

Muddy Waters: What's Up With WOTUS?

American Society of Farm Managers
and Rural Appraisers

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- I do not represent you.
- I am not for hire.
- This is not legal advice.
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How A Bill Becomes A Law

- Federal agencies make rules
- In 2016:
 - Congress passed 214 laws
 - Agencies promulgated 3853 rules

The Clean Water Act

- The Clean Water Act (CWA) of 1972:
 - Gives authority to the Environmental Protection Agency and the U.S. Army Corps of Engineers to regulate the “waters of the United States.”
 - Gives authority to make rules, require permits, etc.
 - Does not define “waters of the United States.”
- Who interprets the law and decides what “waters of the United States” means?
 - The EPA and the Corps of Engineers
 - Subject to challenge in the courts

The Previous Statute and Rules

- Unlawful to discharge dredged or fill material into “navigable waters” without a permit.
- “Navigable Waters:” The waters of the United States, including the territorial seas.
- Agencies interpreted the definition very broadly.

Previous Definition

- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - Which are used or could be used for industrial purposes by industries in interstate commerce;

Previous Definition

- All impoundments of waters otherwise defined as waters of the United States under this definition;
- Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- The territorial sea;
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
- Prior converted cropland is not included.

Cases Leading Up to the New Rule

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
 - Using an abandoned sand and gravel pit for solid waste disposal.
 - Congress evidenced its intent to regulate at least some waters that would not be deemed “navigable” under the term’s classical understanding.
 - However, permitting the agencies to claim federal jurisdiction over the waters at issue would result in a significant impingement of the states’ traditional and primary power over land and water use.

Cases Leading Up to the New Rule

- *Rapanos v. U.S.*, 547 U.S. 715 (2006).
 - Rapanos wanted to build on his cornfield but was prosecuted under the Act.
 - The Court refused to interpret the definition as broadly.
 - Scalia: “Waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes,” and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive definition...is not based on a permissible construction of the statute.”

Cases Leading Up to the New Rule

- *Rapanos v. U.S.*, 547 U.S. 715 (2006):
 - Scalia (cont'd): “Waters of the United States” hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as a land-use regulation; and to authorize federal action that stretches the limits of Congress’s commerce power.
 - Kennedy: ***Absent more specific regulations***, the Corps must establish a ***significant nexus*** on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries....
 - Wetlands possess the requisite significant nexus if the wetlands, either alone or in combination with similarly situated wetlands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.

Cases Leading Up to the New Rule

- *Great Northwest, Inc. v. U.S. Army Corps of Engineers*, 2010 WL 9499071 (D. Alaska 2010).
 - The Corps of Engineers urged the court to apply the significant nexus test in order to bring the waters at issue under the rule.
 - Court refused, saying that by its reading of the rule the waters were not jurisdictional.
 - Refused to apply the test in order to broaden the rule.
 - ***“If you want a broader rule, you should have written a broader rule.”***

The WOTUS Rule

- Original effective date: August 28, 2015
- Regulation made under rulemaking authority granted by the CWA
- Broadly expanded CWA jurisdiction.
 - No longer limited to traditional navigable waters
- Any change in current use of “jurisdictional” lands without a permit violates the rule.
- Getting a permit typically takes 1-3 years and \$200,000-\$250,000
 - This does not include expenses to mitigate effects of the change.
- Fines up to \$37,500 per day, and possible imprisonment.

What Do You Do?

- Unwittingly violate the law?
- Assuming you even think about it...
 - Get the permit?
 - Risk getting caught?
 - Don't do it?
- This is on YOUR LAND!

What's “Jurisdictional?”

- Any land defined as jurisdictional by the act.
 - Traditional Navigable Waters
 - Interstate Waters and Territorial Seas
 - Impoundments and Wetlands
- Any land that can be declared jurisdictional by the agencies under the “***significant nexus***” test.
- Definition expanded under the new WOTUS Rule to include:
 - Broader definition of “tributaries” and “adjacent waters and wetlands.”
 - Prairie Potholes and Texas Coastal Prairie Wetlands
 - ***Within 100-year floodplain or within 4,000 feet of Traditional Navigable Waters***

Why are they regulating *land* use?

