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Legal Sidebar

What's Next for WOTUS: Recent Litigation and Next Steps in Redefining "Waters of the United States"

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On September 3, 2021, the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) announced that they halted implementation of the Navigable Waters Protection Rule, which defined "waters of the United States" (WOTUS) for purposes of establishing the scope of Clean Water Act (CWA) jurisdiction. The announcement followed a federal district court decision on August 30 in *Pasqua Yaqui Tribe v. EPA*, in which the court remanded and vacated the rule. Although the agencies had requested that the court allow implementation of the rule while they developed a new definition of WOTUS through the rulemaking process, the court instead agreed with parties challenging the rule who argued that it should be vacated immediately. The court's vacatur of the Trump-era Navigable Waters Protection Rule requires the Corps and EPA revert to an older regulatory definition while the Biden Administration undertakes its rulemaking process to redefine WOTUS.

This Sidebar discusses recent developments in the litigation surrounding the Corps and EPA's efforts to define WOTUS. A companion CRS Report provides more in-depth discussion of the actions taken by the Obama, Trump, and Biden Administrations to define WOTUS, along with related legislation and case law.

Overview of Agency Efforts to Define WOTUS

The CWA prohibits discharging certain pollutants into "the waters of the United States, including the territorial seas" without a permit. The statute does not define "waters of the United States," however. Congress, the courts, stakeholders, and the Corps and EPA—the two agencies responsible for administering the CWA—have long debated how to interpret the term, and thus the scope of waters that are federally regulated.

Prior to 2015, regulations promulgated by the Corps in 1986 and EPA in 1988 were in effect. The Corps and EPA also issued guidance in 2003 and 2008 to clarify the scope of CWA. Several Supreme Court decisions, most notably *Rapanos v. United States* in 2006, prompted the agencies to consider changes that would clarify the scope of WOTUS." In 2015, the Corps and EPA issued the Clean Water Rule, which redefined WOTUS in the agencies' regulations for the first time since the 1980s. Under both the 2015

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Clean Water Rule and the pre-2015 regulatory framework, the agencies' jurisdictional analysis sorted waters into three categories: (1) waters and wetlands that are categorically WOTUS; (2) waters and wetlands that may be deemed WOTUS on a case-by-case basis upon a finding of a "significant nexus" with traditionally navigable waters; and (3) waters and wetlands that are categorically excluded from WOTUS. Among other things, the 2015 Clean Water Rule also defined the regulatory term "tributaries" for the first time, and established numerical distance-based criteria for determining when waters and wetlands were jurisdictional by virtue of their adjacency to certain regulated waters.

The 2015 Clean Water Rule was quickly mired in litigation. At the time President Trump took office in 2017, the rule had been stayed by the U.S. Court of Appeals for the Sixth Circuit. After the Supreme Court held that the Sixth Circuit did not have jurisdiction to enter that order because challenges to the rule must be litigated in federal district courts, the Sixth Circuit lifted its stay and the rule became effective in states that were not subject to one of several preliminary injunctions issued at the district court level. By that point, however, the Trump Administration had already begun its efforts to repeal the 2015 Clean Water Rule and replace it with a new definition of WOTUS.

On February 28, 2017, President Trump issued an executive order (E.O. 13778) directing the Corps and EPA to review and rescind or revise the 2015 Clean Water Rule. The agencies then embarked on a two-step regulatory process. First, the agencies repealed the 2015 Clean Water Rule and recodified the pre-2015 regulatory text. Then, on April 21, 2020, the agencies issued the Navigable Waters Protection Rule. Overall, the Navigable Waters Protection Rule narrowed the definition of WOTUS, and thus the scope of waters and wetlands under federal jurisdiction. Among other changes, the rule (1) eliminated the category of waters whose jurisdictional status would be determined on a case-by-case basis, and the classification of all waters as either categorically included or categorically excluded; (2) excluded ephemeral features (i.e., those that flow or pool only in direct response to precipitation), including ephemeral tributaries, and features that did not provide surface water flow in a "typical year" to jurisdictional waters; (3) more narrowly defined "tributaries" and "adjacent wetlands," both of which continued to be considered jurisdictional; and (4) removed interstate waters as a separate category of jurisdictional waters.

Litigation Under the Trump Administration

The litigation surrounding the Navigable Waters Protection Rule has proceeded in piecemeal fashion in federal district courts across the country. Stakeholders (including 19 states) filed lawsuits in eleven district courts challenging both the repeal of the 2015 Clean Water Rule and the issuance of the 2020 Navigable Waters Protection Rule. The rule took effect on June 22, 2020 in all states except Colorado, where the federal district court issued a preliminary injunction that barred the rule from taking effect there. The U.S. Court of Appeals for the Tenth Circuit reversed the preliminary injunction on March 2, 2021, at which point the rule went into effect in Colorado. While each case has proceeded on its own timeline, no court has issued a final ruling on the merits of the Navigable Waters Protection Rule. Recent actions of the Biden Administration, however, make a merits ruling less likely.

