WOTUS: The Legal Landscape

"Zombie WOTUS" Threatens Farmers and Ranchers

NEW DIRTY WATER RULE WOULD TRASH COMMUNITIES’ DRINKING WATER

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Outline

➢ WOTUS in SCOTUS
   • Riverside Bayview, SWANCC, and Rapanos

➢ Clean Water Rule
   • Litigation on the rule and the proper judicial forum

➢ Trump Administration actions
   • Rescind, suspend, and replace

➢ Next steps and future scenarios
Status of Trump administrative actions affecting the Clean Water Rule

1986/1988 Regulation and pre-2015 guidance

2015 Clean Water Rule (CWR)

Suspension Rule

Repeal Rule

Replacement Rule

July 2017 Proposal to repeal CWR published in Federal Register

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Adapted from Gardner & Okuno (2018)
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SWANCC

Isolated waters
33 CFR § 328.3(a)(3)

Coastal wetland subject to the ebb and flow of the tide
33 CFR § 328.3(a)(1)

Territorial sea
33 CFR § 328.3(a)(6)

Wetland adjacent to non-navigable tributary
33 CFR § 328.3(a)(7)

Wetland adjacent to traditional navigable water
33 CFR § 328.3(a)(7)

Non-navigable tributary
33 CFR § 328.3(a)(5)

River
33 CFR § 328.3(a)(1)
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Clean Water Rule

➢ Proposed rule issued in April 2014
➢ Comment period until November 2014
➢ Final rule issued in June 2015
From the Congressional Research Service ...

Figure 1. Jurisdictional Waters under the Final Clean Water Rule

(Not drawn to scale)

Jurisdictional by Rule

Adjacent Waters

Jurisdictional by Rule if located within 1,500 ft of the high tide line, or the OHWM of the Great Lakes ("adjacent waters")

Jurisdictional if not an "adjacent water," but there is significant nexus to a jurisdictional water determined case-by-case

Jurisdictional if there is a significant nexus to a jurisdictional water determined case-by-case*

Jurisdictional by Rule

Rivers, streams, tributaries, interstate waters and wetlands, territorial seas

Jurisdictional by Rule

D I R Y  L A N D

4,000 FEET

1,500 FEET

100 FEET

OHWM

100-YEAR FLOODPLAIN

D I R Y  L A N D

OHWM

Ordinary High Water Mark

* Also applies to prairie potholes, Carolina and Delmarva Bays, Pocosins, western vernal pools, and Texas coastal prairie wetlands


Notes: “Jurisdictional by Rule” waters are jurisdictional per se without case-specific analysis. Other waters in this figure may be jurisdictional if there is a significant nexus to a jurisdictional downstream water. See text for discussion.
The litigation response ...

➢ United States District Courts
   • 18 cases filed

➢ United States Circuit Courts of Appeals
   • 22 petitions for review filed
A multitude of legal claims …

- **Procedural violations associated with the rulemaking process**
  - Substantial changes to proposed rule without additional public comment
  - Final rule is not a “logical outgrowth” of the proposed rule
  - Failed to make all information relied upon available to the public
  - Failed to respond appropriately to comments

- **Clean Water Act (statutory) violations**
  - Exceeds the agencies’ CWA authority
  - Inconsistent with CWA’s plain language

- **Constitutional violations**
  - Commerce Clause
  - Tenth Amendment
  - Due Process Clause

- **Other violations**
  - Regulatory Flexibility Act
  - Unfunded Mandates Reform Act
  - National Environmental Policy Act
  - Anti-Lobbying Act
  - Executive Orders
Two-track litigation

**US District Court**
- August 2015: US District Court for the District of North Dakota issues preliminary injunction
- Injunction applies in 13 states

**US Court of Appeals**
- October 2015: Sixth Circuit issues national injunction (before deciding whether it has jurisdiction)
- February 2016: Sixth Circuit decides, 2-1, that it has jurisdiction

January 2017: US Supreme Court agrees to review the Sixth Circuit case

➢ Unanimous decision authored by Justice Sotomayor

➢ Inquiry begins and ends with the statutory text
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
The key take-aways:

A challenge to (any) WOTUS rule must begin in U.S. District Courts

And thus the Sixth Circuit’s national stay of Clean Water Rule is lifted
Meanwhile ...
Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

EXECUTIVE ORDER

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).
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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>
<thead>
<tr>
<th>Table 3-3: Differences between effective dates and compliance or applicability dates</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Effective Date</strong></td>
</tr>
<tr>
<td>Addresses the CFR placement.</td>
</tr>
<tr>
<td>Is the date the rule affects the current CFR.</td>
</tr>
<tr>
<td>Is required by OFR.</td>
</tr>
<tr>
<td>Must not be retroactive.</td>
</tr>
</tbody>
</table>
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,
CHARLESTON WATERKEEPER,
AMERICAN RIVERS,
CHATTahoochee Riverkeeper,
CLEAN WATER ACTION, DEFENDERS
OF WILDLIFE, FRIENDS OF THE
RAPPahannock, North Carolina
Coastal Federation, and North
Carolina Wildlife Federation,

Plaintiffs,

v.

