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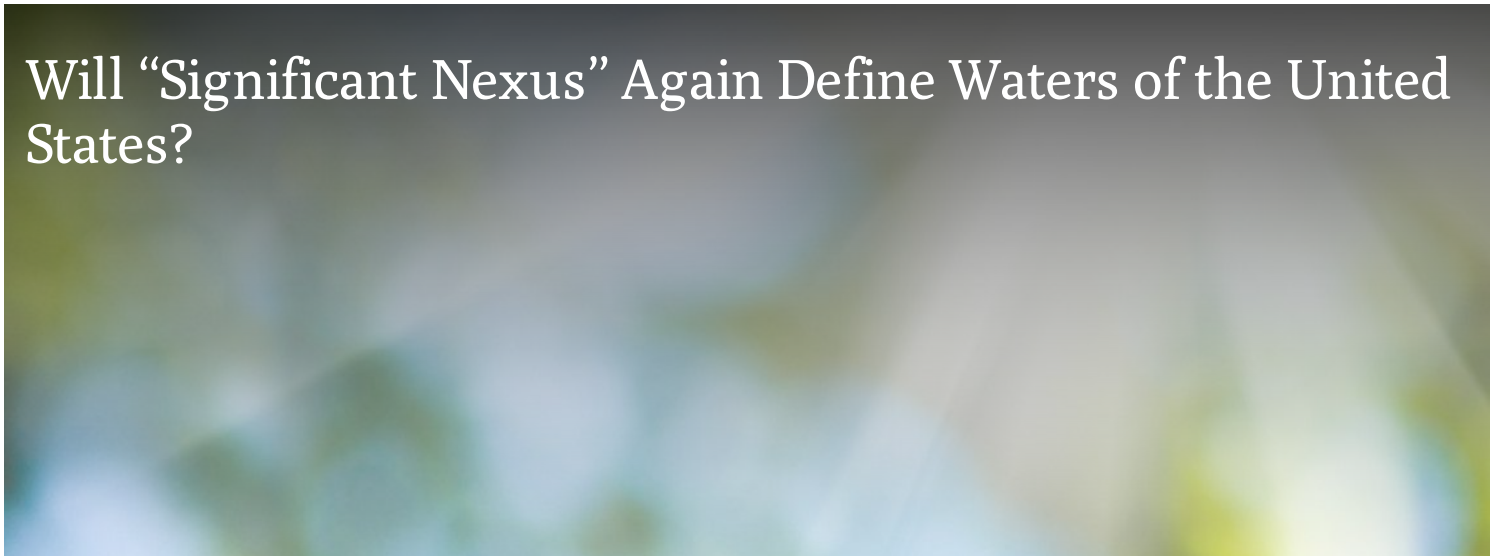
BLOG

Will "Significant Nexus" Again Define Waters of the United States?



AUGUST 11, 2021

The U.S. Environmental Protection Agency and the U.S. Department of the Army Corps of Engineers (the Agencies) recently announced they will take another run at defining "waters of the United States" (WOTUS). This is key to the scope of federal permitting and enforcement jurisdiction under the Clean Water Act (CWA). The Biden administration first seeks to reinstate the "significant nexus" regime, then create an "enduring" definition of WOTUS.[1] All indications are, however, that uncertainty and litigation will continue for the foreseeable future. Even the first step will be subject to legal challenge.

The Agencies' Proposed Path Forward

On July 30, 2021, the EPA and the Army Corps announced plans to engage stakeholders in another process revising the definition of "waters of the United States" under the CWA.[2] The "WOTUS" term is not defined by the statute. Instead, it has been defined by the Agencies through regulations since the 1970s. Regulations promulgated in 1986 were the foundation until a revision finalized by the Obama administration in 2015. Since then, the "WOTUS" definition has been altered several times, each resulting in legal challenges.

Certain states and other plaintiffs challenged the Agencies' 2015 WOTUS rule. This version of WOTUS aimed to implement Justice Kennedy's "significant nexus" test from his concurrence in *Rapanos v. United States*.[3] Several courts concluded that the plaintiffs' challenges were likely to succeed and blocked the implementation of the 2015 rule in much of the country. In 2019, two courts, and then the EPA, found that the Agencies' 2015 WOTUS rule was procedurally or substantively unlawful. The Agencies repealed it.[4] The Agencies then promulgated a new definition for "WOTUS" in 2020, known as the Navigable Waters Protection Rule.