The Biden Administration Seeks Remand

The Biden Administration has begun taking steps to reconsider the definition of "waters of the United States." Shortly after taking office, President Biden issued an executive order revoking the Trump Administration's E.O. 13778, and instructing the heads of agencies to review all actions taken by the Trump Administration that "are or may be inconsistent with, or present obstacles to" the new administration's scientific and environmental policy objectives. A separate factsheet included the Navigable Waters Protection Rule on a list of agency actions to be reviewed.

On June 9, 2021, the Corps and EPA announced that they intended to revise the definition of WOTUS, first by a rule to "[restore] the protections in place prior to the 2015 WOTUS implementation," and then by developing a new regulatory definition. Concurrent with that announcement, the United States began filing motions to remand the Navigable Waters Protection Rule back to the Corps and EPA. The United States requested remand *without* vacatur, which meant that a court granting the United States' motion would dismiss the suit and allow the Navigable Waters Protection Rule to remain in effect while the Corps and EPA went through the rulemaking process to revise or replace the rule.

In the motions, the United States also argued that remand was appropriate because the Corps and EPA had identified substantial concerns with the Navigable Waters Protection Rule, and intended to replace it through the rulemaking process. Declarations by Corps and EPA officials accompanied the remand motions and provided further detail on those concerns. In particular, the issues highlighted by the agencies included whether the rule adequately considered the CWA's statutory objective and "adequately considered the effects of the [rule] on the integrity of the nation's waters"; whether the agencies sufficiently considered the impact of the rule's categorical exclusion of ephemeral waters; and the impacts of the rule's implementation, including an increase in projects no longer subject to CWA requirements. The United States also argued that remand would allow the parties to avoid litigating the merits of a rule that the agencies intended to replace, would allow the agencies to address fully and receive input on the parties' concerns through the administrative rulemaking process, and would conserve the courts' and the parties' resources.

Some plaintiffs that challenged the Navigable Waters Protection Rule supported the United States' motions for remand, but argued that courts should also vacate the rule because the agencies committed substantive errors that could not easily be cured. They posited that those errors would likely change the outcome on remand. The plaintiffs also argued that remand without vacatur would cause significant disruptive consequences, including irreparable environmental harm. Other parties that intervened in support of the Navigable Waters Protection Rule either opposed remand, or supported the motion for voluntary remand without vacatur.

Courts Respond to Remand Motions, and the Agencies Respond to the Courts

To date, courts have granted all or part of the United States' motion in eight cases. Of those, six have remanded the Navigable Waters Protection Rule without vacatur or without deciding the vacatur question. The first court to act was the District Court for the District of South Carolina, which remanded the Navigable Waters Protection Rule without vacatur. The court's one-page order did not address the plaintiffs' opposition to vacatur.

By contrast, two courts have remanded and vacated the rule. On August 30, 2021, the U.S. District Court for the District of Arizona entered an order in *Pasqua Yaqui Tribe v. EPA* granting the United States' motion for voluntary remand, but also granting the plaintiffs' request to vacate the Navigable Waters Protection Rule. (Although the caption refers to the lead plaintiff as the "Pasqua Yaqui Tribe," the correct spelling is "Pascua Yaqui.") The court held that remanding the rule was consistent with courts' typical practice of granting voluntary requests for remand unless "the agency's request is frivolous or made in bad faith." The court explained that, in the Ninth Circuit, remand *without* vacatur was an "atypical remedy" to be ordered only in limited circumstances, such as where vacatur would risk environmental harm or where an agency could adopt the same rule on remand by offering better reasoning or complying with procedural requirements. The court further found that remand with vacatur could be appropriate "even in the absence of a merits adjudication." Accordingly, the court evaluated whether to vacate the rule

by considering "how serious the [agencies'] errors are and the disruptive consequences of an interim change that may itself be changed."

Applying that test, the court concluded that the concerns identified by the plaintiffs in their opposition to the United States' remand motion, and by the United States in the declarations filed along with the motion, "are not mere procedural errors or problems." Rather, they "involve fundamental, substantive flaws that cannot be cured without revising or replacing the [Navigable Waters Protection Rule's] definition of 'waters of the United States.'" Additionally, the court found that vacatur would not result in possible environmental harm, and that remand without vacatur instead "would risk serious environmental harm" in light of the reduction in waters subject to federal jurisdiction under the Navigable Waters Protection Rule. The court further found that the consequences of an interim change in regulatory regime did not support remand without vacatur, because the pre-2015 framework was already familiar to the agencies and regulated parties, and because the Corps and EPA had already indicated their intent to return to the pre-2015 framework while working to develop a new definition of "waters of the United States."

The Arizona district court's order did not specify whether the vacatur would apply nationwide, or only in Arizona. Nevertheless, on September 3, 2021, the Corps and EPA announced that they "have halted implementation of the Navigable Waters Protection Rule" in light of the Arizona district court's order and "are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime until further notice." Accordingly, the Navigable Waters Protection Rule is not currently in effect.

