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Practice Update

WOTUS, SCOTUS, and POTUS—Act III (Or Is it Act IV?)

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Section 404 of the Clean Water Act of 1972, 33 U.S.C. Section 1251 et seq., prohibits the discharge of dredged or fill material into "navigable waters" without a permit. Section 502(7) of that act defines "navigable waters" as "the waters of the United States..." (WOTUS). The definition of WOTUS has been the subject of repeated regulatory and judicial interpretation and disagreement covering the Obama, Trump, and Biden administrations. On December 31, 2022, the United States Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE) issued a final rule defining WOTUS—the third iteration of a defining rule issued in the past seven years. Because the permitting process is time consuming and expensive, the question of whether the EPA and the ACOE have jurisdiction over a project, development, or other planned construction is an important factor in the decision-making process of landowners, developers, and other stakeholders.

A Brief History of the Regulatory Scheme

The EPA and the ACOE issued the first set of regulations seeking to define WOTUS, codified at 42 FR 37122, in 1977. The definition was broad, essentially covering waters that are, have been, or may be susceptible to navigation in interstate commerce; their tributaries; and, most notably,

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wetlands adjacent to waters identified as subject to jurisdiction (see 33 CFR 328.3).

The definition remained essentially the same with some revisions in 1979, 1986, and 1992. In 2006, the U.S. Supreme Court, in *Rapanos v. United States,* 547 U.S. 715 (2006), a case involving the application of Section 404 to wetlands adjacent to tributaries, held that the 1986 regulations were overly broad and inconsistent with the text of the statute. In a plurality opinion, authored by Justice Scalia, the Court limited jurisdiction to "relatively permanent" water bodies connected to traditional navigable waters or wetlands with a "continuous surface connection" to such water bodies (547 U.S. at 739,742). Justice Kennedy, in a concurring opinion, proffered a different standard: a water or wetland with a "significant nexus" to navigable waters would be subject to jurisdiction.

Neither the EPA nor the ACOE issued new regulations for almost a decade following the decision in *Rapanos.* Rather, they issued a "guidance" that provided for jurisdiction if a water meets either Justice Scalia's "relatively permanent" standard or Justice Kennedy's "significant nexus standard." Beginning in 2015, the agencies finalized three rules revising the definition—one by the Obama administration, one by the Trump administration, and now one by the Biden administration.

The 2015 rules issued by the Obama administration were stayed by an order of the U.S. Court of Appeals for the Sixth Circuit and several District Courts.[1] They were also repealed (but not replaced) by a Repeal Rule issued pursuant to Executive Order 13778, in which then President Trump directed the agencies to "consider interpreting the term 'navigable waters'... in a manner consistent with" Justice Scalia's opinion in *Rapanos*. In 2020, the agencies issued the Navigable Waters Protection Rule: Definition of the Waters of the United States (NWPR).[2] That rule essentially interpreted WOTUS

on Justice Scalia's "relatively permanent" standard. Several judicial challenges ensued, resulting in conflicting injunctions, several of which remanded and vacated the rule.[3] The net result of this regulatory and judicial back and forth is that, for the most part, the guidance issued in 2008 is in effect. However, in several jurisdictions, the NWPR is in effect.

The New Biden Administration Rule

On his first day in office, President Biden signed Executive Order 13990, "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." Among other things, this executive order revoked President Trump's 2017 executive order and directed the agencies to review and address regulations and other actions of the preceding four years (i.e., during the Trump administration) that are found to be inconsistent with what President Biden stated was his policy to protect the environment. The final rule issued on December 31, 2022, is the result of this direction from the president. It will take effect 60 days after its final publication.

The new rule identifies five categories of WOTUS:

1. Traditional navigable waters, territorial seas, and interstate waters;
2. Impoundments of waters of the United States;
3. Tributaries to waters identified in items 1 and 2—if they meet either the relatively permanent standard or the significant nexus standard;
4. Wetlands (a) adjacent to waters identified in item 1; (b) adjacent to and with a continuous subsurface connection to relatively permanent impoundments; (c) adjacent to tributaries that meet the relatively permanent standard; and (d) adjacent to and with a significant nexus to impoundments or jurisdictional tributaries; and
5. Intrastate lakes and ponds, streams, or wetlands not listed above that meet either the relatively

permanent or the significant nexus standard.

The new rule adopts both the "relatively permanent" and "significant nexus" standards. Moreover, it codifies several exclusions that were not previously officially excluded, providing an additional degree of certainty to people or businesses whose projects or developments could be subject to jurisdiction.

The Next Steps

Needless to say, the publication of the new rule does not constitute the end of this saga. It can be anticipated that opponents of the breadth of the rule will seek to have it vacated. In fact, several states, as well as farm and other industry groups have already filed lawsuits seeking to have the rule set aside. Alternative versions may also find their way to Congress, but their ultimate enactment is not likely during the current administration.

In addition, on the first day of this year's term, the Supreme Court heard argument in *Sackett v. EPA,* No 21-454, a challenge to the EPA's definition of "adjacent" in the context of its determination of jurisdiction over a wetland. The decision in that case, which is expected no later than the end of the Court's term this June or July, could inform the validity of the new rule.

Time will tell.

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[1] *In re EPA & Dep't of Def Final Rule*, 803 F. 3d 804 (6thCir. 2015); *Georgia v. Pruitt, 326 F.Supp. 3d 1356* (S.D.Ga 2018); *Texas v. EPA,* No .3:15- civ- 162, 2018 WL 4518230 (S.D. Tex. 2018).

[2] 85 FR 2250 (April 21, 2020).

[3] *See, e.g. ,Navajo Nation v. Regan,* 563 F.Supp. 3d 1164 (D.N.M. 2021) (vacating and remanding); *Pascua Yaqui Tribe v. EPA,* 557 F. Supp. 3d 949 (D. Ariz. 2021).