Redefining Navigable Waters: The Next Frontier of the WOTUS Saga

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In the ongoing saga of the Clean Water Act's so-called "Waters of the United States" or WOTUS rule, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE) announced changes to the definition of "Navigable Waterways" on January 23, 2020. Those changes were published in the Federal Register on April 21, 2020. The EPA and ACOE share jurisdiction for administering the Clean Water Act and are collectively responsible for adopting regulations for implementing the Clean Water Act. The change to the definition of Navigable Waters is the latest move by the EPA and ACOE to redefine the scope of the Clean Water Act's reach during the years following the introduction of the 2015 Clean Water Rule. The confusion and controversy stem, ironically, from the Clean Water Act's simple definition of "navigable waters" as "waters of the United States." The Act itself doesn't provide any further definition, and determining the waters over which the Act confers jurisdiction has been the subject of controversy and litigation for years.

The most dramatic move to clarify the meaning of "navigable waters" or "waters of the United States" was taken by the Obama Administration in 2015. It was almost immediately the subject of myriad lawsuits challenging its propriety, and was ultimately stayed in the majority of states. This new rule is the latest step in a two-step process advanced by the Trump Administration to repeal and replace the 2015 rule. According to the new rule's text, it seeks to preserve the EPA and ACOE's ability to regulate waters that are clearly jurisdictional, while still providing the states more authority to manage the resources and waters within their borders. The intent identified by the EPA and ACOE is to clarify the meaning of "waters of the United States" under the Clean Water Act in a way that increases the predictability and consistency of Clean Water Act programs and jurisdiction.

Now that it is published, it is likely to be the subject of litigation once it is published and effective. This is in keeping with the ongoing litigation over the 2015 Clean Water Rule, and the subsequent 2019 rule that repealed the 2015 Clean Water Rule. Thus, despite the new rule's intent to clarify the scope of the Clean

Water Act, it is likely that it will remain the subject of controversy and confusion, until there is a final determination by one or more courts. But how did we get here?

A. Where Did It Start?

The regulations originally adopted with the Clean Water Act, in 1986, interpreted the jurisdictional scope of the Act broadly. However, two major U.S. Supreme Court decisions restricted that broad interpretation. First, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court determined that it was improper to include temporary, man-made ponds from construction work within the waters that fell within the Clean Water Act's jurisdiction. Second, in *Rapanos v. United States,* 547 U.S. 715 (2006), Justice Kennedy's opinion introduced a new "significant nexus" test, that resulted in the need for a case-by-case assessment of whether a specific water fell within the Act's jurisdiction if it wasn't clearly and obviously connected to a sea, river, lake, or bay. The EPA and ACOE took the first step toward trying to clarify this muddled interpretation in 2008, publishing non-binding guidance. However, confusion and controversy continued.

B. 2015 Clean Water Rule

The 2015 Clean Water Rule, adopted under the Obama Administration, attempted to clarify that the reach of the Clean Water Act is dependent on the physical and geological connections between water bodies. This was a definitive step away from the prior formulation of the Clean Water Rule, which had developed primarily through a number of U.S. Supreme Court decisions.

When it was adopted, the 2015 Clean Water Rule generated widespread controversy both among regulated entities and regulators, with some saying that it markedly expanded the EPA and ACOE jurisdiction, and others saying that the change would either not change the scope of the Clean Water Act, or would actually restrict the Clean Water Act's jurisdiction. This controversy resulted in multiple lawsuits filed all over the United States by both states and regulated industries. In response, a handful of courts stayed the effect of the 2015 Clean Water Rule in various states, while others allowed the 2015 Clean Water Rule to remain in place, as the courts attempted to resolve the dispute.

As the Trump Administration began to examine the 2015 Clean Water Rule, the United States was a patchwork of states to which the 2015 Clean Water Rule both did and did not apply.

C. Clean Water Rule Reform

Citing the confusion and inconsistent application of the 2015 Clean Water Rule that the litigation generated, the Trump Administration embarked on a two-step process in February 2017. The process began at the behest of a February 28, 2017 Executive Order calling on the EPA and ACOE to review the 2015 Clean Water Rule, to rescind it, and to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's dissenting opinion in the Supreme Court case *Rapanos v. United States*, 547 U.S. 715 (2006).