Following the Arizona court's ruling, other courts have granted the Corps and EPA's motion for voluntary remand without vacatur. In *Conservation Law Foundation v. EPA*, the U.S. District Court for the District of Massachusetts acknowledged the Arizona district court's order and declined to grant the plaintiffs' request for vacatur, stating that "[t]he most orderly means for me to assist in resolving the larger dispute over the [Navigable Waters Protection Rule] is to remand this case to the agencies and correlatively dismiss it without separately addressing the merits as to which the litigation is in an advanced stage in the District of Arizona." Additionally, the U.S. District Court for the Northern District of New York remanded the rule without vacating it. (*See* Order, *Murray v. Regan*, No. 1:19-cv-01498, Doc. No. 46 (N.D.N.Y. Sept. 7, 2021).) In that case, however, all parties had consented to remand without vacatur.

In three separate cases, two courts—the Northern District of California (in *Waterkeeper Alliance v. Regan* and *California v. Regan*) and the District of New Mexico (*Pueblo of Laguna v. Regan*)—have concluded that the Arizona district court's order mooted the question of whether vacatur was appropriate. In the two California cases, however, the court indicated that it "would not be inclined to impose vacatur" had the Arizona district court not mooted the question because there had been "no evaluation of the merits—or concession by defendants—that would support a finding that the rule should be vacated."

Finally, one other district to date court has remanded *and* vacated the Navigable Waters Protection Rule following the Arizona district court's decision. On September 27, the U.S. District Court for the District of New Mexico remanded and vacated the rule in *Navajo Nation v. Regan*. Although the District of New Mexico is within the Tenth Circuit and therefore bound by different precedent, the court applied the same test and adopted the same reasoning as the Arizona district court.

Next Steps in the Litigation and the Regulatory Process

Industry stakeholders that intervened in the Arizona litigation in support of the Navigable Waters Protection Rule have indicated that they intend to appeal the vacatur order to the Ninth Circuit, and other intervenors are still considering an appeal. An order staying the Arizona court's decision pending appeal, or reversing the vacatur in its entirety, could result in the Navigable Waters Protection Rule going back into effect until the Biden Administration completes the regulatory process for rescinding the rule. If the Ninth Circuit limits the scope of the vacatur to Arizona, the rule would go back into effect elsewhere

unless another court or courts vacate it. (See this CRS Report for discussion of nationwide injunctions of agency action.) Any appeals of the *Pasqua Yaqui* decision must be filed by October 29, 2021. Unless the Ninth Circuit were to grant emergency relief, the agencies' decision to halt implementation of the Navigable Waters Protection Rule would remain in effect while any such appeal is pending.

Further proceedings before the Arizona district court could also affect the current regulatory landscape. In addition to challenging the Navigable Waters Protection Rule, the plaintiffs in that litigation have also challenged the 2019 Repeal Rule, which repealed the 2015 Clean Water Rule and reinstated the pre-2015 regulatory regime pending the promulgation of the Navigable Waters Protection Rule. The court has not yet ruled on the merits of the 2019 Repeal Rule, but has directed the parties to submit proposals for briefing regarding the 2019 Repeal Rule. Further proceedings could thus potentially result in a ruling that the repeal of the 2015 Clean Water Rule was unlawful.

In the meantime, in light of the Corps and EPA's September 3 announcement that they had reverted to the pre-2015 regulatory framework, the Navigable Waters Protection Rule is not currently in effect. The agencies' change in approach sets up potential complexities for CWA-regulated projects that are currently underway. For example, it is not apparent what regulatory framework would apply to activities that are currently underway in water bodies that were not jurisdictional under the Navigable Waters Protection Rule, but would fall within CWA jurisdiction under the pre-2015 framework.

Nor is it clear what will happen to CWA permit applications that have already been submitted or approved based on jurisdictional determinations (AJDs) made under the Navigable Waters Protection Rule. AJDs are Corps documents that state whether waters of the United States are present or absent on a parcel, and that identify the limits of any such waters. EPA has indicated that, "[a]s a general matter, the agencies' actions are governed by the rule in effect at the time the Corps completes an AJD, not by the date of the request for an AJD." Accordingly, AJDs completed prior to the *Pasqua Yaqui* decision will remain valid until their expiration, unless they meet one or more criteria for revision or the recipient requests a new AJD pursuant to the pre-2015 regulatory framework. The agencies have not yet indicated how they will apply the criteria for determining whether revision is appropriate, including what would constitute "new information [that] warrants revision" prior to an AJD's expiration date.

The agencies have begun public outreach and stakeholder engagement activities but have not identified a schedule for proposing or finalizing any new rule, although statements in legal filings indicate that the agencies "anticipate issuing a proposed rule within the coming months." Finally, parties to several long-running disputes regarding the definition of WOTUS have recently filed a petition for certiorari with the Supreme Court, asking that the Court revisit its decision in *Rapanos* and adopt a narrower test for CWA jurisdiction. Although that proceeding is separate from the litigation surrounding the Navigable Waters Protection Rule, the Court's action could affect the outcome of the agencies' current regulatory process.

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