Here Come the Feds: EPA Final Rule Defining Waters of the United States–Again

Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law
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Overview

On December 30, 2022, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COA) announced the final "Revised Definition of 'Waters of the United States'" rule which will be effective 60 days after it is published in the *Federal Register*. It represents a "change of mind" of the agencies from the positions that they held concerning a water of the United States (WOTUS) and wetlands from just over three years ago. The bottom line is that the new interpretation is extremely unfriendly to agriculture, particularly to farmland owners in the prairie pothole region of the upper Midwest.

Background

The scope of the federal government's Clean Water Act (CWA) regulatory authority over wet areas on private land, streams and rivers has been controversial for more than 40 years. The CWA bars the discharge of a "pollutant" into the "navigable waters of the United States without a federal discharge permit. A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste."

Note: The legislative history of the CWA reveals that the Congress was not thinking about preserving wetlands when the definition of a "pollutant" was written. Instead, it blended together (under the umbrella of "pollution") the COE's responsibility to protect navigation with the EPA's responsibility to prevent contamination. This is the genesis of upstream regulation that environmental groups and numerous courts latched onto. Routine farming activities were exempted from the discharge permit requirement.

Many court opinions have been filed attempting to define the scope of the government's jurisdiction. On two occasions, the U.S. Supreme Court attempted to clarify matters, but in the process of rejecting the regulatory definitions of a WOTUS proffered by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) didn't provide clear direction for the lower courts. See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 175 (2006).*

Particularly with its *Rapanos* decision, the Court failed to clarify the meaning of the CWA phrase "waters of the United States" and the scope of federal regulation of isolated wetlands. The Court did not render

a majority opinion in *Rapanos*, instead issuing a total of five separate opinions. The plurality opinion, written by Justice Scalia and joined by Justices Thomas, Alito and Chief Justice Roberts, would have construed the phrase "waters of the United States" to include only those relatively permanent, standing or continuously flowing bodies of water that are ordinarily described as "streams," "oceans," and "lakes." In addition, the plurality opinion also held that a wetland may not be considered "adjacent to" remote "waters of the United States" based merely on a hydrological connection. Thus, in the plurality's view, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by permit requirement of Section 404 of the CWA.

Justice Kennedy authored a concurring opinion, but on much narrower grounds. In Justice Kennedy's view, the lower court correctly recognized that a water or wetland constitutes "navigable waters" under the CWA if it possesses a significant nexus to waters that are navigable in fact or that could reasonably be so made. But, in Justice Kennedy's view, the lower court failed to consider all of the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. Without more specific regulations comporting with the Court's 2001 SWANCC opinion, Justice Kennedy stated that the COE needed to establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to non-navigable tributaries, in order to avoid unreasonable application of the CWA. In Justice Kennedy's view, the record in the cases contained evidence pointing to a possible significant nexus, but neither the COE nor the lower court established a significant nexus. As a result, Justice Kennedy concurred that the lower court opinions should be vacated, and the cases remanded for further proceedings.

Justice Kennedy's opinion was neither a clear victory for the landowners in the cases or the COE. While he rejected the plurality's narrow reading of the phrase "waters of the United States," he also rejected the government's broad interpretation of the phrase. While the "significant nexus" test of the Court's 2001 SWANCC opinion required regulated parcels to be "inseparably bound up with the 'waters' of the United States," Justice Kennedy would require the nexus to "be assessed in terms of the statute's goals and purposes" in accordance with the Court's 1985 opinion in *United States v. Riverside Bayview Homes*. *474 U.S. 121 (1985).*

The "WOTUS Rule". The Obama Administration attempted take advantage of the lack of clear guidance on the scope of federally jurisdictional wetland by dramatically expanding the federal government's reach by issuing an expansive WOTUS rule. The EPA/COE regulation was deeply opposed by the farming/ranching and rural landowning communities and triggered many legal challenges. The rule was challenged by over 30 states and the courts were, in general, highly critical of the regulation and it became a primary target of the Trump Administration.

The "NWPR Rule". The Trump Administration essentially rescinded the Obama-era rule with its own rule – the "Navigable Waters Protection Rule" (NWPR). *85 Fed. Reg. 22, 250 (Apr. 21, 2020).* The NWPR redefined the Obama-era WOTUS rule to include only: "traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters. In short, the NWPR narrowed the definition of the statutory phrase "waters of the United States" to comport

with Justice Scalia's approach in *Rapanos*. Thus, the NWPR excludes from CWA jurisdiction wetlands that have no "continuous surface connection" to jurisdictional waters. The rule much more closely followed the Supreme Court's guidance issued in 2001 and 2006 that did the Obama-era rule, but it was challenged by environmental groups. Indeed, the NWPR has been challenged in 15 cases filed in 11 federal district courts.

