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# ARIZONA FEDERAL COURT VACATES THE NAVIGABLE WATERS PROTECTION RULE, EPA AND THE ARMY CORPS TO REDEFINE "WATERS OF THE UNITED STATES"

By Dietrich Hoefner and James Voyles on 09/2/2021
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On August 30, 2021, Judge Marquez of the U.S. District Court for the District of Arizona vacated the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively "Government Defendants") 2020 "Navigable Waters Protection Rule" ("NWPR"), finding that the NWPR had "fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition of 'waters of the United States.'"

The Order also granted the Government Defendants' Motion for Voluntary Remand to allow the agencies to revise or replace the NWPR. The Government Defendants made this request in connection with Executive Order 13,990, which directed the Government Defendants "to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives."

Although the Plaintiffs in the case also challenged the Government Defendants' 2019 rule repealing the 2015 "Clean Water Rule" ("CWR") and reinstating the preexisting rules that were in place prior to 2015, the Court did not rule on this issue and, instead, directed parties to file proposals within 30-days of the Order on how to proceed with respect to this aspect of the challenge. Finally, the Court denied other pending motions without prejudice.

The Order does not, however, address critical questions that include whether:

- Vacatur of the NWPR reinstates the 2015 CWR,
- Vacatur of the NWPR reinstates the navigable waters definition in Rapanos v. United States,
- Vacatur has nationwide application,
- Vacatur only applies in states where Plaintiffs reside, or
- Vacatur only applies in Arizona.

These critical questions are expected to be answered, in part, via Department of Justice guidance to the Corps or through request for clarification from the Court. In the interim, the Corps is expected to cease working on any and all permitting activities that may be impacted by this decision.

The EPA and Corps announced their intent to revise the definition of "waters of the United States" in June 2021. On September 3, 2021, the EPA and Corps announced that, in response to the Order, they are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime until further notice. This includes both the previous regulatory text in 40 C.F.R. § 230.3 as well as various agency guidance documents further interpreting the regulation. The agencies have not yet provided an estimate of when a new regulatory definition will be published.

**Background**

The Clean Water Act of 1972 ("CWA") was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Specifically, the CWA seeks to regulate point source pollution discharges into "navigable waters." This term is used in the CWA to define the extent of federal jurisdiction to limit surface-water discharges. The statute defines "navigable waters" only as "waters of the United States," and the terms are often used interchangeably.

Before 2006, 33 C.F.R. § 328.3 generally defined navigable waters to include tributaries, impoundments of interstate waters, adjacent wetlands, and waters used in interstate or foreign commerce. Various agency guidance further elaborated on this definition, which was also the subject of Supreme Court decisions in United States v. Riverside Bayview Homes, Inc., 474 U. S. 121 (1985) (upholding the Corps' interpretation that "waters of the United States" include wetlands adjacent to navigable waters) and Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U. S. 159 (2001) (rejecting the argument that use of isolated and abandoned sand and gravel pits by migratory birds did not establish federal jurisdiction).

In 2006, the Supreme Court again considered the scope of navigable waters under the CWA, issuing a four-vote plurality opinion authored by Justice Scalia that defined "waters of the United States" as (1) "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes" and (2) as "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 waters and wetlands, are adjacent to such waters and covered by the CWA."

Justice Kennedy issued a separate opinion concurring in the judgment, finding that "when wetlands are isolated, or adjacent only to a non-navigable tributary of a navigable waterway, those wetlands are regulable under the CWA only if there is a significant nexus between the wetlands at issue and the navigable waterway." Most federal appellate courts that have considered the Rapanos decision have found that Justice Kennedy's concurring opinion is controlling, leading to significant debate and litigation as to what constitutes a "significant nexus" under the test he announced.

Taking an expansive view of Justice Kennedy's concurring opinion, the 2015 CWR substantially expanded the scope of federal jurisdiction over surface waters by creating detailed criteria for determining the types of wetlands and other

waters that would be considered by rule to have a "significant nexus." This rule was repealed by the EPA in 2019 in favor of the NWPR, which adopted a much narrower interpretation of "navigable waters" by essentially adopting Justice Scalia's Rapanos standard into regulation.

The 2020 NWPR redefined navigable waters as (1) "territorial seas" and waters used "in interstate or foreign commerce," (2) "tributaries" of those waters, (3) "lakes and ponds, and impoundments of jurisdictional waters," and (4) "adjacent wetlands."

In June 2021, the EPA and Corps announced their intent to revise, once again, the definition of "waters of the United States." No estimated date has been announced for the new rule, but it is very likely to generate additional litigation and regulatory uncertainty if and when it goes into effect. In the interim, the EPA and Corps intend to implement the pre-2015 regulations as discusses above.

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If you have questions regarding this case and navigating the possible implications or for more information, please contact Lewis Roca regulatory and government lawyers James Voyles or Dietrich Hoefner

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