streamlines and, ultimately, decreases the categories of waters subject to prohibitions and permitting requirements under the Clean Water Act.

It is anticipated that the Rule will face challenges by environmental groups and certain states filed in federal district courts across the country. It is unclear whether the Trump administration's Rule will be the final word on what are WOTUS or whether this is just another chapter in one of environmental law's longest running storylines.

THE RULE IN CONTEXT.

The Clean Water Act's stated objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] To achieve this objective, the Clean Water Act seeks to eliminate the discharge of pollutants to "navigable waters" through, among other things, permitting programs implemented by the EPA, the Corps, and delegated states.[3] The Clean Water Act defines the term "navigable waters" as "the Waters of the United States, including the territorial seas."[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]

Perhaps the single most defining chapter in this long and winding history is the United States Supreme Court's 2006 fractured decision in *U.S. v. Rapanos*.[6] The *Rapanos* Court failed to reach agreement on the constitutional and statutory limits of what aquatic features fall within the scope of WOTUS. The *Rapanos* decision resulted in two jurisdictional tests that limit the Clean Water Act's reach: Justice Scalia, writing for four justices of the Court, articulated a test that limits federal jurisdiction to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters and to "wetlands with a continuous surface connection to" such relatively permanent waters, and Justice Kennedy, in a concurring opinion, articulated a test that limits federal

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jurisdiction to those waters with a "significant nexus" to the traditional navigable waters (regardless of surface connection).

Since 2006, the EPA and the Corps have grappled with implementing the *Rapanos* decision. In 2008, the Bush administration released its post-*Rapanos* guidance, under which EPA and the Corps could assert jurisdiction over waters that met either Justice Scalia's or Justice Kennedy's jurisdictional tests.[7] In 2015, the Obama administration issued the Clean Water Rule, which used Kennedy's significant nexus test as its guiding principle.

The Clean Water Rule provided some increased clarity with respect to the scope of waters subject to Clean Water Act jurisdiction, and arguably expanded federal jurisdiction in comparison to prior interpretations. The Clean Water Rule's expansive view of WOTUS provoked waves of litigation across the United States.[8] In addition to litigation, the Clean Water Rule was a target of the then incoming Trump administration. On February 28, 2017, President Trump issued Executive Order 13778: Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule. The Executive Order directed the EPA and the Corps to review the Clean Water Rule and either rescind or revise the rule. In doing so, the Executive Order directed the EPA and Corps to interpret the terms "navigable waters" consistent with Justice Scalia's opinion in *Rapanos*.

CLEAN WATER RULE IS DISMANTLED, WOTUS IS REDEFINED YET AGAIN.

Consistent with the Executive Order, on October 22, 2019, the EPA and Corps published a rule, which became effective on December 23, 2019, repealing the Clean Water Rule and replacing it with the agencies' pre-existing definition of WOTUS (i.e., the agencies' pre-2015 regulations as informed by applicable agency guidance, most notably the Bush administration's 2008 post-*Rapanos* guidance), while a new rule could be developed. The EPA's and Corps' repeal of the Clean Water Rule is already being litigated.[9]

On January 23, 2020, after receiving over 600,000 comments on the proposed Rule, the EPA and Corps finalized the Rule consistent with Trump's Executive Order:

- The Rule eliminates Kennedy's "significant nexus" test for evaluating non-categorical water bodies.[10]
- The Rule generally excludes waters that are not "relatively permanent, standing or continuously flowing bodies of water" connected to "traditional" navigable waters. This leaves less room for a case-by-case analysis and scientific review of the factual characteristics of the water subject to review, leaving the analysis of whether the water is a WOTUS to be almost exclusively a legal one.

The Rule defines four categories of jurisdictional waters:

- "**Territorial seas and traditional navigable waters**," stayed the same as proposed, except now combines traditional navigable waters and territorial seas into a single category, eliminates the stand-alone interstate waters category as proposed, and clarifies that there must be evidence of "physical capacity for *commercial* navigation."[11]
- "**Tributaries**," stayed the same as proposed, being a naturally occurring surface water channel that is perennial or intermittent in a "typical" year and that contributes surface water flow to a territorial sea or traditional navigable water, but that expressly excludes ephemeral streams. The Rule also eliminates a stand-alone category for ditches. Only ditches meeting the definition of "tributary" are considered WOTUS.

