The Endless Dance: Defining "Waters of the United States"

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The two-step regulatory process initiated in 2017 by EPA and the U.S. Army Corps of Engineers (together, the "Agencies") to revise the regulatory definition of "waters of the United States" ("WOTUS") continues its methodical "two-step" through a busy litigation dancehall. As discussed in our October, 2018 edition of *Environmental Notes (see here),* the regulatory process involves (1) rescission of the 2015 Clean Water Rule amendments to the definition of WOTUS, a temporary reversion to the pre-Clean Water Rule definition of WOTUS (circa 1986/1988), and use of 2008 EPA and Corps WOTUS guidance to implement the pre-Clean Water Rule definition; and (2) issuance of a new/replacement WOTUS definition.

As to step 1, the Agencies published this past October a final rule, effective December 23, 2019, repealing the Clean Water Rule and reverting temporarily to the pre-Clean Water Rule definition of WOTUS and using the 2008 WOTUS implementation guidance ("Final CWR Repeal"). For step 2, the Agencies published on February 14, 2019 the proposed new/replacement definition of WOTUS, which, after extensive public comment filings, is still being finalized. These actions come after and amid various legal challenges to the Clean Water Rule and the Agencies' 2017-2018 attempt to push the effective date for the Clean Water Rule into 2020, which also fell to legal challenges. The net result of this mix of legal challenges had been a patchwork of Clean Water Rule applicability in various states.

With the Final CWR Repeal now effective, all of the nation rests on equal regulatory footing for determining what is WOTUS. In addition, the Final CWR Repeal clarifies that any previous Corps-approved jurisdictional determination for WOTUS delineations issued pursuant to the Clean Water Rule will remain valid through its 5-year effective period, though parties may seek a sooner reevaluation of this determination based on the Final CWR Repeal's reversion to the pre-Clean Water Rule regulation implemented through the 2008 WOTUS guidance.

As part of the two-step approach, the Agencies have stated they want a clearer and more functional definition of WOTUS that aligns better with statutory authority. In the Final CWR Repeal, the Agencies examined why they now believe the Clean Water Rule was faulty and warranted repeal and why they believe it is best to revert to the 1986/1988 regulations and the 2008 Guidance until the new WOTUS definition is finalized. On substantive legal grounds, they raise concerns about how the Clean Water Rule expanded the scope of regulated waters in several respects that were inconsistent with the Clean Water Act, underlying authority to regulate "navigable waters" pursuant to the U.S. Constitution's Commerce Clause, and three recent U.S. Supreme Court cases addressing the appropriate scope of regulated waters under the Clean Water Act. On procedural grounds, the Agencies noted that significant changes from the proposed version of the Clean Water Rule were included in the final version that extended (or limited) jurisdiction over certain water features based on their specific

distances from otherwise regulated waters. Because these changes were not subjected to public comment pursuant to the federal Administrative Procedure Act ("APA"), they are procedurally flawed. To buttress these concerns, the Agencies also cite problems with the Clean Water Rule found by the courts as the basis for enjoining implementation of the Clean Water Rule.

Two specific themes of the Agencies' rationale for the Final CWR Repeal are worth exploring, as they seem to offer greater insight into how the Agencies will next approach framing a final WOTUS definition rule reflecting a narrower scope of regulated waters. First, the Agencies argued that the Clean Water Rule exceeded in several respects the scope of the Agencies' legal authority to regulate waters pursuant to the Clean Water Act, particularly as opined by Justice Kennedy in his "significant nexus" test in *Rapanos v. United States* and *Carabell v. United States* (together, *Rapanos*). The Agencies now believe they went too far when extrapolating the significant nexus test from *Rapanos*, relying too heavily on a purely technical analysis of hydrological and ecological connections and failing to recognize the limits of the Commerce Clause and Clean Water Act on their jurisdiction and powers. This is a particularly significant *mea culpa*, because in 2015 the Agencies based the Clean Water Rule framework largely on the significant nexus test. To reverse course in this regard required a substantial amount of explaining by the Agencies and will likely be further justified in the final rule for the planned new/replacement definition of WOTUS as the basis for a narrower scope of regulated waters, particularly as to relatively remote or inactive water features.

Second, by arguably extending federal control over nearly all surface waters, regardless of their remoteness to navigable-in-fact waters, the Clean Water Rule failed to properly preserve states' traditional authority over waters and planning for water resources and land use, as protected by the Clean Water Act, particularly given the lack of clear Constitutional or legislative authority for expanding the reach of such jurisdiction. Therefore, the Agencies can be expected to frame any new WOTUS definition in the context of ensuring that states retain a significant role and powers over water resource and land use planning.

The Agencies explore each of these points extensively in the preamble of the Final CWR Repeal, but it seems that wrestling with the extent of lawfully authorized jurisdiction over tributaries and adjacent and remote water bodies and wetlands remains the biggest concern in shaping a new definition of WOTUS. The Final CWR Repeal also incorporates a somewhat different and lengthier economic analysis of the effects of the repeal. This new economic analysis was not subjected to public notice before issuing the Final CWR Repeal, so whether that poses a procedural problem for the Final CWR Repeal under the APA remains to be seen.

As expected, various environmental, industry and agricultural interest groups have already lodged several challenges to the Final CWR rule based on different grounds. Accordingly, litigation continues to swirl around the WOTUS definition. In the meantime, the simple "two-step" envisioned by the Agencies could become an endless line dance. When and how the music stops, no one knows.

***Definition of "Waters of the United States" – Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56626 (Oct. 22, 2019).**

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