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ENVIRONMENTAL AND ENERGY

JULY 22, 2020

Current Events and Roiling Waters: A Series Update on Recent Clean Water Act Developments

Part 2: Redefining "Waters of the United States"

This is Part 2 in a five-part series addressing the recent changes in legal standards regulating water resources in the United States. Part 2 examines how the phrase "waters of the United States" is now defined under new federal regulations and how several ongoing lawsuits are already challenging it.

To view Part 1 of this series, click here.

How Did We Get Here?

The Clean Water Act (CWA) controls activities causing pollution in "navigable waters," which is defined to mean "waters of the United States, including the territorial seas." Therefore, the standard dictating what qualifies as "waters of the United States" (WOTUS) directly impacts which activities in which waters must comply with the CWA (e.g., obtaining discharge permits under CWA § 402 or dredge/fill permits under CWA § 404).

Despite its importance, however, the CWA itself does not further define WOTUS. Instead the federal agencies charged with implementing the CWA—the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army Corps of Engineers (Corps)—have defined WOTUS by regulation since the 1970s. Those regulations became the source of frequent lawsuits by parties who challenged the reach of the WOTUS definition under the CWA. The resulting outcomes created a complex web of legal standards—especially where wetlands were involved—in which the agencies and the regulated community looked not only to the statute and regulations, but also to tests established in judicial opinions and agency guidance subsequently developed to comply with all these requirements. While the WOTUS standards under this old regime often were confusing and difficult to implement, the revised WOTUS regulations adopted by the past two presidential administrations are what critics on both sides of the aisle regularly call "clear as mud."

In June 2015, EPA and the Corps under the Obama Administration issued the "Clean Water Rule" that purported to clarify which waters qualified as jurisdictional WOTUS under the CWA (the 2015 Rule). Industry groups, dozens of states, and environmentalists quickly flocked to the courts, resulting in multiple proceedings in different federal district and appellate courts across the country where parties both challenged and defended the 2015 Rule. Frequent criticisms lodged against the 2015 Rule were that it ambiguously defined WOTUS and its effect far exceeded the CWA's authority by classifying waters as WOTUS that the CWA did not intend to cover. The court rulings that followed in those actions, several of which stayed implementation of 2015 Rule, led to a kaleidoscope of requirements that would vary both by the state and by the date.

In the meantime, the Trump Administration began efforts to roll back the 2015 Rule altogether. On February 28, 2017, President Trump signed Executive Order 13778, which directed EPA and the Corps to review the 2015 Rule and to begin a rulemaking that would rescind or revise the 2015 iteration. As instructed, EPA and the Corps began a two-step rulemaking process with the stated goal of providing certainty to the regulated community and the public while the agencies developed a revised WOTUS definition. In October 2019, the agencies completed step one in that process by officially repealing the 2015 Rule and recodifing the preexisting regulations effective December 23, 2019.

A few months later, on April 21, 2020, EPA and the Corps completed step two in their planned rulemaking process by finalizing the "Navigable Waters Protection Rule" (the WOTUS Rule), which is supposed to streamline the definition of WOTUS and clarify which waters are and are not subject to CWA regulation. The WOTUS Rule took effect on June 22, 2020, except in Colorado where a court order stayed the rule as discussed further below.

What is Now a WOTUS?

The WOTUS Rule establishes two broad classes of waters: "jurisdictional waters" and "non-jurisdictional waters." Jurisdictional waters are WOTUS, which is now defined to consist of only four specific categories of waters. Twelve categories of waters are explicitly defined as "non-jurisdictional waters" that are not WOTUS (the WOTUS Exclusions).

Critically, under the WOTUS Rule, if a water does not fall into one of the four new categories to constitute a "jurisdictional water," then the water is expressly classified as "non-jurisdictional" under the WOTUS Exclusions and is not subject to regulation under the CWA regardless of whether it meets any other specific exclusion. Furthermore, even when a water meets one of the four categories for "jurisdictional waters," a WOTUS Exclusion may still apply to remove that water from the reach of federal regulation. These provisions bring important clarification to the regulated community about how to apply the WOTUS Rule in practice. However, the broad scope of these exclusions combined with the narrow scope of the jurisdictional WOTUS categories has also prompted intense criticism that the rule leaves numerous surface waters across the country unprotected.