In early 2020, the U.S. Court of Appeals for the Tenth Circuit reversed a Colorado trial court that had entered a preliminary injunction barring the NWPR from taking effect in Colorado as applied to the discharge permit requirement of Section 404 of the CWA. The result of the appellate court's decision was that the NWPR became effective in every state. *Colorado v. United States Environmental Protection Agency, 989 F.3d 874 (10th Cir. 2021).*

Later, a federal district court in South Carolina remanded the NWPR to the EPA. South Carolina Coastal Conservation League, et al. v. Regan, No. 2:20-cv-016787-BHH (D. S.C. Jul. 15, 2021). The NWPR was being challenged on the scope issue. Even though the NWPR was remanded, the court left the rule intact. That fit with the strategy of present Administration. If the court had invalidated the NWPR, then the Administration would have had to defend the indefensible Obama-era rule in court. That wouldn't have turned out well for the Administration. In addition, the opinion not vacating the NWPR allowed the Administration to proceed in trying to write a new rule without bothering to defend the Obama-era rule in court.

Another definition. On December 7, 2021, the EPA and the COE published a proposed rule redefining a "water of the United States" (WOTUS) in accordance with the pre-2015 definition of the term. *86 FR 69372 (Dec. 7, 2021).* Under the proposed rule, EPA stated its intention to define a WOTUS in accordance with the 1986 regulations as further defined by the courts since that time. In addition, the agencies said that the proposed rule would base the existence of a WOTUS on the "significant nexus" standard set forth in prior Supreme Court decisions. As such, a WOTUS would include traditional navigable waters; territorial seas and adjacent wetlands; most impoundments of a WOTUS and wetlands adjacent to impoundments or tributaries that meet either the relatively permanent standard or the significant nexus standard; all waters that are currently used or were used in the past or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide.

The proposed rule defines "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of State boundaries" regardless of whether those waters are also traditionally navigable. A "tributary" is also defined as being a WOTUS if it fits in the "other waters" category via a significant nexus with covered waters or if it is relatively permanent. The EPA and COE further define the "relatively permanent standard" as "waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters." The "significant nexus standard" is defined as "waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the "foundational waters")."

Final Rule

The agencies announced their Final Rule on December 30, 2022. It will become effective 60 days after it is published in the Federal Register. As promised, the Final Rule uses a definition that was in place before 2015 (for purposes of the Clean Water Act) for traditional navigable waters, territorial seas, interstate waters, and upstream water resources that "significantly" affect those waters.

Note: Going back to before 2015 is interesting. It was in 2015 that the Obama Administration was going to "clarify" everything, and the result was to greatly expand control over private property. As noted above, this "clarification" resulted in more than 30 states suing the federal government and an injunction was imposed. Also as noted above, the EPA and the COE under the Trump administration then pursued a long, careful rulemaking procedure which brought actual clarity to the definition. It's that clarity that has now been completely overturned, supposedly for "clarity's" sake.

Two joint memos were published with the final rule to set forth the delineation of the implementation of roles and responsibilities between the agencies. One is a joint coordination memo to "ensure accuracy and consistency of jurisdictional determinations under the final rule." The other is a memo with the USDA to provide "clarity on the agencies' programs under the Clean Water act and the Food Security Act (Swampbuster)."

Adjacency. The EPA wants to restore the "significant nexus" via "adjacency." This is a big change in the definition of "adjacency." It doesn't mean simply "abutting." Instead, "adjacent" includes a "significant nexus" and a "significant nexus" can be established by "shallow hydrologic subsurface connections" to the "waters of the United States. A "shallow subsurface connection," the Final Rule states, may be found below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. Frankly, that means farm field drain tile.

Note: Farmers needs to pay attention to this, despite what USDA will undoubtedly say about it – the USDA's Natural Resource Conservation Service (NRCS) is now completely under the thumb of the EPA and the COE (particularly because the practice of mitigation banking under the CWA will cease). Practically every tile for every tile-drained farmed wetland connects to an open ditch which is a WOTUS. This effectively disqualifies farmed wetland from being an isolated wetland –[these terms means specific things under the regulations]. The only wetland that will qualify as an isolated wetland (no hydrological connection to a WOTUS) will be those that don't overflow and don't have drain tile.

Specifically, the Final Rule sets forth two kinds of adjacency: 1) the traditional "relatively permanent" standard; and 2) the "significant nexus" standard. The EPA and the COE say the agencies will not assume that all wetlands in a specific geographic area are similarly situated and can be assessed together on a watershed basis in a significant nexus analysis. But it is clear from the Final Rule that the agencies intend to expand jurisdiction over isolated prairie pothole wetlands using the "significant nexus" standard.

