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Overview of the Army Corps and EPA Rule to Define "Waters of the United States" (WOTUS) and Recent Developments

Overview: What Is "WOTUS"?

In June 2015, the Army Corps of Engineers and Environmental Protection Agency (EPA) published the Clean Water—or "Waters of the United States"—final rule (80 *Federal Register* 37053), which revised regulations defining the scope of waters protected and regulated under the Clean Water Act (CWA). Discharges to waters, including wetlands, require a CWA permit (e.g., pollutants from factories or sewage treatment plants and dredging and filling of spoil material through mining or excavation). The legal and policy questions regarding the geographic limit of CWA jurisdiction and the consequences of restricting or expanding that limit have challenged regulators, developers, landowners, and policymakers for decades.

Background of the Rule

The CWA protects "navigable waters," which it defines as "the waters of the United States, including the territorial seas." Waters need not be truly navigable to be subject to CWA jurisdiction. The act's single definition of "navigable waters" applies to the entire law, including Section 301 (the federal prohibition on pollutant discharges except in compliance with the act), Sections 402 and 404 (permit requirements), and Section 309 (enforcement). The CWA gave the Corps and EPA the authority to define the term *waters of the United States* in regulations, which they have done several times, most recently in 1986, 1988, and 2015.

The Corps and EPA proposed revisions to the regulations in 2014 in light of two Supreme Court rulings (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 716 (2006)). Both interpreted the regulatory scope of the CWA more narrowly than previously, but they created uncertainty about the appropriate scope of waters that are protected by the CWA. The Court's decision in *Rapanos*, split 4-1-4, yielded three different opinions. The four-Justice plurality decision, written by Justice Scalia, said that the dredge and fill provisions in the CWA apply only to wetlands connected to relatively permanent bodies of water (streams, rivers, lakes) by a continuous surface connection. Justice Kennedy, writing alone, demanded a "significant nexus" between a wetland and a traditional navigable water, using a case-by-case test that considers ecological connection. Justice Stevens, for the four dissenters, would have upheld the existing reach of Corps/EPA regulations.

In light of those rulings, the agencies issued guidance in 2003 and 2008 to identify categories of waters that remained jurisdictional or not jurisdictional and required a case-specific analysis to determine whether jurisdiction applies. The guidance documents did not resolve all interpretive questions, and diverse stakeholders requested a formal rulemaking to revise the existing rules.

What Is in the Clean Water Rule?

The 2015 final rule retained much of the structure of the agencies' prior definition of WOTUS. It focused on clarifying the regulatory status of waters with ambiguous jurisdictional status following the Supreme Court's rulings, including isolated waters and streams that flow only part of the year and nearby wetlands. Per the final rule's preamble, the Corps and EPA used Justice Kennedy's significant nexus standard in developing the rule, as well as the plurality standard in establishing boundaries on the scope of jurisdiction. The final rule identified categories of waters that are and are not jurisdictional, as well as waters that require a case-specific evaluation. Under the final rule:

- Tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be jurisdictional per se. All of these waters were jurisdictional under pre-2015 rules, but *tributary* was newly defined in the final rule.
- Waters—including wetlands, ponds, lakes, and similar waters—that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be jurisdictional by the final rule. The final rule also put some boundaries on "adjacency."
- Some types of waters—but fewer than under practices used prior to the 2015 rule—would remain subject to a case-specific evaluation of whether or not they meet the standards for federal jurisdiction.
- Certain waters would be excluded from CWA jurisdiction. Some were restated exclusions under pre-2015 rules (e.g., prior converted cropland); some have been excluded by practice and would be expressly excluded by rule for the first time (e.g., groundwater and some ditches). Some were new in the final rule (e.g., stormwater management systems). The rule did not affect existing statutory exclusions: exemptions for existing "normal farming, silviculture, and ranching activities" and for maintenance of drainage ditches (CWA §404(f)), as well as for agricultural stormwater discharges and irrigation return flows (CWA §402(l)).

Issues and Controversy

Much of the controversy since the Supreme Court's rulings has centered on instances that have required CWA permit applicants to seek a time-consuming, case-specific analysis to determine if CWA jurisdiction applies to their activity. The Corps and EPA's stated intention in proposing the rule was to clarify questions of CWA jurisdiction in view of the

rulings while reflecting their scientific and technical expertise. Specifically, they sought to articulate categories of waters that are and are not protected by the CWA, thus limiting the water types that require case-specific analysis.

Industries that are the primary applicants for CWA permits and agriculture groups raised concerns over how broadly the proposed rule would be interpreted. They contended that the proposed definitions were ambiguous and would enable agencies to assert broader CWA jurisdiction than is consistent with law and science. The final rule added and defined key terms, such as *tributary* and *significant nexus*, and modified the proposal in an effort to improve clarity.