The four categories of waters that are now defined as jurisdictional WOTUS are:

1. Territorial seas and waters susceptible to use in interstate or foreign commerce (also referred to as traditional navigable waters), including waters subject to the ebb and flow of the tide;
2. Tributaries;
3. Lakes, ponds, and impoundments of jurisdictional waters; and
4. Adjacent wetlands.

While at first glance these categories may appear clear and obvious to implement, each category carries unique definitions and specifications that must be understood and followed to avoid violating the CWA. For example, tributaries are classified as rivers, streams and other natural occurring surface water channels that contribute surface water flow to a traditional navigable water in a "typical year" through one of the other three categories of jurisdictional waters. A "typical year" is precisely defined as "when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling 30-year period." Tributaries that are WOTUS may be perennial (now defined to mean surface water flowing continuously year-round) or intermittent (now defined to mean surface water flowing continuously during certain times of the year and more than in direct response to precipitation).

Similarly, whether a wetland legally qualifies as an "adjacent wetland" that is a WOTUS involves numerous technical considerations. For example, you must determine whether it "physically touches" or "abuts" another jurisdictional water; shares a direct hydrologic connection with another jurisdictional water; is separated from another jurisdictional water by certain natural or artificial features; or is flooded by another jurisdictional water in a "typical year." Thus, while the WOTUS Rule purports to establish a plain language legal standard that the average person could understand and apply for him/herself, in reality, determinations about which waters qualify as WOTUS will continue to require specialized scientific information and training. Moreover, since these technical concerns must support any WOTUS determination by the agency or the regulated party, disagreements about when and where the WOTUS definition applies will likely continue to arise.

The WOTUS Exclusions will also be important to fully evaluate in any WOTUS determination since they provide many potential "off-ramps" from CWA regulation. The WOTUS Exclusions which are not WOTUS and are classified as non-

jurisdictional are:

1. Waters and water features that are not covered by the four categories of jurisdictional WOTUS;
2. Groundwater including groundwater drained through subsurface drainage systems;
3. Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;
4. Diffuse stormwater run-off and directional sheet flow over upland;
5. Certain ditches;
6. Prior converted cropland;
7. Artificially irrigated areas that would revert to upland without irrigation water;
8. Certain artificial lakes and ponds;
9. Certain water-filled depressions incidental to mining or construction activity;
10. Stormwater control features in upland or non-jurisdictional waters;
11. Groundwater recharge, water reuse, and wastewater recycling structures in upland or non-jurisdictional waters; and
12. Waste treatment systems.

These terms also carry several specific definitions and parameters that must be considered before concluding whether an exclusion applies. In addition, regulated entities should exercise caution when utilizing the groundwater exclusion given the U.S. Supreme Court's April 23, 2020 decision (just after the WOTUS Rule was issued but before it took effect) in County of Maui v. Hawaii Wildlife Fund, which found that a CWA permit could still be required for discharges of pollutants through groundwater into a WOTUS. While the Court's decision does not directly contradict the groundwater exclusion, this decision has not yet been tested in practice and future challenges on this front are possible. The Court's decision in County of Maui will be discussed further in Part 5 of this series.

Where Are We Going?

Dozens of parties have already sued EPA and the Corps to challenge the WOTUS Rule in six separate proceedings filed in five different federal district courts. These jurisdictional differences have already resulted in divergent court orders: a judge in the Northern District of California denied a request in State of California et al. v. Andrew R. Wheeler to block the WOTUS Rule nationwide, while a judge in the District Court for the District of Colorado in State of Colorado v. U.S. Environmental Protection Agency et al. granted a stay of the WOTUS Rule within Colorado only.

