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Agriculture and the Clean Water Act: WOTUS, Groundwater and More WOTUS, and Agriculture

Jesse J. Richardson Jr. and Tiffany Dowell Lashmet

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I. Introduction

The legal scope of “waters of the United States” has been debated in the legislature, federal agencies, and courtrooms across the country since the 1972 Clean Water Act (CWA). CWA section 404 prohibited discharge of dredged or fill material into “navigable waters” of the United States. 33 U.S.C.A. § 1344, i.e. “waters of the United States, including the territorial seas”; 33 U.S.C.A. § 1362(7), but “waters of the United States” (WOTUS) was not further defined in the CWA. Below, we review the case law and regulatory rules interpreting WOTUS, including the 1993 WOTUS definition, the 2015 “Obama Rule,” the 2019 “Trump Rule,” and the current still-unsettled status of the law.

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II. Regulatory Interpretations of WOTUS

Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) have tried to define WOTUS in two key rules, first in 1993 and more recently in 2015.

A. The 1993 Rule Sets the Stage for *Rapanos* and the Obama Rule

The 1993 Rule tried to define the meaning of WOTUS under the Clean Water Act with clarity, listing seven categories: (1) those used, or were used in the past, in interstate or foreign commerce, including tidal movement; (2) interstate waters and wetlands; (3) various other waters like intrastate lakes, rivers, streams (even intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, assuming such waters: (i) enable interstate or foreign travelers use for recreational or other purposes; or (ii) provide habitat for fish

or shellfish that are sold in interstate or foreign commerce; or (iii) those used for industrial purpose by industries in interstate commerce.

To enable tidal movement interpretation, the 1993 Rule also defines “ordinary high water mark” and “tidal waters.” 33 CFR § 328.3(e), (f).

WOTUS does not include prior converted cropland or water treatment systems. 33 CFR § 328.3(a) (8). 33 CFR § 328.3(b) defines wetlands as areas saturated by surface or groundwater that support swamp vegetation. Congress excluded nonpoint sources from federal jurisdiction, making clear their desire to regulate only the sources with the most obvious and direct contributions to downstream water quality. For example, agricultural storm water was exempted from the scope of CWA and thus not WOTUS.

In a key ruling that presaged future case law debates, “adjacent” is defined as “bordering, contiguous, or neighboring” including those separated by “man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” 33 CFR § 328.3.

B. The Obama Rule Draws Litigation, Splits States

In light of the decades of legal debate over the meaning of WOTUS, and perhaps in response to the chiding of Chief Justice Roberts in his *Rapanos* concurrence, the EPA and Corps tried to define the scope of WOTUS in 2014. *See* Army Corps of Engineers and EPA, “Definition of Waters of the United States Under the Clean Water Act, 79 FR 22188 (April 21, 2014).

The agency received more than one million comments on the proposed rule and published a final rule in June 2015 (effective date of August 28, 2015). *See* Army Corps of Engineers and EPA, “Clean Water Rule: Definition of ‘Waters of the United States,’ Final Rule,” 80 FR 37054 (June 29, 2015) (Obama Rule).

The Obama Rule followed the 1993 Rule in large part, and published “categorical” exemptions (i.e., waters that are categorically not considered WOTUS, even if they meet the terms of the definitions in the Rule). However, the Obama Rule stirred controversy with its adoption of the “Kennedy-Rapanos” test outlined below at IIC.C. a.

With regard to ponds or lakes, “adjacent” waters include any wetlands within or abutting the ordinary high-water mark. *Id.* Adjacent waters include all waters that connect segments of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries. *Id.*

Certain waters would be subject to a case-by-case, factual evaluation of whether or not they are a WOTUS based on the existence of a significant nexus to a jurisdictional water, using the following criteria.

- a. Regional water features with a significant nexus.
- b. Proximity to flood plain or high tide line with a significant nexus.

Upon publication of the Obama Rule, lawsuits were filed across the country by 31 states and 53 non-state parties including environmental groups and industry groups representing agriculture, forestry, and recreational interests. *See* 84 FR 4161. Due to uncertainty over where these cases should be brought under the CWA, cases were filed in both federal district courts and federal appellate courts across the country. *Id.* Courts decided that the proper venue for legal challenges to the WOTUS definition is district court. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 137 S. Ct. 811 (2017) (holding that the “WOTUS Rule falls outside the ambit of §1369(b)(1), challenges to the Rule must be filed in federal district courts”)

The Obama Rule was not stayed and was enforced in 28 states for awhile. *See, e.g., North Dakota v. EPA*, 127 F. Supp. 1047 (D.N.D. 2015) (injunction in 13 states); *Georgia v. Pruitt*, No. 15-cv-79, slip op. at 10 (S.D. Ga. June 8, 2018) (11-state injunction); *Texas v. EPA*, No. 3:15-cv-162, 2018 U.S. Dist. LEXIS 160443, at *4 (S.D. Tex. Sept. 12, 2018) (three states). One court stayed the rule nationwide. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015) (issuing nationwide stay of Obama Rule) while another court lifted it. *In re Dep't of Def. & EPA Final Rule*, 713 Fed. App. 489 (6th Cir. 2018). The Trump Administration's vacating the Rule annuls these enforcement and stay decisions effective December 23, 2019.