In March of 2017, the EPA and ACOE gave notice that they intended to review and either rescind or revise the 2015 Clean Water Rule. After over two years of study and comment, and continued litigation, the EPA and ACOE rescinded the 2015 Clean Water Rule on October 22, 2019. This move essentially put all of the rules and regulations for the Clean Water Act back to how they existed prior to the 2015 Clean Water Rule. As of December 23, 2019, the pre-2015 Clean Water Act rules and regulations once again became the law of the land.

D. Step Two: Redefining Navigable Waters

On January 23, 2020, the EPA and ACOE took the second step towards reforming the Clean Water Act by announcing a proposed rule that redefines the meaning of "navigable waters" as used in the Clean Water Act. The revised definition includes only four categories of waters, as opposed to the eight different categories of jurisdictional waters identified in the 2015 Clean Water Rule. (Compare 80 Fed. Reg. 37,058 (June 29, 2015) ("2015 Clean Water Rule") with Pre-publication Copy of EPA and ACOE, The Navigable Waters Protection Rule: Definition of "Waters of the United States," available here, pp. 5-6.)

Additionally, the revised definition of waters of the United States, as clarified by the EPA and ACOE in late 2019, specifically ***excludes*** the following categories of water, meaning that they are no longer considered waters of the United States:

- Groundwater, including groundwater drained through subsurface drainage systems;
- Ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools;
- Diffuse stormwater runoff and directional sheet flow over upland;
- Ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetlands, subject to certain limitations;
- Prior converted cropland;
- Artificially irrigated areas that would revert to upland if artificial irrigation ceases;
- Artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland or non-jurisdictional waters;
- Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- Groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and
- Waste treatment systems.

(85 Fed. Reg. 22,250, 22,251-22,252 (April 21, 2020).) Of particular note in the revised definition is that the revised definition, which hews more closely to the plurality opinion in *Rapanos v. United States,* 547 U.S. 715 (2006), interprets what constitutes "adjacent wetlands" more narrowly than the 2015 Clean Water Rule, focusing on navigability and intermittent or perennial surface water connection rather than the "significant nexus" test. This interpretation of what navigable waters are is much more similar to Justice Scalia's concurring opinion in *Rapanos*.

This chart summarizes the changes made by the new navigable waters rule from the 2015 Clean Water Rule.

Some of the key differences between the navigable water rule and the 2015 Clean Water Rule are that the new rule appears to expand some of the previously existing exemptions from jurisdiction by presuming that all waters and features that are not expressly listed are non-jurisdictional, and it no longer places the obligation on applicants to prove that certain waters are non-jurisdictional. Instead, the new rule presupposes that certain waters are not jurisdictional. It is not yet clear how the rule's reliance on surface flows feeding a water in a "typical year" as a measure of whether or not something is a water of the United

States will work out. This new interpretation relies heavily on Justice Scalia's opinion in *Rapanos*, which argued that the Clean Water Act could only properly apply to waters with a "relatively permanent" surface water connection to larger waterways. However, as some commentators have pointed out, the interpretation also seems to blend in some elements of Justice Kennedy's "significant nexus" test without calling it that. It remains to be seen how this blended approach will play out in reality, and whether it will be able to withstand legal challenges to the new rule.

E. What Does This All Mean?

The rule, announced on January 23, 2020, was published in the Federal Register on April 21, 2020. The Rule becomes effective on June 22, 2020. In the short term, once the new rule goes into effect, this means that there will be a smaller number of situations in which federal jurisdiction will be triggered.

It is likely that the requirement that adjacent wetlands experience relatively permanent surface water flow from intermittent or perennial sources in a "typical" year, will be particularly significant. For industry groups, the short-term, practical effect is that it will be more difficult to find a basis for federal jurisdiction if all you have is an adjacent wetland, and it's not clear whether it has a surface water flow in a typical year. This means that it will be more difficult to find a federal connection for projects needing an Incidental Take Permit under the Endangered Species Act, if there is no longer a federally-regulated wetland present. It also comes at a time when states, such as California, have stepped up and expanded state water regulation schemes to mimic the federal permitting process, and to include all non-federal waters as waters of the State. In California, for example, waters of the State includes both surface and groundwaters, including saline water and wetlands, within the boundary of the state.

With such expansive definitions of waters under state jurisdiction, it can be expected that the state will begin to play a larger role in regulating wetlands and other waters on a national scale. It can also be expected that project developers in need of a basis for federal jurisdiction for Endangered Species Act compliance may turn to habitat conservation plans in the absence of a water of the United States. Whether this remains the law of the land will depend on the outcome of litigation that is almost certain to arise.