

WATERS OF THE U.S. WORKSHOP

Society of American Military Engineers

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“Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the WOTUS Rule” – February 28, 2017

- > Early in President Trump’s first year in office, several key Executive Orders were issued that charted a significant redirection of federal agencies.
- > These Executive Orders embody both a turn away from President Obama’s major energy and environmental initiatives, (*i.e.*, Climate Action Plan, “Waters of the U.S.” Rule and other agency policies and practices) and mandate agency pursuit of new Executive Branch priorities.
- > Nearly three years later – how is implementation going?

Administrative Procedure Act and Federal statutes governing individual agencies are major considerations in Executive Branch Regulatory Change Campaigns

- Substance of Change(s)
- Timing of Change(s)
- Mixed reactions from Courts
 - All acknowledge Executive authority to change policy and regulations but requiring varying/stringent degrees of agency justification.

CLEAN WATER ACT (CWA)

- Federal jurisdiction is only over “navigable waters” (also known as “waters of the United States”)
- CWA prohibits the discharge of any “pollutant” into “navigable waters” without a federal permit
 - Every requirement of the CWA applies only to waters within the CWA’s jurisdiction
- CWA and U.S. Supreme Court recognize states’ retained authority over land use and intrastate waters
 - Implications of *expanded* Federal Jurisdiction

WHAT ARE NAVIGABLE WATERS?

- CWA – “waters of the United States, including territorial seas”
- 40 C.F.R. § 230.3(s) (EPA); 33 C.F.R. § 328(a) (Corps)
 - All waters currently used, or used in the past, or susceptible to use in interstate or foreign commerce, including all waters subject to ebb and flow of tide
 - All interstate waters including interstate wetlands
 - All other waters, including wetlands, use, degradation or destruction that could affect interstate commerce
 - Territorial seas
- The 2015 WOTUS Rule – expansive changes to the scope of WOTUS

THE MEANING AND SCOPE OF WOTUS BEFORE THE U.S. SUPREME COURT

➤ ***United States v. Riverside Bayview Homes* (1985)**

- Wetlands *adjacent* to traditional navigable waters are covered by the CWA
- Wetlands need not be *navigable* to be regulated

➤ ***Solid Waste Agency of Northern Cook County (SWANCC) v. Corps of Engineers* (2001)**

- Corps determined in 1986 that federal jurisdiction extended to isolated wetlands visited by migratory birds
- *SWANCC* curtailed *Riverside Bayview* - there must be some *nexus* to navigable waters
- For federal jurisdiction to extend to isolated, intrastate wetlands, they must be “adjacent to” some navigable water

THE MEANING AND SCOPE OF WOTUS BEFORE THE U.S. SUPREME COURT

(cont'd)

➤ ***Rapanos/Carabell* Decisions (2006)**

- Whether CWA covers wetlands that do not contain, and are not adjacent to, waters that are not navigable in fact?
- Supreme Court split 4-1-4
- No majority opinion

➤ ***Nat'l Assoc. of Manufacturers v. Pruitt, et al.* (2018)**

- What federal court has jurisdiction to review CWA WOTUS rules?
- Unanimous decision – the district courts, not Courts of Appeals, and vacated the 6th Circuit nationwide stay of 2015 WOTUS Rule

RAPANOS PLURALITY OPINION

➤ J. Scalia two-part test on what “Navigable waters” means

- “...relatively permanent standing or flowing body of water connected to traditional interstate navigable waters”
- “...continuous surface connection to bodies that are ‘waters of the United States’ in their own right” – making it difficult to determine where “water” ends and “wetland” begins

➤ “Relatively permanent”

- Excludes *intermittent* and *ephemeral* streams
- But does not necessarily exclude:
 - “Streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought”
 - Seasonal rivers that contain continuous flow during some months of the year but no flow during dry months

JUSTICE KENNEDY CONCURRING OPINION IN RAPANOS

- Defers heavily to *SWANCC*'s “**significant nexus**”
- Says Corps correctly interprets CWA to apply to *impermanent* streams
- Says “nexus” exists “if the wetlands ... significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable’”

WHAT'S COVERED BY THE 2015 WOTUS RULE

- **The Rule's first four categories *are* consistent with the Agencies' traditional application of federal CWA jurisdiction:**
 - (1) Waters currently, previously, or potentially used in interstate commerce;
 - (2) Interstate waters, including wetlands;
 - (3) Territorial seas;
 - (4) Impoundments of waters otherwise defined as “waters of the United States”;

ADDED NEW NON-TRADITIONAL CATEGORIES

1. Tributaries
 - “Tributaries” of waters used in interstate commerce, interstate waters, and territorial seas
 - Intermittent and Ephemeral Streams
 - **No case-by-case analysis required**; waters that satisfy the Rule’s definition are **automatically subject** to CWA jurisdiction
2. “Adjacent” waters
3. Waters with “Significant Nexus” to Covered Waters

WHAT ARE THE IMPLICATIONS OF THE 2015 WOTUS RULE?