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- "**Lakes, ponds and impoundments**," differs from that proposed in that it now captures impoundments that was previously a stand-alone classification in the proposed rule, and it eliminates the requirement that the water bodies contribute perennial or intermittent flow to a traditional navigable water. This category includes water bodies that are connected to a downstream jurisdictional water if connected via an ephemeral stream, but not if via a non-channelized flow such as sheet flow or diffuse runoff, as well as water bodies inundated by flooding by downstream navigable water, tributary, or territorial sea.
- "**Adjacent wetlands**," eliminates isolated wetlands that (a) do not abut, (b) are separated by more than a natural berm from, or (c) are not inundated by flooding in a typical year from, and do not have a direct hydrologic surface connection in a typical year to, a jurisdictional non-wetland water. Adjacent wetlands are subject to a different jurisdictional test than tributaries, lakes, ponds, and impoundments of jurisdictional waters, in that an adjacent wetland must have a "continuous surface connection" to such relatively permanent waters. The Rule is slightly more inclusive than the proposed rule (which required wetlands to physically abut other waters) in that adjacent wetlands can be separated from other waters by artificial dike, barrier or similar structure so long as there is a "direct hydrologic surface connection" between the wetland and the jurisdictional water.

The Rule also enumerates 12 types of waters that are categorically ***excluded*** from the scope of WOTUS.[12] The exclusions largely re-codify pre-existing exclusions and agency practice (e.g., prior converted crop land, artificially irrigated areas, and groundwater), but some are new or deviate from past practice (e.g., ephemeral streams and ditches).

REDUCED CLEAN WATER ACT JURISDICTION AND EMPHASIS ON STATE AUTHORITY.

Many of the most important aspects of the Rule are imbedded in the new definitions of terms such as tributary, intermittent, ephemeral, typical year, and adjacent wetlands.[13] However, there are two significant, overarching themes.

First, the Rule departs from the agencies' past interpretations of WOTUS. The EPA maintains that the Rule merely recodifies what was already understood to be jurisdictional versus non-jurisdictional in the pre-Clean Water Rule era.[14] But, as a practical matter, the Rule's strict adherence to Scalia's *Rapanos* opinion excludes many waters that were previously subject to Clean Water Act review under a case-by-case significant nexus evaluation or through less narrow categories. For example, the Rule's elimination of all ephemeral streams from the definition of WOTUS will likely result in a marked decrease in the scope of Clean Water Act jurisdiction in the arid southwest United States (Arizona, New Mexico, Utah, Colorado, and California).

Second, the Rule emphasizes the role of state and tribal authorities to regulate waters beyond the scope of federal jurisdiction. The EPA and the Corps explain that the Rule balances the Clean Water Act's goal of eliminating pollution to "Navigable Waters" with one of Congress' key Clean Water Act policy directives: to, among other things, "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[15] Therefore, state-level responses to the Rule will be just as critical for the regulated community to understand as the Rule itself. For example, certain states do not regulate waters unless they qualify as WOTUS; other states may expand the scope of their regulation over intrastate waters that may no longer be WOTUS.

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DO WE FINALLY HAVE A SETTLED DEFINITION OF WOTUS?

The Rule's narrow definition of WOTUS will—in most cases—streamline the agencies' process for determining whether waters are subject to Clean Water Act jurisdiction. But, with legal challenges almost certainly to be brought over this latest definition of WOTUS, the fate of the Rule remains uncertain. Punctuating the Rule's uncertain future, if the 2020 election yields a change in the administration, it seems probable that the new administration will seek to dismantle the Rule—much like the Trump administration's efforts to dismantle the Clean Water Rule.

Challenges to the Rule will likely be filed in U.S. District Courts across the country and plaintiffs will no doubt seek a nationwide stay of the Rule's effectiveness while litigation runs its course. Without a nationwide stay, we are likely to see disparate rulings from multiple district courts leading to a patchwork of Clean Water Act jurisdiction. Substantively, challenges will raise myriad legal issues: from the minutia of the Rule's definitions (e.g, typical year) to broad principles of statutory construction.