- The agencies claim the CWA's jurisdiction begins at the source of the waters.
- Where is the source?
 - It's not entirely aquatic.
 - It's not dry land.
 - There is no definition.

Exclusions

- Normal ongoing farm and ranch operations
 - What does this mean?
 - Any farm and ranch operations?
 - Those taking place when the regulations went into effect?
- Irrigated lands reverting back to dry land
- Certain artificial lakes, ponds, and pools
- Rice fields
- Water-filled depressions created incidental to mining or construction activity
- Erosional features that are not “tributaries”
- Puddles

Challenges to the Rule

- 2015: Sixth Circuit enjoined implementation. (Stay tuned!)
- Congress declared it unconstitutional, but Obama vetoed it.
- *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. ____; 136 S.Ct. 1807 (2016).
 - Challengers do not have to exhaust administrative remedies prior to a court challenge.
- This opened the door for numerous other challenges.
- Executive Order No. 13778, 82 Fed. Reg. 12497, issued by President Trump:
 - Rescind or revise the 2015 WOTUS Rule.
 - Agencies are in the process of reviewing the Rule and considering a revised definition of WOTUS consistent with the Executive Order.

New Rules

- July 27, 2017: Proposed to rescind the WOTUS rule and recodify the pre-2015 definition of “waters of the United States.”
 - Intent was to propose a revised definition at a later date.
- November 16, 2017: Proposed to establish a new effective date—two years from the date of final action.
 - This will be at least 2020.
- February 6, 2018: “The Delay Rule”
 - Final rule adding applicability date to the 2015 Rule.
 - Intent is to maintain the status quo until final revision.

More Litigation!

- *National Ass'n of Mfrs. v. Dept. of Defense*, 583 U.S. ____ 138 S.Ct. 617 (2018).
 - January 22, 2018
 - Challenges to EPA action may generally be filed in federal district courts (usually under the APA).
 - CWA provides for exclusive jurisdiction in the federal courts of appeals if the actions fall into certain categories.
 - Department of Defense contended that the action fell into one of those categories and should be dismissed.
 - The Court sided with the National Association of Manufacturers.
 - Result: Vacated Sixth Circuit injunction.
 - Did not address any substantive challenges to the Rule.

More Litigation!

- Reopened district court cases after NAM case.
- New lawsuits:
 - Challenges calling for a nationwide stay against enforcement of the WOTUS rule
 - Some courts have granted injunctions
 - “Backstop” to Delay Rule
 - Challenges calling for the Delay Rule to be struck down.
- August 16, 2018: *South Carolina Coastal Conservation League v. Pruitt*, 318 F.Supp.3d 959 (D. S.C. 2018). Vacated stay of implementation of WOTUS in 26 states (including Texas). (Delay Rule did not follow APA.)
 - Trump administration has asked the court to delay the vacation of the stay.

What About Texas?

- September 12, 2018: *Texas v. U.S. Environmental Protection Agency*, 2018 WL 4518230 (S.D. Tex. 2018).
 - Court granted a preliminary injunction on implementation of WOTUS in Texas, Louisiana, and Mississippi.
 - “Clarification regarding what is, and what is not, a navigable water under the Clean Water Act is long overdue.”
 - “Until that question can ultimately be answered, a stay provides much needed governmental, administrative, and economic stability.”
 - Did not grant nationwide injunction.

Is there any progress on the Rule?

- The WOTUS Replacement Rule has been sent to the White House Office of Information and Regulatory Affairs (OIRA) for review.
- June 29, 2018: Supplemental Notice of Proposed Rulemaking was issued. Agencies plan to repeal the WOTUS Rule and go back to the previous rule while they work on a new definition.

Now What?

- Congress may amend the CWA.
- The President may direct the agencies on rulemaking and/or enforcement.
 - More litigation.
- The agencies may amend the rules or make new ones.
 - More litigation.
- The agencies may delay changes to the rules.

Questions?