Some local governments that own and maintain public infrastructure also criticized the proposal. They argued that it could increase the number of locally owned ditches under federal jurisdiction because it would define some ditches as WOTUS under certain conditions. Corps and EPA officials asserted that the proposed exclusion of most ditches would decrease federal jurisdiction, but the issue remained controversial. The final rule expressly excluded stormwater management systems and structures from jurisdiction.

Many states expressed support for a rule to clarify the scope of CWA jurisdiction, but there was no consensus on the proposed or final rule. Some were largely supportive; others believed the agencies did not adequately consult with states.

Environmental groups supported the agencies' efforts to protect waters and reduce uncertainty. Still, some argued that the proposal should be strengthened—for example, by designating additional categories of waters and wetlands (e.g., prairie potholes) as categorically jurisdictional. The final rule did not do so. Instead, such waters would require case-specific analysis to determine if jurisdiction applies.

Corps and EPA officials under the Obama Administration defended the proposed rule but acknowledged that it raised questions they believed the final rule clarified. In their view, the final rule did not protect any new types of waters that were not protected historically, did not exceed the CWA's coverage, and would not enlarge jurisdiction beyond what is consistent with the Supreme Court's rulings and scientific understanding of significant connections between small and ephemeral streams and downstream waters. The agencies asserted that they had addressed criticisms of the proposed rule by defining tributaries more clearly, better defining how protected waters are significant, and preserving agricultural exclusions and exemptions.

What Is the Current Status?

Issuance of the final rule did not diminish concerns. Many groups contended that the rule did not provide needed clarity, that its expansive definitions made it difficult to identify any waters that would fall outside the boundary distances established in the rule, and that the threshold for determining "significant nexus" was set so low that virtually any water could be found to be jurisdictional. The final rule would impose costs, critics said, but have little or no environmental benefit. Environmental groups were supportive but also faulted parts of the final rule.

Industry groups, more than half the states, and several environmental groups filed lawsuits challenging the rule in multiple federal district and appeals courts. An appeals court ordered a nationwide stay of the rule in October 2015 and later ruled that it had jurisdiction to hear consolidated challenges to the rule. In January 2018, the Supreme Court unanimously held that federal district courts, rather than appellate courts, are the proper forum for filing challenges to the rule. Accordingly, on February 28, 2018, the appeals court vacated its nationwide stay. However, in anticipation of a possible lift of the stay, the Corps and EPA had proposed a rule that added an "applicability date" to the 2015 rule—delaying implementation until February 2020—which they finalized on February 6, 2018. Environmental groups and states filed lawsuits challenging the rule, and on August 16, 2018, a district court issued a nationwide injunction of the rule. As a result, the 2015 Clean Water Rule is now in effect in 22 states. It will remain in effect unless, for example, a district court issues a nationwide stay or the Administration finalizes its proposed rule to rescind the 2015 rule (see below). The other 28 states are covered by three district court injunctions issued on the 2015 rule.

The Administration has also taken steps to rescind and revise the 2015 rule. In February 2017, President Trump issued an executive order directing the Corps and EPA to review and rescind or revise the rule and to consider interpreting the term *navigable waters* as defined in the CWA in a manner consistent with Justice Scalia's opinion in *Rapanos*. In July 2017, the agencies published a proposed rule that would "initiate the first step in a comprehensive, two-step process intended to review and revise the definition of 'waters of the United States' consistent with the Executive Order." The first step proposes to rescind the 2015 rule and re-codify the regulatory definition of WOTUS as it existed prior to the rule. In July 2018, the agencies published a supplemental notice of proposed rulemaking to solicit comment on additional considerations supporting the agencies' proposed repeal. According to EPA, the agencies are continuing to review comments on the step one rule and have held listening sessions and solicited recommendations to develop a proposed step two rule. Observers largely agree that the order and ensuing agency actions indicate a move toward narrowing the CWA's jurisdictional scope.

Actions in the 115th Congress

Among other WOTUS measures, H.R. 1105 would repeal the rule, while H.R. 1261 would narrow the definition of waters subject to CWA jurisdiction. Members in the House and Senate have proposed resolutions expressing the sense that the rule should be withdrawn or vacated (H.Res. 152 and S.Res. 12). Two House-passed appropriations bills (H.R. 3219 and H.R. 3354) contain provisions that would authorize withdrawal of the rule "without regard to any provision of statute or regulation that establishes a requirement for such withdrawal" (e.g., the Administrative Procedure Act). The House-passed version of the farm bill (H.R. 2) includes an amendment to repeal the rule.

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