- Decrease in (or more overlap with) state regulatory authority – admitted increase in asserted federal jurisdiction
- Additional regulatory obligations for numerous and diverse activities located near newly covered “waters of the United States”
 - Spill prevention, control, and countermeasure (“SPCC”) plans
 - Release reporting under CERCLA
 - Wastewater/storm water discharge permits
- More development projects potentially subject to federal CWA permitting requirements

2015 WOTUS RULE IN COURT

- Just after the Rule was promulgated in 2015 - 13 separate lawsuits filed in U.S. District Courts around the country
- 14 separate petitions for review filed in various federal Courts of Appeal – all consolidated in the Sixth Circuit
- One day before the WOTUS Rule was to take effect, the U.S. District Court in North Dakota granted a preliminary injunction (PI) against the Rule
 - Only District Court PI issued in the country
 - Scope of PI was the 12 states involved

THE NORTH DAKOTA, et al. v. EPA PI MOTION

➤ **The States Will Suffer Irreparable Harm if the WOTUS Rule is Implemented**

- The States' Sovereign Right in Regulating State Waters and Lands are Harmed by the WOTUS Rule
- Expanded CWA Programs Will Cause Unrecoverable Monetary Harm

➤ **The States are Likely to Succeed on the Merits**

- The WOTUS Rule Extends the Agencies' Jurisdiction Beyond Constitutional and Statutory Limits
 - The WOTUS Rule Violates the Tenth Amendment and the Commerce Clause
 - The WOTUS Rule Violates the CWA in Excess of the Authority Granted the Agencies by Congress
- The Agencies Failed to Comply with APA Requirements When Promulgating the WOTUS Rule
 - The WOTUS Rule is Arbitrary and Capricious
 - The WOTUS Rule is not a "Logical Outgrowth" of the Proposed Rule
- The Agencies Violated NEPA When Promulgating the WOTUS Rule

➤ **The Balance of Harms Tip in Favor of an Injunction**

➤ **An Injunction is in the Public Interest**

SIXTH CIRCUIT NATIONWIDE STAY OF WOTUS RULE OVERTURNED BY U.S. SUPREME COURT

- The Sixth Circuit issued a nationwide stay of the WOTUS Rule. In re EPA & Dep't of Def. Final Rule, 803 F.3d 804 (6th Cir. 2015).
- **But** – On January 22, 2018 – a *unanimous* U.S. Supreme Court overturned the Sixth Circuit's decision and held that federal district Courts have jurisdiction to review WOTUS rules.
 - Upheld original jurisdictional decision by U.S. District Court in North Dakota
 - Dissolved the Nationwide Stay of WOTUS Rule – putting it back into effect (except in 13 states)

ADMINISTRATIVE ACTIONS ON WOTUS

- The February 28, 2017 Executive Order - 2015 WOTUS Rule.
- On July 27, 2017, Agencies proposed to rescind the 2015 WOTUS Rule and recodify a prior regulatory definition of “waters of the United States” before beginning a new rulemaking process concerning that term (Recodification Rule).
- On February 6, 2018, Agencies final rule added a February 6, 2020 applicability date to the WOTUS Rule (Delay Rule).
- The Delay Rule was immediately challenged the day it became final. See New York v. Pruitt, Case No. 1:18-cv-1030 (S.D.N.Y. Feb. 6, 2018); NRDC v. EPA, Case No. 1-18-cv-1048 (S.D.N.Y. Feb. 6., 2018; S.C. Coastal Conservation League v. Pruitt, Case No. 2-18-cv-330 (D.S.C. Feb. 6, 2018).
- U.S. District Court in So. Carolina invalidated Delay Rule and reinstated WOTUS Rule *nationwide!*

RECENT ACTION IN THE U.S. DISTRICT COURT IN NORTH DAKOTA

- Immediately after the Supreme Court's unanimous decision, North Dakota and several sister states asked the District Court to lift the stay issued in that case after the Sixth Circuit's decision.
- On March 23, 2018, the Court granted North Dakota's Motion to Lift the Stay and ordered the parties to confer/submit proposals on how to proceed to the merits.
 - Briefing completed.
 - Awaiting oral argument/hearing on the merits!

WHERE THINGS STAND TODAY

STEP 1 (<https://www.epa.gov/wotus-rule/step-one-repeal>)

- This was the EPA proposal to solely repeal the Obama WOTUS Rule effort, and return the regulations to the Pre-Obama-Era WOTUS Rule.
- This comment period closed 8/13/18
- EPA Administrator Wheeler signed the rule 9/12/19.

Step 2 (<https://www.epa.gov/wotus-rule/step-two-revise>)

- This is the effort to revise the WOTUS Rule
- The final Phase 2 Rule is pending, and EPA is expected to publish it before “end of winter.”

WHERE THINGS STAND NOW

- > EPA now has the opportunity in its Phase 2 Rule to correctly define the scope of federal jurisdiction over state-waters under the Clean Water Act, and to limit that jurisdiction to waters that are “navigable in fact” or have a direct surface connection to navigable waters.
- > EPA’s first draft of a Phase 2 rule that would redefine the correct scope of waters that the federal government can regulate under the Clean Water Act.
 - While the first draft of the rule was promising, it still attempted to assert jurisdiction over water bodies that should remain under state control under the Clean Water Act, including isolated ponds, intermittently flowing ditches and gullies, and prairie potholes.
 - This includes limiting federal jurisdiction to waters that are “navigable,” and those tributaries that have a direct surface connection to those navigable waters.

FINAL OBSERVATIONS ON EVENTS TO COME.

- Large changes to environmental and energy regulation and policy are unfolding – with mixed results.
- Executive Branch prerogatives tempered by the APA
 - Energized role of the states in both enforcement and regulatory actions
- Rise of the NGOs

Thank you!

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