A number of plaintiff states and organizations challenged the 2020 rule in courts across the country. But efforts to enjoin implementation of the 2020 rule nationwide were this time rejected by federal courts. In March 2021, an injunction issued by a lone district court in the state of Colorado was vacated in the Tenth Circuit.[5] Thus, no court currently holds that the Agencies' 2020 WOTUS rule is unlawful.

The Agencies' Reasons for Replacing the 2020 Rule

The current definition of “WOTUS” was promulgated in the Navigable Waters Protection Rule. There are now generally four categories of waters that are federally regulated:

- territorial seas and traditional navigable waters;
- perennial and intermittent tributaries to those waters;
- certain lakes, ponds, and impoundments; and
- wetlands adjacent to jurisdictional waters [6]

A particular area of dispute with the 2020 Rule was the Agencies’ categorical exclusion of ephemeral waters.[7]

The Biden administration plans to rescind the 2020 Navigable Waters Protection Rule, stating that it is “leading to significant environmental degradation.”[8] This is primarily based on the exclusion of ephemeral waters from federal jurisdiction, leaving that regulation to states, localities, and tribes. The Biden administration says it will issue its own new definition. The new round of revisions to the “WOTUS” definition will involve two proposed rulemakings. First, the EPA and the Army Corps plan to issue a “foundational rule” to restore the 1986 definition of “WOTUS” that was in effect until 2015, when the Obama administration redefined “WOTUS.” This would, in effect, restore the “significant nexus” regime that existed after the Supreme Court’s 2006 *Rapanos* decision. Then, the Agencies will issue a second, separate rulemaking again redefining “WOTUS.”[9]

Continued Disputes and Expected Challenges

The Agencies have given little indication about how they might again redefine the definition of “waters of the United States” to create a “durable” rule. It is certain, however, that even the Agencies’ announced first step of promulgating a “foundational rule” restoring the 1986 definition will be met with legal challenges.

The 1986 regime was criticized—then judicially limited through as-applied legal challenges—for being overbroad and ambiguous. Supreme Court decisions found that those regulations asserted jurisdiction over waters exceeding the scope of the CWA. These include the *SWANCC* decision in 2001 and the *Rapanos* decision in 2006. In *SWANCC*, the Supreme Court decided that isolated, abandoned sand and gravel pits with seasonal ponds are not WOTUS. The majority opinion, written by Chief Justice Rehnquist, relied on the meaning of the term “navigable,” which the majority found implied a connection to traditionally navigable waters.[10] In *Rapanos*, the Supreme Court examined whether WOTUS includes a wetland that occasionally empties into a tributary of a traditionally navigable water.[11] The Supreme Court did not produce a majority decision. While five justices opined against the Army’s interpretation, two different tests were put forth. Justice Scalia’s plurality opinion held that a mere “hydrological connection” is not enough to qualify a wetland as a WOTUS; a continuous surface connection is needed. Justice Kennedy, on the other hand, proposed a “significant nexus” to a traditionally-navigable-waterway rule in his concurring opinion until a more precise rule might be adopted. Notably, the *Rapanos* decision featured a concurrence by Chief Justice Roberts. Roberts was critical of the Agencies’ attempt to “adhere to [their] essentially boundless view of the scope of [their] power” in the wake of *SWANCC* and failure to timely amend the 1986 regulations and “develop[] some notion of an outer bound to the reach of their authority.”[12]

Under the *Chevron* doctrine,[13] judicial deference is given to an agency’s interpretation of a statute so long as (1) Congress has not unambiguously answered the question in the statute after judicial application of the tools and canons of statutory construction for first determining what Congress itself intended (*Chevron* Step One) and (2) the agency’s interpretation of the statute is reasonable. Here, when repealing the 2015 Obama-era rule, the Agencies asserted that the 2015 WOTUS rule was prohibited by the statutory text of the CWA, as reflected by the Supreme Court’s decisions in *SWANCC* and *Rapanos*. Yet the Agencies’ recent announcement does not suggest that the text of CWA unambiguously prohibits the current Navigable Waters Protection Rule at *Chevron* Step One.