In general, Plaintiffs are likely to raise two significant, related issues. First, that the Rule impermissibly eliminates Justice Kennedy's "significant nexus" test for establishing the outer-bounds of Clean Water Act jurisdiction. Nearly every Circuit Court of Appeals has endorsed Kennedy's significant nexus test, and at least the Eleventh Circuit has completely rejected the *Scalia* test.[16] Second, that the Rule's reliance on the Scalia test and narrow view of the geographic reach of the Clean Water Act cannot be squared with existing science regarding the connectivity of water systems (e.g., the scientific findings underpinning the Clean Water Rule) and the agencies' past interpretations of WOTUS.

In support of the Rule's new framework for WOTUS, the agencies state that it "presents a unifying legal theory for federal jurisdiction," and that "science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the [Clean Water Act]."[17] In the end, the Rule's approach to defining WOTUS effectuates this administration's policy choices. The U.S. Supreme Court may ultimately have to determine whether the Rule is a reasonable interpretation of WOTUS.

While the Rule seeks to clarify how federal agencies will interpret the reach of their Clean Water Act authority, which offers greater certainty for the regulated community, litigation may yet affect the scope of federal jurisdiction. As such, the saga of what waters fall within the scope of WOTUS will continue.

NOTES

[1] Presidential Executive Order No. 13778: Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule (Feb. 28, 2017).

[2] 33 U.S.C. § 1251(a).

[3] *Id*. at §§ 1251(a)(1), 1311(a)(1), 1342, and 1344.

[4] *Id*. at § 1362(7).

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[5] For a detailed accounting of the history of WOTUS rulemaking, guidance, and litigation, see our prior Alerts: Ankur Tohan et al., *Trump Administration Begins "Round 4" in the Battle Over Clean Water Act Jurisdiction*, K&L GATES LLP (Jan. 14, 2019), http://www.klgates.com/trump-administration-begins-round-4-in-the-battle-over-clean-water-act-jurisdiction-01-14-2019/.

[6] *See Rapanos v. United States*, 547 U.S. 715 (2006).

[7] *Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States*, p. 3 (December 2, 2008).

[8] *See e.g., National Ass'n of Mfrs. V. Department of Defense*, 138 S.Ct. 617 (2018).

[9] *See State of New York, et al. v. Andrew R. Wheeler, et al.*, Docket No. 1:19-cv-11673-ALC (U.S. Dist. Ct. S.D.N.Y., Dec. 20, 2019); *William Murray, et al. v. Andrew Wheeler, et al.*, Docket No. 1:19-cv-1498 (U.S. Dist. Ct. N.D.N.Y., December 4, 2019); *South Carolina Coastal Conservation League, et al. v. Andrew R. Wheeler, et al.*, Docket No. 2:19-cv-3006 (U.S. Dist. Ct. S. Carolina, October 23, 2019); *New Mexico Cattle Growers' Association v. United States Environmental Protection Agency, et al.*, Docket No. 1:19-cv-988 (U.S.D.C. New Mexico, October 22, 2019).

[10] Rule, p. 276.

[11] *Id*. at 119 (emphasis added).

[12] The 12 exclusions are: (1) any water or water feature not identified within the four enumerated categories, including interstate waters that do not independently qualify as jurisdictional waters, (2) groundwater, (3) ephemeral features, (4) diffuse stormwater runoff, (5) certain types of ditches, (6) prior converted cropland, (7) artificially irrigated areas, (8) artificial lakes and ponds, (9) water-filled depressions and sand, gravel and fill pits, (10) stormwater control features, (11) groundwater recharge, and (12) waste treatment system.

[13] The agencies' issued a Fact Sheet with guidance on general implementation for some of the Rule's key technical aspects, including determining perennial or intermittent flow, direct hydrologic surface connection, and surface flow and surface water connections in a "typical year."

[14] Rule, p. 38.

[15] *Id*. at pp. 46–47; 33 U.S.C. § 1251(b).

[16] *See United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *Northern California River Watch v. Wilcox,* 633 F.3d 766 (9th Cir. 2011); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007); *United States v. Gerke Excavating*, Inc., 464 F.3d 723 (7th Cir. 2006); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

[17] Rule pp. 80, 142.

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