President Trump Signs WOTUS Rule's Death Warrant

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On February 28, 2017, President Trump signed an Executive Order to begin the process of rescinding or revising the infamous Waters of the United States (or WOTUS) Rule. Years in the making, the WOTUS Rule was supposed to clarify which waterbodies fall under the permitting requirements of the US Army Corps of Engineers (Corps) and US Environmental Protection Agency (EPA) under the Clean Water Act.

Key Takeaways

- The permitting regime that predated the WOTUS Rule is likely to remain in effect for years, as EPA and the Corps seek to formulate a new rule or rescind the WOTUS Rule. President Trump's Executive Order also called on the Attorney General to try to freeze ongoing litigation, which would preserve the current regime.
- EPA and the Corps may apply existing WOTUS rules less aggressively in the current administration, so close calls are more likely to go in favor of the regulated community.
- If a new rule eventually is issued and survives legal challenges, it is likely to encompass "relatively permanent" waterbodies with a "continuous surface connection" to traditionally navigable waters.

Background

The Clean Water Act expressly regulates discharges to "navigable waters," which the statute defines as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The scope of the terms "navigable waters" and "waters of the United States" is relevant under several Clean Water Act programs, including those regulating discharges of dredged or fill material under Section 404 (administered jointly by the Corps and EPA), discharges of pollutants from "point sources" under Section 402 (delegated to most states for permitting under the National Pollution Discharge Elimination System) and spills of oil and hazardous substances under Section 311.

In 1985, the US Supreme Court decided that the term "navigable waters" includes more than just waters that would be deemed "navigable" in the "classical" or traditional sense. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

But the scope of the terms “navigable waters” or “waters of the United States” has remained difficult to define. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court created two definitions. Under one definition, offered by Justice Scalia and endorsed by three other justices, “waters of the United States” are “relatively permanent” waters that hold a “continuous surface connection” to a traditionally navigable water. Under the second definition, posed by Justice Kennedy in a concurring opinion, “waters of the United States” must have a “significant nexus” to a traditionally navigable water.

Federal courts have inconsistently applied *Rapanos*.

- The 1st, 3rd and 8th Circuits have decided that either the “relatively permanent” definition or the “significant nexus” definition can be used. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009).
- The 11th Circuit has held that only the “significant nexus” definition can be used. *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007).
- The 4th, 6th, 7th and 9th Circuits have used the “significant nexus” definition to resolve cases but left open the possibility of using the “relatively permanent” definition as an alternative. *See Precon Development Corporation, Inc. v. United States Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007).

In 2008 guidance, EPA and the Corps stated that *Rapanos* gave them regulatory jurisdiction over a waterbody if either definition was met. EPA/Corps, Clean Water Act Jurisdiction Following the US Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (Dec. 2, 2008).

But according to EPA and the Corps, “Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the [Clean Water Act] clearer, simpler, and faster.” 80 Fed. Reg. 37056 (June 29, 2015).

So, after preparing a 1,200-page scientific report on the “connectivity” of waters and convening EPA's Science Advisory Board to review the report, EPA and the Corps issued the first draft of the WOTUS Rule in March 2014. The agencies received over a million public comments. While some claimed that the Rule did not go far enough, the loudest critics called the Rule an inappropriate expansion of federal jurisdiction. Congress sought to prevent the Rule's progress, and the House passed the Waters of the United States Regulatory Overreach Protection Act of 2014.

The final WOTUS Rule was published on June 29, 2015. Despite the agencies' efforts to scale back the draft rule, states, business interests and environmental groups filed suits challenging the final WOTUS Rule in federal district courts and courts of appeal. On August 27, 2015, a federal judge enjoined the Rule in 13 western states. *North Dakota v. United States EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). The Rule otherwise became effective on August 28, 2015. Then, on October 9, 2015, the Sixth Circuit stayed the Rule nationwide. *In re EPA*, 803 F.3d 804 (6th Cir. 2015). On

January 13, 2017, the US Supreme Court granted a petition to consider whether the Sixth Circuit could decide the Rule's fate. *National Association of Manufacturers v. Department of Defense*, No. 16-299 (U.S. Jan. 13, 2017) (cert. granted). (Under the Clean Water Act, certain types of cases must be brought directly in courts of appeals and cannot be brought in federal district courts.) The Supreme Court seemed eager to constrict the Rule, with certain justices opining in *United States Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016), that "the reach and systemic consequences of the Clean Water Act remain a cause for concern."

In the end, the scope of the WOTUS Rule did not represent much of a departure from the agencies' existing practices. And the Rule would have categorically *excluded* certain types of waters that previously could have been construed (and now may continue to be construed) as jurisdictional. Despite some assertions to the contrary, the WOTUS Rule expressly excluded "puddles." 80 Fed. Reg. 37099.

When he signed the Executive Order, President Trump called the WOTUS Rule "a horrible, horrible rule" and "one of the worst examples of federal regulation . . . truly run amok." Remarks by President Trump at Signing of Waters of the United States (WOTUS) Executive Order (Feb. 28, 2017). Under the Executive Order, EPA and the Corps must publish for notice and comment a proposed rule rescinding or revising the Rule. Further, the order requires EPA and the Corps to consider defining "navigable waters" based on Justice Scalia's "relatively permanent" waters test from *Rapanos*.

Implications

The WOTUS Rule was stayed nationwide shortly after it became effective. So, while it generated a tidal wave of political and legal action, it did not move the needle toward the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Rescinding or revising the Rule will require notice and comment, a time-consuming process that will likely be protracted by litigation. Until a new rule is promulgated, the regulated community must continue to abide by the panoply of existing regulations, case law and agency guidance that attempts to clarify what is meant by "waters of the United States."
If you would like to discuss more particularized implications for your project or company, please contact WilmerHale's Energy, Environment and Natural Resources Group.

Authors

H. David Gold

SPECIAL COUNSEL

david.gold@wilmerhale.com

+1 617 526 6425