What’s Next for WOTUS?

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Overview

- Historical Context
- *National Association of Manufacturers v. DOD*
- Wassup with the Stay?
- New Rulemakings
- Potential Litigation
CWA Statutory Definition

“Navigable waters” =

“the waters of the United States, including the territorial seas”

The same definition applies throughout CWA, e.g., §§ 404, 402, 401, 311

Definition has been addressed 3 times by the Supreme Court
Riverside Bayview (1985)

- 9-0: CWA confers federal authority to regulate adjacent wetlands
- Term “navigable” is of “limited import”

SWANCC (2001)

- 5-4: Corps cannot regulate isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds
- “Navigable” may have limited effect, but not no effect
Rapanos (2006)

Plurality (4 Justices): Relatively permanent waters that connect to a TNW and wetlands with a continuous surface connection

Concurrence (1 Justice): Waters that, either alone or in combination with other similarly situated features in the region, have a significant nexus with a TNW

Dissent (4 Justices): Waters that satisfy either the Scalia or the Kennedy test
The Clean Water Rule (6/29/15)

**Purpose:** To provide a simpler, clearer, and more consistent approach to determining jurisdictional status of waters, based upon science, the agencies’ expertise and experience, and Supreme Court decisions

Established 3 categories:
- Waters that are jurisdictional in all instances
- Waters that require case-by-case sig/nex analysis
- Exclusions

Supported by extensive record: connectivity report that reviewed 1200 peer-reviewed science publications; an extensive economic analysis; 400 public hearings; consideration of more than 1 million public comments
Clean Water Rule Litigation

18 District Court Complaints:
- 100 plaintiffs (businesses, states & environmental groups)
- U.S. motion to consolidate all complaints denied (10/13/15)
- Most complaints dismissed or stayed; one court issued PI

22 Petitions for Review:
- 100 petitioners
- Consolidated in 6th Circuit Court of Appeals
- CWR stayed (10/9/15)
- 6th Circuit ruled that it has exclusive jurisdiction (2/22/16)
- Rehearing en banc denied (4/21/16)
- Four sets of opening briefs (292 pages) (11/1/16)
- U.S. responsive brief (245 pages) (1/13/17)
- Litigation in 6th Circuit stayed (1/25/17)
# States Challenging or Supporting the Clean Water Rule

**States Challenging the Rule**

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<tr>
<th>State</th>
<th>Agency/Department</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>New Mexico (Environment Department and State Engineer)</td>
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<td>Alaska</td>
<td>North Carolina (Department of Environment and Natural Resources)</td>
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<td>Arizona</td>
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**States Supporting the Rule**

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National Association of Manufacturers v. Department of Defense

- Unanimous decision authored by Justice Sotomayor
- Inquiry begins and ends with the statutory text
National Association of Manufacturers v. Department of Defense

- CWA enumerates 7 categories of EPA actions for which review is exclusively in the U.S. Courts of Appeals
  - Clean Water Rule is not an effluent or other limitation
  - Clean Water Rule is not an action issuing or denying a section 402 permit
National Association of Manufacturers v. Department of Defense

- Supreme Court rejects policy arguments: the text is clear

  - Bifurcation of review occurs elsewhere in CWA (e.g., review of section 402 and section 404 permits)

  - Congress did not prioritize quick and orderly resolution of WOTUS rule challenges

  - Congress’s plain language trumps the goal of promoting national uniformity
National Association of Manufacturers v. Department of Defense

The key take-away:

A challenge to (any) WOTUS rule must begin in U.S. District Courts
Wassup with the Stay?

- Sixth Circuit lacked jurisdiction to stay Clean Water Rule
- Supreme Court judgment will issue no earlier than Feb. 16, 2018
- North Dakota preliminary injunction could go back into effect
- Other district courts could issue PIs
- Could be overtaken by intervening rulemakings
Sec. 3. Definition of "Navigable Waters" in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "Navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006).
Initially, a two-step process to rescind and replace …
EPA and the Army Finalize Rule Adding an Applicability Date to the 2015 Rule

The Environmental Protection Agency and U.S. Department of the Army finalized a rule adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule will not be applicable until February 6, 2020. Read the Final Rule.
Wait, what’s an applicability date?
Effective date
The effective date is the date that we amend the CFR by following your amendatory instructions. Therefore, effective dates cannot be retroactive and only rule documents that amend the CFR have effective dates.

Compliance dates and applicability dates
Some rules include a compliance or applicability date in addition to an effective date. The compliance or applicability date is the date that the affected classes must comply with the rule. Place the compliance or applicability date after the effective date (see Example 3-9).

<table>
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<tr>
<th>Table 3-3: Differences between effective dates and compliance or applicability dates</th>
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<tr>
<td><strong>Effective Date</strong></td>
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<tr>
<td>Addresses the CFR placement.</td>
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<td>Is the date the rule affects the current CFR.</td>
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<td>Is required by OFR.</td>
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<td>Must not be retroactive.</td>
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Why did the agencies suspend the Clean Water Rule?

- Maintain the “legal” status quo (once Sixth Circuit lifts improper national stay) to provide:
  - clarity
  - certainty
  - consistency
Why did the agencies suspend the Clean Water Rule?

- Clarity? (That was the reason for the Clean Water Rule in the first place: to try to clarify CWA jurisdiction post-*Rapanos*.)

- Certainty? (The only certainty is the judicial challenge to the Suspension Rule.)

- Consistency? (The U.S. Supreme Court just told us that is not a primary concern.)
At least the legal issues are clear …

- We know which courts will review the Suspension Rule (U.S. District Courts).

- We know the agencies are not relying on APA section 705 (because they said so).

- We know the agencies declined to examine the scientific basis of the Clean Water Rule and alternatives, costs, and benefits of its delay (because they said so).
And so the next round of litigation begins …
Current and Potential Litigation

- Challenges to Suspension Rule
  - Complaints already filed by 11 states in SDNY and by environmental groups in SDNY and DSC

- Challenges to Rescission Rule

- Challenges to Replacement Rule
Issues Likely to be Litigated

- Can a district court issue a nationwide injunction?
- Role of science vs. policy
- Costs and benefits
- Applicability of Scalia test
What Test Applies?
Hughes v. United States

- How should lower courts construe fractured decisions of Supreme Court when one opinion concurring in judgment is not a subset of another?

Possible outcomes:

- Plurality opinion controls
- Concurring opinion controls
- Either opinion controls
- Both opinions control
- Reasoning vs. results
- No controlling rule of law