State of California was filed by a coalition of seventeen states and cities (the State Plaintiff Coalition) in May 2020, who challenge the WOTUS Rule as unlawful, arbitrary and capricious agency action. The State Plaintiff Coalition claims the WOTUS Rule is inconsistent with existing law governing what qualifies as WOTUS, disregards scientific evidence and prior agency findings, and fails to consider water quality impacts and the CWA's objective to protect the country's water resources. The State Plaintiff Coalition moved to enjoin the agencies from implementing and enforcing the WOTUS Rule, or for a stay of regulation's effective date, claiming it unlawfully eliminates whole categories of waters from federal protection, including many streams and wetlands that the agencies previously found vital to maintain the water quality of downstream navigable waters.

State of California has drawn significant attention, with more than a dozen industry organizations seeking to intervene and defend against the State Plaintiff Coalition's claims. Those organizations represent business interests like farming, ranching, forestry, manufacturing, mining, power generation, and construction. They contend that vacating the WOTUS Rule would subject their members to more burdensome regulatory requirements and inhibit their productive use and enjoyment of their lands. Likewise, on June 1, 2020, another 24 states joined this fight (predominantly those in the south and midwest) and sought to intervene in support of the WOTUS Rule, contending in part that it better respects the states'

regulatory authority over lands and waters by returning federal regulators to their appropriate lane.

On June 19, 2020, the California District Court judge denied the State Plaintiff Coalition's preliminary injunction and stay on rule's effective date, finding the plaintiffs failed to provide enough support for their claims and that the government has the power to reasonably interpret the long-disputed definition of WOTUS under the CWA and establish its reach given its ambiguity. While certainly not a death knell on the State Plaintiff Coalition's claims against the WOTUS Rule, the court's order portends the uphill battle the plaintiffs will face to convince the court that the WOTUS Rule must be vacated.

In May 2020, Colorado filed its own Complaint in State of Colorado in the District Court for the District of Colorado against EPA and the Corps, contending that new WOTUS definition conflicts with the CWA, contravenes controlling Supreme Court precedent, contradicts the CWA's objective, and ignores sound science. Colorado raised several alleged procedural defects too and requested a declaration that the WOTUS Rule is unlawful and should be vacated in its entirety, allowing the regulations and guidance existing prior to its promulgation to govern instead. Many of the same industry groups that intervened in State of California moved to intervene in Colorado's proceeding as well.

Colorado also requested a preliminary injunction on the WOTUS Rule and, on June 19, 2020, the District Court ordered a stay of rule's effective date within the District of Colorado. The court reasoned that earlier Supreme Court precedent (Rapanos v. U.S.) prevented the administration from amending the rule as it did in the latest regulations. This foreshadows a potential future where different courts in turn uphold or vacate the WOTUS Rule, or portions of it, creating a new kaleidoscope of requirements that the regulated community must be careful to track and follow.

Several other challenges also remain pending by environmental groups and Native American tribes in the District Courts for the District of Arizona and the District of New Mexico. Those parties raised several claims seeking to vacate both the WOTUS Rule and the Trump Administration's earlier rule repealing the 2015 Rule. Lastly, the New Mexico Cattle Growers' Association requested a narrow preliminary injunction in its preexisting proceeding in the District Court of New Mexico, asking the court to prohibit the agencies from enforcing the two words "or intermittent" within the definitions for "tributaries" and "adjacent wetlands" under the new WOTUS Rule. The Cattle Growers' Association contends this language regulating intermittent non-navigable waters exceeds the agencies' authority under the CWA and the Supreme Court's holding in Rapanos. The New Mexico District Court has not yet ruled on this request, but if granted, its nuanced effect could open new doors in the WOTUS challenges that often involve an "all or nothing" approach.

Since these lawsuits over the WOTUS Rule continue to proceed through the courts, the requirements that could apply in any particular state remain subject to further changes. Thus, this fluidity in the WOTUS Rule's effect means that entities planning activities in the coming year impacting surface waters should carefully consider their CWA obligations and be prepared to adjust course if needed.

If you are have questions about this series, please contact any attorney in the Environmental and Energy practice or the attorney at the firm with whom you are regularly in contact.

To continue to Part 3 of this series, click here.

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