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Client Alert: The Legal Tug of War Over the Definition of Waters of the United States

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Once again, developers and other interested parties are grappling with yet another District Court decision regarding the definition of Waters of the United States. On August 30, 2021, the Federal District of Arizona vacated the Trump Administration of Waters of the United States. *Pasqua Yaqui Tribe v. U.S. EPA*, Case No. 4:20-cv-00266-RM, ECF No. 99; Definition of "Waters of the United States;" Final Rule, 85 Fed. Reg. 22250 (April 21, 2020) (Navigable Waters Protection Rule (NWPR)). Due to this most recent decision, the U.S. Environmental Protection Agency (U.S. EPA) and Army Corps of Engineers (ACOE) "halted implementation of the NWPR and are interpreting 'Waters of the United States' consistent with the pre-2015 regulatory regime until further notice."[1]

Pasqua Yaqui Tribe v. U.S. EPA

On June 22, 2020, Plaintiffs filed suit in the U.S. District Court of Arizona that challenged the NWPR for a variety of reasons as arbitrary and capricious, an abuse of discretion, and contrary to the Clean Water Act. Plaintiffs also challenged the rule Definition of "Waters of the United States – Recodification of Pre-Existing Rules," 84 Fed. Reg. 56626 (Oct. 22, 2019), which repealed the 2015 Obama Rule that is discussed below.

Plaintiffs moved for summary judgment on May 11, 2021. Rather than filing a response to Plaintiffs' motion, U.S. EPA, now under the Biden Administration, filed a motion for voluntary remand without vacatur of the NWRP rule and a motion for abeyance of briefing on the 2019 rule. Plaintiffs requested that the Court not only grant the voluntary remand of the NWRP rule, but also vacatur of the rule. On August 30, 2021, the Court granted U.S. EPA's motion and also Plaintiffs' request for vacatur. The Court also ordered that the parties, within 30 days, file a proposal for further proceedings concerning the challenge to the 2019 Rule.

In response to the Court's decision and the split among the District Courts regarding what definition of "Waters of the United States" applies for jurisdictional purposes, the U.S. EPA and ACOE issued notice that it would make jurisdictional determinations "consistent with the pre-2015 regulatory regime until further notice."[2]

On September 29, 2021, Plaintiffs requested a motion for an extension of time to November 30, 2021 to file a proposal for further proceedings concerning the challenge to the 2019 Rule. Some Plaintiffs have indicated

that they will seek a stay of the vacatur prior to November 30, 2021.

Impact of the Federal Agencies' Use of the Pre-2015 Jurisdictional Determination

The Trump Administration's definition of Waters of the United States, excluded from regulation many waters, such as ephemeral streams and isolated wetlands, which previously required a CWA 404 permit for dredge and fill activity. States varied in how they intended to approach implementation of the Trump Administration Rule. Some states determined that they had no jurisdiction over these waters and other states created a permitting process that would address ephemeral streams and isolated wetlands. Now, the U.S. EPA and ACOE has indicated that states must cease implementing the Trump Administration's Rule.

Interested parties that were relying on a state's implementation of the Trump Administration Rule should contact the state's environmental authority to determine the next paths forward under the recent Agencies' decision. Depending on the state, there may be additional permitting needs to address the recent decision and Agencies' guidance.

The Two-Decade Legal Tug of War

CWA § 404(a) states that "the Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable (Waters of the United States)." The Clean Water Act does not define "Waters of the United States," but leaves the discretion to U.S. EPA and ACOE to define it through regulation. Since the 1970s, 40 CFR § 230.3(o) defines the following waters jurisdictional as:

- The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
- Tributaries;
- Lakes and ponds, and impoundments of jurisdictional waters; and
- Adjacent wetlands.

There has been little debate regarding the Agencies' jurisdiction over these waters. However, there has been a great debate and political fight regarding whether the Agencies have jurisdiction over isolated wetlands and ephemeral streams. Several Supreme Court cases have shaped the definition over the last 20 years. Many of the cases shaping the definition involves the development of property that contains isolated wetlands.