III. Case Law Comes to Conflicting Conclusions

Among the many WOTUS cases, there are a few key U.S. Supreme Court cases that set the stage for the Obama WOTUS Rule.

A. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)

This decision held that the Corps has jurisdiction over “wetlands that actually abutted on a navigable waterway,” upholding as “reasonable” the Corps’ conclusion that “wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality.” *Riverside Bayview*, 474 U.S. at 135.

B. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC)

The Seventh Circuit agreed that the Corps had jurisdiction over an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds. The Corps asserted jurisdiction under the Migratory Bird Rule under WOTUS on habitat for migratory birds. The U.S. Supreme Court reversed in a 5–4 decision, which denied *Chevron* deference, citing states authority over local water quality issues. Chief Justice Rehnquist wrote a 5–4 majority opinion holding that *only* waters that are adjacent or tributaries that are adjacent to navigable waters would be WOTUS. Justice Stevens’ dissent argued that this “new jurisdictional line” limited WOTUS to “actually navigable waters, their tributaries, and wetlands adjacent to each.” *Id.* at 176.

C. *Rapanos v. United States*, 547 U.S. 715 (2006)

a. Justice Kennedy’s Concurrence (the Ostensible “Majority”)

Justice Kennedy’s concurrence sets out the test that is most often used after *Rapanos*, and the test that has generated the most uncertainty. The “significant nexus” test (drawn from SWANCC) grants the Corps jurisdiction over “wetlands” (and presumably other “waters”) where a significant nexus exists between the wetlands and “navigable waters in a traditional sense.” *Rapanos*, 547 U.S. at 779 (Kennedy concurring). Wetlands possess this nexus where the wetlands, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” The plurality opinion characterized Justice Kennedy’s concurrence as resting upon “an interpretation of the phrase ‘significant nexus,’” which appears in one of our opinions. *Rapanos*, 547 U.S. at 753.

Justice Kennedy appears to find that the Corps’ standard for jurisdiction over adjacent wetlands is based upon a reasonable interpretation of the statute under the *Chevron* test. *Rapanos*, 547 U.S. at 780 (Kennedy concurring) (relying on *Riverside Bayview*). However, the concurrence finds that the definition of “tributary” was too broad, so a case-by-case analysis is necessary in making jurisdictional determinations for non-adjacent wetlands. *Id.* at 780–82.

As is discussed below, Justice Kennedy’s concurrence differs from the plurality opinion, *inter alia*, by interpreting the significant nexus test as applying to isolated wetlands, or to isolated wetlands and wetlands adjacent to some types of tributaries, whereas the plurality found that the actual abutment itself formed the significant nexus. Under the plurality’s opinion, isolated waters are not jurisdictional.

b. Justice Scalia's Plurality Echoes SWANCC

In a 4–4–1 decision, Justice Scalia, writing for the plurality, held that WOTUS includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features; that are described in ordinance parlance as ‘streams,’ ‘oceans, rivers, [and] lakes,’ Webster’s New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage or rainfall.” *Rapanos*, 547 U.S. at 732–33. The language of the statute indicates that “navigable waters” differ from “point source” and that a point source is therefore not a navigable water. *Id.* at 735. Many of the conduits classified by the Corps and lower courts as tributaries are actually point sources. *Id.*

In addition, Justice Scalia set out, in the plurality’s view, the correct standard to determine “adjacency.” To be “adjacent,” wetlands must “[possess] a continuous surface connection that creates the boundary-drawing problem . . . addressed in *Riverside Bayview*.” *Rapanos*, 547 U.S. at 757. When Justice Scalia referred to “surface connection,” he presumably intended to articulate the fact that the wetland extended to the boundary (abutted) the navigable water in *Riverside Bayview*. Note that Justice Scalia did not say “surface water connection,” which some commentators seem to infer. A groundwater connection existed in *Riverside Bayview*, another fact that indicates that Justice Scalia was referring to actual abutment.

c. Justice Roberts’ Concurrence

Chief Justice Roberts wrote separately to note that it was “unfortunate” that the Court failed to reach a majority. Additionally, he criticized the Corps for refusing to publish guidance on the scope of its power, even after being warned to do so in SWANCC.

IV. Conclusion

The definition of WOTUS under the Clean Water Act remains both unclear and contentious. Both the Obama Rule and the Trump Rule clearly exclude groundwater from the definition, but much remains to be determined. Particularly contentious issues include the definitions of “adjacency” and “tributary”. Ephemeral streams have also been the focus of much debate. As the existing litigation continues, more litigation is likely after the Trump Rule is finalized. Short of unlikely Congressional action, the issue will likely not be resolved, if ever, until after years of litigation.

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