In the absence of a claim that the CWA requires the Agencies to repeal the Navigable Waters Protection Rule, certain states and litigants are likely to challenge even a temporary return to the ad hoc regulatory regime founded on the 1986-era regulations would be arbitrary and capricious and without substantial justification. A proposed

"foundational rule" will likely be claimed to "rest[] upon factual findings that contradict those which underlay its prior policy."[14] The challengers will likely note that in such a case, "or when [the Agencies'] prior policy has engendered serious reliance interests that must be taken into account," the Supreme Court holds that the Agencies must "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[15]

Moreover, the CWA features criminal penalties. Therefore, the rule of lenity is likely to be asserted as another statutory, interpretative bar to the Agencies' first step. This rule of statutory construction generally requires a court to resolve an unclear or ambiguous statutory question in favor of a criminal defendant. The "significant nexus" test that became the keystone of the 1986-era regulations does not appear in text of the CWA. There may also be constitutional challenges under the "void-for-vagueness doctrine."[16] This doctrine "guarantees that ordinary people have 'fair notice' of the conduct a [law] proscribes" and "guards against arbitrary or discriminatory law enforcement by insisting that a [law] provide standards to govern the actions of police officers, prosecutors, juries, and judges."[17]

The "significant nexus" regime originally came about as judicial gloss on the 1986 regulations imposed by as-applied legal challenges constraining the regulatory text. Those regulations were not facially challenged or vacated in total in *SWANCC* or *Rapanos* because of the statute of limitations. A plan to repromulgate the 1986 regulations now will confront facial legal challenges. Litigants are likely to challenge the Agencies' attempts to intentionally reimpose the regulatory regime that has not successfully clarified the "notoriously unclear" reach of the CWA as contrary to statutory text at *Chevron* Step One and unconstitutional.[18] Even Justice Kennedy later expressed concern about how the CWA, as implemented by the Agencies using the significant nexus test, "raise[d] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[19]

Key Takeaways

- The Biden administration announced a two-step rulemaking process to revise the "WOTUS" definition. It will include (1) repealing the Navigable Waters Protection Rule and returning to the 1986 "significant nexus" regime, followed by (2) a separate rulemaking revising the "WOTUS" definition.
- Actions to revoke the current Navigable Waters Protection Rule and revise the "WOTUS" definition will continue to face legal challenges, as with the prior WOTUS rule rewrites.
- Even the Agencies' proposed first step of issuing a "foundational rule" to reinstate the 1986-era regulations is likely to face legal challenges.

To learn more about the scheduled engagement activities and submitting written recommendations, visit the EPA public-outreach webpage here. For further information or questions about the proposed changes to the "WOTUS" definition and potential implications for your operations, please contact Jonathan D. Brightbill (Partner, White Collar, Regulatory Defense & Investigations/Environmental Litigation), Madalyn Brown (Associate, Environmental), or your Winston relationship attorney.

** Jonathan D. Brightbill served at U.S. Department of Justice from 2017 to 2021, including as Acting Assistant Attorney General of the Environmental and Natural Resources Division. Please note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date set forth above.*

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[1] *EPA and Army Announce Next Steps for Crafting Enduring Definition of Waters of the United States*, EPA (July 30, 2021), https://www.epa.gov/newsreleases/epa-and-army-announce-next-steps-crafting-enduring-definition-waters-united-states.

[2] *Id.*

[3] *Rapanos v. U.S. s*, 547 U.S. 715 (2006) (Kennedy, J., concurring).

[4] 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[5] *Colorado v. U.S. EPA*, 989 F.3d 874 (10th Cir. 2021).

[6] 33 CFR pt. 328.

[7] *Trump Water Rule Will Remain In Place During Review*, Law 360 (July 15, 2021, 3:34 PM EDT), https://www.law360.com/articles/1403478/trump-water-rule-will-remain-in-place-during-review.

[8] *EPA, Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

[9] *Id.*

[10] *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

[11] *Rapanos v. U.S.*, 547 U.S. 715 (2006).

[12] *Id.* at 757-58 (Roberts, C.J., concurring).

[13] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[14] *F.C.C. v. Fox*, 556 U.S. 502, 515 (2009).

[15] *Id.*

[16] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

[17] *Id.*

[18] *Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring).

[19] *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, J., concurring).

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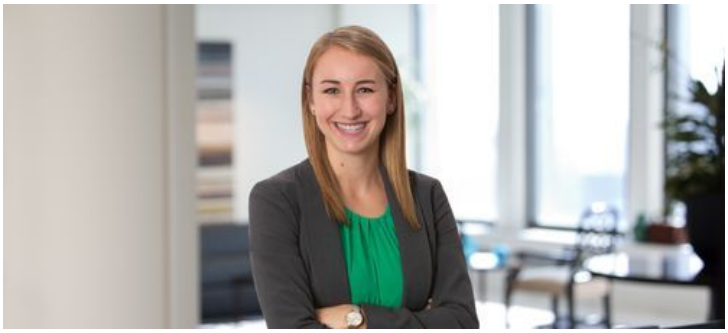

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