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Practice Update

WOTUS Update: The Courts, Congress, and the Biden Administration Continue the Dance

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Exactly what should be considered "waters of the United States" as it applies to the Clean Water Act has been ill defined and contended in the courts and in Congress for more than 15 years. A review of recent court decisions in Texas and North Dakota, resolutions from Congress, and a veto from President Biden illustrate exactly why there is little hope of resolving the issue anytime soon and why that is unwelcomed news for industry.

Court Decisions

In a decision and order issued on March 19, 2023, U.S. District Court Judge Jeffrey Vincent Brown of the U.S. District Court for the Southern District of Texas granted a motion by the State of Texas, several of its agencies, and the State of Idaho (the State Plaintiffs) to preliminarily enjoin enforcement of the final rule defining the term "waters of the United States" (WOTUS) that was issued by the United States Environmental Protection Agency (EPA) and Army Corps of Engineers while the case is pending. The court did not, however, grant a request by a group of 18 national trade associations (the Associations) for a nationwide preliminary injunction.

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The decision in *State of Texas, et al* v. *United States Environmental Protection Agency, et al.* (No. 3:23-cv-17) found that the State Plaintiffs had standing to sue, that they had a likelihood of success on the merits, that they would be irreparably harmed by the enforcement of the rule during the litigation of the case, and that the equities favored the State Plaintiffs' positions. However, the court found that the Associations did not demonstrate that they or their members would be irreparably harmed and denied their application for an injunction. Because only the Associations, and not the State Plaintiffs, moved for a nationwide injunction, the court did not grant one.

Regarding the merits, the court determined that the rule improperly expanded the "substantial nexus" test found in Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) by expanding the scope of that rule to expand federal jurisdiction over features that Justice Kennedy's expression of the test did not include. It also determined that the rule's blanket inclusion of all interstate waters, regardless of their navigability, expanded the rule beyond the scope of the underlying legislation—Section 502(7) of the Clean Water Act.

In an interesting note, Judge Brown made reference to *Sackett v. EPA* (Case No 21-454), which was argued in the U.S. Supreme Court last October. *Sackett* involves a challenge to the existing WOTUS rule and includes a claim that the substantial nexus test created by Justice Kennedy in *Rapanos* is a valid exercise of agency jurisdiction under the Clean Water Act. Judge Brown states, "There is little public interest or efficiency gained with implementing a rule codifying the significant nexus test mere months before the Supreme Court decides [that claim]."

In a decision issued on April 12, 2023, U.S. District Court Judge Daniel J. Hovland of the District Court of North Dakota entered a preliminary injunction blocking the implementation of the Rule in 24 states.

His decision in *States of West Virginia, North Dakota, Georgia and Iowa, et al.* v. *U.S. Environmental Protection Agency, et al., (*D. North Dakota, Case No 3:23-cv-0032) relied on the decision issued by Judge Brown, stating:

"The court finds that the new 2023 rule is neither understandable nor 'intelligible,' and its boundaries are unlimited....Beyond the many problems with the new 2023 rule recognized by the considered decision of the federal district court in Texas, this court is of the opinion the 2023 rule raises a litany of other statutory and constitutional concerns."

In another case, *Commonwealth of Kentucky, et al.* v. *United States Environmental Protection Agency, et al.* (E.D. Kentucky Civil No. 3:23-cv-00007), the court dismissed a challenge to the rule filed by Kentucky and others on the ground that they lacked standing to challenge the rule.

Neither the EPA nor the Corps of Engineers has filed an appeal from either decision to the United States Court of Appeals for the Fifth and Sixth Circuits, respectively, but they have 30 days in which to do so.

Congressional and Presidential Action

On March 9, 2023, the House of Representatives by a vote of 227-198 passed a resolution under the Congressional Review Act, seeking to overturn what the majority party in the House called the "flawed, overreaching Biden rule."[1] On March 29, 2023, the Senate, by a vote of 53-43 passed its own resolution to overturn the rule, sending the matter to President Biden, who promptly exercised his veto powers. Congress took a similar action when the Obama administration proposed a broad definition but President Obama vetoed that resolution as well.

The Issues for Industry and Environmental Groups

Stakeholders, including states and agricultural and business groups have concerns that enforcement of

the rule would expand federal jurisdiction and require permits for a variety of projects.

The permitting process under the Clean Water Act is expensive and time consuming, often taking years and hundreds of thousands of dollars. Moreover, civil penalties for violating the rule—*i.e.* developing a project without the necessary permit—are significant. They can be as much as $10,000 per day. On top of that, there is a potential for criminal penalties. The stakeholders, including states and municipalities, developers, farmers. and others, express concerns that by expanding federal jurisdiction to include more "waters" than expressly listed in the two decisions in *Rapanos* will increase the time and cost of approving their projects and risk their constituents' potential exposure to fines and criminal penalties. In addition, states have vested interest in preserving their own sovereignty over land use regulations in their jurisdictions.

Environmental groups, some Native American tribes, and, of course, the Biden administration, have argued that rule is consistent with Justice Kennedy's "substantial nexus" test and is necessary to protect wetlands from encroachment from development. Wetlands play an important role in enhancing habitats and filtering contaminants from waters. By limiting the rule, it is argued that this protection of wetlands would be (excuse the pun) watered down.

A Suggested Resolution

The controversy over the definition of WOTUS has been wending its way through Congress, the courts, and the White House for more than 15 years. It has become a case of what noted pundit, Lawrence Peter Berra called "déjà vu all over again." The administrations promulgate rules, the courts invalidate them (but can't rewrite them), and rather than fix the problem by amending the underlying statute, Congress merely objects to and attempts to nullify rules. It can be argued that, in the best of all worlds, the question could be resolved by clarifying

the language of the underlying statute. Unfortunately, we are and have for some time been living in highly partisan times—a far cry from the best of all worlds. Thus, it is, in my view, unlikely that Congressional action will be taken and highly likely that this issue will continue to bounce among the three branches of the federal government into the foreseeable future.

Stay tuned.

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[1] See https://transportation.house.gov/wotus/