Note: The "significant nexus" can be established via a connection to downstream waters by surface water, shallow subsurface water, and groundwater flows and through biological and chemical connections. The Final Rule states that adjacency can be supported by a "pipe, non-jurisdictional

ditch,… or some other factors that connects the wetland directly to the jurisdictional water." This appears to be the basis for overturning the NWPR. Consequently, the prairie pothole region is directly in the "bullseye" of the Final Rule.

Prior Converted Cropland. The agencies say the final rule increases "clarity" on which waters are not jurisdictional – including prior converted cropland. This doesn't make much sense. Supposedly, the agencies are "clarifying" that prior converted cropland, (which is not a water), is not a water, but it somehow could be a water if the agencies had not clarified it? In addition, the burden is placed on the landowner to prove that prior converted cropland is actually prior converted cropland and therefore not a water.

Ditches and drainage devices. The Final Rule is vague enough to give the government regulatory authority over non-navigable ponds, ditches, and potholes. On the ditch/drainage device maintenance issue, there is also no recognition that the agencies will follow the opinion of the U.S. Circuit Court of Appeals for the Eighth Circuit in *Barthel v. United States Department of Agriculture, 181 F.3d 934 (8th Cir. 1999).* In *Barthel*, the court ruled that a landowner can do whatever is necessary with respect to an existing drainage device to maintain the "historic wetland and farming regime" for the farm. While *Barthel* is a Swampbuster case, it is relevant with respect to the Final Rule given that the USDA is now basically subservient to the EPA and the COE.

The U.S. Supreme Court

It is rather presumptuous of the CWA and the COE to develop a Final Rule before the U.S. Supreme Court issues its opinion in a case presently pending involving the definition of a WOTUS. In *Sackett v. Environmental Protection Agency, 8 F.4th 1075 (9th Cir. 2021), cert, granted, 142 S. Ct. 896 (2022).* The issue in the case is whether the U.S. Circuit Court of Appeals for the Ninth Circuit used the proper test for determining whether wetlands are "waters of the United States" under the CWA. The plaintiffs bought a .63-acre lot in 2004 on which they intended to build a home. The lot is near numerous wetlands the water from which flows from a tributary to a creek, and eventually runs into a lake approximately 100 yards from the lot. The lake is 19 miles long and is a navigable water subject to the CWA. The plaintiffs began construction of their home, and the Environmental Protection Agency (EPA) issued a compliance order notifying the plaintiffs that their lot contained wetlands due to adjacency to the lake and that continuing to backfill sand and gravel on the lot would trigger penalties of $40,000 per day. The plaintiffs sued and the EPA claimed that its administrative orders weren't subject to judicial review.

Ultimately the U.S. Supreme Court unanimously rejected the EPA's argument and remanded the case to the trial court for further proceedings. The EPA withdrew the initial compliance order and issued an amended compliance order which the trial court held was not arbitrary or capricious. The plaintiffs appealed and the EPA declined to enforce the order, withdrew it and moved to dismiss the case. However, the EPA still maintained the lot was a jurisdictional wetland subject to the CWA and reserved the right to bring enforcement actions in the future. In 2019, the plaintiffs resisted the EPA's motion and sought a ruling on the motion to bring finality to the matter. The EPA claimed that the case was moot, but the appellate court disagreed, noting that the withdrawal of the compliance order did not give the plaintiffs final and full relief. On the merits, the appellate court noted that the lot

contained wetlands 30 feet from the tributary, and that under the "significant nexus" test of *Rapanos v. United States, 547 U.S. 715 (2006),* the lot was a regulable wetland under the CWA as being adjacent to a navigable water of the United States (the lake).

The U.S. Supreme Court agreed to hear the case and oral argument occurred in early October of 2022. The Court's opinion is anticipated sometime before mid-March of 2023, but the issuance of the Final Rule may cause that to be delayed. In any event, the Supreme Court will have the final say on what a WOTUS rather than the COE or the EPA.

Note: EPA says the Final Rule reflects prior Supreme Court decisions and will provide "clarity" on which waters are jurisdictional and which ones are not. How can EPA provide "clarity" when the Supreme Court hasn't yet said what a WOTUS is? The role of an administrative agency is to take a statute, or a court decision construing a statute and then write a rule defining the boundaries of the definition - in this instance, that of a WOTUS.

Conclusion

The definition of a WOTUS has become a political football. This constant flip-flopping of definitions lends a lack of credibility to the COE and the EPA on the issue. Didn't these same agencies believe the 2019 NWPR was good? The Final Rule represents the agencies' stealth techniques to extend the government's reach over wetlands on private property. There is absolutely no chance that the Final Rule is fair to farmers.