



WOTUS, WOTUS, WOTUS...

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10.07.2021

Like everything else today, the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA) ebbs and flows depending on which political party holds office. However, while the Biden Administration gets its ducks in a row to propose a new WOTUS rulemaking, in lawsuits challenging the Trump Era Navigable Waters Protection Rule (NWPR), federal courts are being asked by EPA and the Army Corps of Engineers (Corps) to remand the NWPR without vacating it to allow time to revoke it themselves and issue a new rule after public comment. As has happened previously in WOTUS rulemaking challenges, the courts in different parts of the country are dealing with the same issues but coming out with different rulings, some remanding without vacating the NWPR, some remanding and vacating it, and some still in limbo. Meanwhile, on September 3, 2021, Biden's EPA and the Corps have ended the period for stakeholders to comment on a new WOTUS rulemaking and ended public informational sessions. What does this mean to those in the process of seeking a jurisdictional determination? More uncertainty is guaranteed.

Background: Trump, Obama, Biden...

In 2015, Obama's EPA and the Corps amended the 1986 CWA regulation definition of "navigable waters" or WOTUS by enacting the Clean Water Rule, broadening the scope of the CWA by giving EPA and the Corps jurisdiction over non-adjacent wetlands and other non-navigable water bodies. In 2019 and 2020, Trump's EPA and the Corps fired back, rescinding the Obama-era Clean Water Rule in their first rulemaking and issuing the NWPR in a second rulemaking. Trump's NWPR limited CWA jurisdiction by providing categorical listings of waters and wetlands that are considered WOTUS (i.e. territorial seas, waters used in interstate commerce, tributaries, lakes, ponds, impoundments of jurisdictional waters, and adjacent wetlands), and those that are excluded, including ephemeral streams and isolated wetlands. Lawsuits by states, tribes and environmentalists followed, and, in January of 2021, President Biden took office.

Immediately upon taking office, President Biden issued an Executive Order, directing that federal agencies take action to address Trump-era regulations that do not meet his administration's stated environmental protection goals. EPA and the Corps responded by issuing a June 9, 2021, notice of proposed rulemaking to revise the definition of WOTUS to better protect our nation's water resources.

The notice stated a plan to enact two rules: (1) a foundational rule to restore longstanding protections that existed with the 1986 definition of WOTUS and Supreme Court rulings prior to 2015; and (2) a second to build on that foundation with a revamped definition of WOTUS.

In late July, EPA announced initial public meetings to hear from interested stakeholders regarding what the revamped definition of WOTUS should be and how to implement that definition. EPA also invited interested parties to provide written comments on the subject by September 3, 2021. The docket for these comments shows 348 comments submitted before the deadline, with comments coming from environmentalists, non-profits, government organizations, trade groups, and industry, including but not limited to the following: South Carolina Department of Natural Resources, National Ready Mixed Concrete Association, Alaska Support Industry Alliance, National Stone, Sand and Gravel Association, National Association of Home Builders, National Mining Association, Waters Advocacy Coalition, American Farm Bureau Federation, North Carolina Farm Bureau Federation, Inc., National Cotton Council, American Exploration & Mining Association, United States Chamber of Commerce, United States Senate - Committee on Environment and Public Works, National Wildlife Federation, and Southern Environmental Law Center.

Decisions: Remand With Vacatur, Remand Without Vacatur...

In the meantime, the lawsuits from environmentalists, state attorneys general, and tribes against EPA and the Corps challenging the legality of the Trump-Era NWPR continue to move through the courts. Each case alleges different injury and damages as a result of the NWPR limits on the definition of WOTUS. However, each case has one common thread: EPA and the Corps are defendants and are requesting the courts to remand the cases without vacating the NWPR. EPA and the Corps argue that, by remanding without vacatur, EPA can address the concerns raised in the lawsuit and through EPA's promise to revoke the rule and issue a new one, after public comment and input from stakeholders. While U.S. District Courts like those in South Carolina and Colorado recently granted EPA's request to remand without vacatur, federal courts in Northern California and New Mexico have not ruled yet on a request to remand without vacatur. One court, the United States District Court for the District of Arizona, is not waiting on the Biden administration to revoke and pass its promised revised WOTUS definition. The Arizona federal court instead vacated the 2020 Trump-era NWPR by Order of August 9, 2021. The court's Order sides with tribal plaintiffs, stating that vacatur of the NWPR is necessary to prohibit further harm by the continued use of the narrower definition of WOTUS under the Trump-era NWPR.

What's Next...

It is not clear whether the Arizona ruling will be applied nationwide or just in Arizona, or whether it will be appealed by intervenors, or EPA and the Corps. However, vacating the NWPR could have negative consequences for those who received a jurisdictional determination under the NWPR prior to the Arizona Ruling, and those who need to know if their project will impact jurisdictional waters from now until a new WOTUS rule is passed. The Arizona court order recognizes that there may be hundreds if not thousands of decisions made from 2020-2021 using the Trump-era NWPR, possibly resulting in significant, actual environmental harms. Furthermore, the Arizona court did not vacate the first Trump rule that vacated the 2015 Obama Clean Water Rule. Therefore, it appears that vacating the NWPR reinstates the 1986 definition of WOTUS, not the 2015 Obama-era Rule. This is consistent with EPA's

very recent posting to its WOTUS webpage, stating:

?In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting ?waters of the United States? consistent with the pre-2015 regulatory regime until further notice. The agencies continue to review the order and consider next steps. This includes working expeditiously to move forward with the rulemakings announced on June 9, 2021, in order to better protect our nation?s vital water resources that support public health, environmental protection, agricultural activity, and economic growth.?

In the meantime, the regulated community and other stakeholders remain in limbo as to how soon EPA will issue a new rule, whether jurisdictional determinations made recently, but prior to August 30, 2021, are still effective, and how pending jurisdictional determination requests will be treated.

80 Fed. Reg. 41911 (Aug. 4, 2021)

Pasqua Yaqui Tribe v. EPA, Case No. 4:20-cv-00266, 2021 W L 3855977 (Aug. 30, 2021)

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