E. Scott Pruitt, as Administrator of the
United States Environmental Protection
Agency; United States
Environmental Protection
Agency; R.D. James, as Assistant
Secretary of the Army for Civil Works; and
United States Army Corps of
Engineers,

Defendants,

American Farm Bureau
Federation, et al.,

Intervenor-Defendants,

No. 2-18-cv-330-DCN

ORDER

IV. CONCLUSION

As administrations change, so do regulatory priorities. But the requirements of
the APA remain the same. The court finds that the government failed to comply with
these requirements in implementing the Suspension Rule. Accordingly, the court
GRANTS summary judgment for the environmental plaintiffs, DENIES the
government’s cross-motion for summary judgment, and ENJOINS the Suspension Rule
nationwide.

AND IT IS SO ORDERED.
Suspension Rule litigation

➢ Nationwide or universal injunction

4 Certainly, nationwide injunctions have the potential for abuse. As the Seventh Circuit recently observed in City of Chicago v. Sessions, 888 F.3d 272, 288 (7th Cir. 2018):

[Under the Obama administration, such injunctions stymied many of the President’s policies, with five nationwide injunctions issued by Texas district courts in just over a year[.]. At that time, then-Senator and now-Attorney General Sessions characterized the upholding of one such nationwide preliminary injunction as “a victory for the American people and for the rule of law.” Press Release, Sen. Jeff Sessions III, June 23, 2016. Now, many who advocated for broad injunctions in those Obama era cases are opposing them.

This court agrees that nationwide injunctions should be utilized “only in rare circumstances.” Id. This is one such set of rare circumstances. Just because the political shoe is on the other foot does not mean that nationwide injunctions are no longer appropriate. What is good for the goose is good for the gander.
Effect of invalidation of the Suspension Rule?
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Replacement rule

- Emphasizes states’ role in CWA implementation
- WOTUS includes:
  - Traditional navigable waters
  - Tributaries that contribute perennial or intermittent surface flow to a TNW*
  - Adjacent wetlands that abut or have a direct, perennial or intermittent, ** hydrologic surface connection to other covered waters

*Or maybe only perennial tributaries  **Or maybe not
Replacement rule: next steps

➢ 60-day written comment period once published in the Federal Register

➢ EPA-Army informational webcast on February 14, 2019

➢ EPA-Army public meeting in Kansas City on February 27-28, 2019

***

➢ Agencies consider public input, and after OMB review, issue a final rule
Expect a multitude of (familiar) legal claims, including…

- Procedural violations associated with the rulemaking process
  - Substantial changes to proposed rule without additional public comment
  - Final rule is not a “logical outgrowth” of the proposed rule
  - Failure to respond appropriately to comments
  - Failure to provide a reasoned explanation for the change
  - Failure to consider the scientific record
  - Failure to consider the economic benefits of wetlands

- Clean Water Act (statutory) violations
  - Inconsistent with CWA’s plain language and its goals

- Other violations
  - National Environmental Policy Act
Expect the challenges to be brought in multiple U.S. District Courts …

… in accordance with National Association of Manufacturers v. Department of Defense

And if a challenger prevails, expect it to request a nationwide or universal injunction
Some states may adjust their current practices in light of a revised definition of “waters of the United States.” However, the agencies are not able to predict what changes might result from the proposed rule. Additionally, the agencies are aware that there are currently, and have been in the past, bills before state legislatures to either add or repeal laws that address the scope of state regulation compared to federal requirements. While this could have an effect on the regulation of waters that are not “waters of the United States” in the future, the agencies will not speculate on the outcomes of these efforts and instead are focused in this chapter on the information that is available to the agencies at this time.
Will states fill the gaps?

➢ No.
What would be likely effects if CWA jurisdiction is limited?

➢ No need for CWA permit to fill certain wetlands or streams, even if they were subject of previous denial

Rollback of federal water rule would have major impacts in Tucson area

By Tony Davis Arizona Daily Star  Dec 11, 2018

ENVIRONMENTAL PROTECTION AGENCY


Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.
What would be likely effects if CWA jurisdiction is limited?

➢ No need for CWA permit means no need for projects to provide offsets, and thus there would be no need to obtain mitigation credits.
Unintended consequences for developers

➢ No need for CWA permit means no need for ESA section 7 consultation and incidental take statement

➢ But the ESA still applies and the developer may then need to obtain an ESA section 10 incidental take permit
Thank you for your attention!