In 1985, the U.S. Supreme Court held that the term "navigable waters" did not only include those waters that were deemed "navigable" as defined by the regulations, but also included adjacent wetlands. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In response, the ACOE used the "migratory bird rule" to assert jurisdiction over isolated wetlands arguing that because some migratory birds that were hunted use isolated wetlands and cross state lines, these waters were part of interstate commerce. The U.S. Supreme Court held that ACOE's interpretation of the migratory bird rule exceeded its authority and isolated wetlands were not within the jurisdiction of the definition of "Waters of the United States." *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The U.S. Supreme Court revisited this issue in *Rapanos v. United States*, 547 U.S. 715 (2006), which resulted in a plurality decision that led to two definitions of "Waters of the United States." Justice Scalia and three other Justices held "Waters of the United States" are "relatively permanent" waters that hold a "continuous surface connection" to a traditionally navigable water. Justice Kennedy, in a concurring opinion, held "Waters of the United States" must have a "significant nexus" to a traditionally navigable water. *Rapanos v. United States*, 547 U.S. 715 (2006).

In response, U.S. EPA and ACOE issued guidance on how to interpret this decision in jurisdictional determinations. U.S. EPA and ACOE's guidance followed the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) for making jurisdictional determinations.[3] This guidance remained in effect until 2015 when the Obama Administration finalized proposed rulemaking regarding the definition "Waters of the United States." Clean Water Rule: Definition of "Waters of the United States": Final Rule, 80 Fed. Reg. 37054.

The Obama Administration revised the definition in an attempt to clarify the plurality definition to include the traditional waters as defined by the regulation, but expanded it to include: (1) impoundments; (2) covered tributaries; (3) adjacent waters; (4) significant nexus waters, including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands; and (5) other significant nexus waters, including non-adjacent waters
, such as wetlands, ponds, impoundments, or certain non-exempt waters in which normal farming, ranching, and silvicultural activities occur, that are located within the 100-year floodplain of or within 4,000 feet of the high tide line of water.

The revised rule received significant interested party pushback and it was appealed in multiple district courts.[4] After 13 states sued to block the rule, the District Court of North Dakota issued a preliminary injunction right before the rule was to take effect. *North Dakota v. U.S. EPA*, 127 F.Supp.3d 1047 (N.D. Dist. 2015). In a separate case, the Sixth Circuit Court halted the implementation of the 2015 Rule by issuing a nationwide stay on October 9, 2015, a day before the rule would come into effect. *In re EPA*, 803 F.3d 804 (Sixth Circuit 2015). This decision was overturned in 2018 when the U.S. Supreme Court issued a unanimous decision that appeals courts do not have jurisdiction to review challenges to the Clean Water Act and, therefore, had no authority to issue a stay. Instead, U.S. District Courts had jurisdiction to hear challenges to the 2015 Rule. *National Ass'n of Mfrs. V. Department of Defense*, 138 S.Ct. 617 (2018). This resulted in split decisions among the District Courts that, at one point, resulted in jurisdiction in 23 states and 23 of 33 New Mexico counties under the Obama Administration's 2015 Rule, and jurisdiction of 26 states and 10 New Mexico counties under the Plurality Supreme Court Decision.

When the Trump Administration took office, in 2017, it announced his intent to review and rescind the 2015 Rule. U.S. EPA and ACOE proposed a rule on February 14, 2019 that would revise the 2015 definition of "Waters of the United States." The proposed definition would exclude isolated wetlands and ephemeral streams. This rule was finalized on April 21, 2020 with the rule becoming effective on June 22, 2020. The NWPR: Definition of "Waters of the United States;" Final Rule, 85 Fed. Reg. 22250 (April 21, 2020).

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[1] www.epa.gov/wotus, last visited on September 8, 2021.

[2] www.epa.gov/wotus, last visited on September 8, 2021.

[3] Available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf, last visited September 13, 2021

[4] CITE

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