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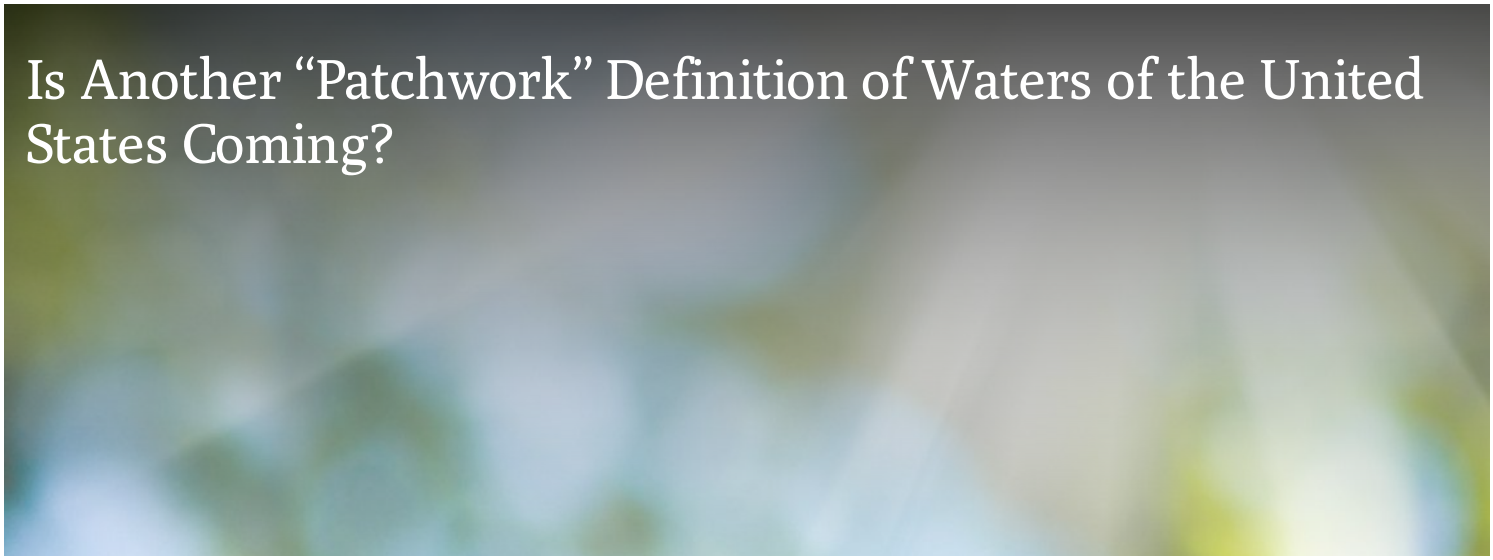
BLOG

Is Another "Patchwork" Definition of Waters of the United States Coming?



SEPTEMBER 9, 2021

Since 2015, the Clean Water Act's definition of "waters of the United States" has often depended on what state you live in. After a district court decision in Arizona on September 3, 2021, the EPA and U.S. Army Corps of Engineers announced they are halting implementation of their 2020 Navigable Waters Protection Rule nationwide.[1] If history is any guide, the Agencies' announcement may not be the last word. Is the United States heading back to another "regulatory patchwork" of definitions of "waters of the United States"?

Background

The scope of the federal government's jurisdiction under the Clean Water Act is limited to "navigable waters," meaning "the waters of the United States."[2] As previously described, the EPA and U.S. Army Corps of Engineers (the "Agencies") are again reconsidering the "WOTUS" rule defining that term. On July 30, 2021, the Agencies announced plans to meet with stakeholders, then propose two new stepwise rules. The Biden administration plans to rescind the Trump administration's 2020 Navigable Waters Protection Rule ("NWPR"), stating that its categorical exclusion for ephemeral waters, in particular, is "leading to significant environmental degradation."[3]

In light of that determination, the Department of Justice ("DOJ") and the Agencies requested that district courts suspend pending litigation challenging the NWPR. The DOJ asked courts to remand the NWPR back to the Agencies while the Agencies reconsider the definition. In July, the U.S. District Court for the District of South Carolina granted this request for voluntary remand *without* vacatur.[4] Similar remand without vacatur requests were granted, or are still pending, in other states. Until recently, no district court had denied the government's request to remand without vacatur.

On August 30, the United States District Court for the District of Arizona ordered a remand of the NWPR to the Agencies *with* vacatur.[5] Shortly thereafter, headlines reported that the NWPR was no longer in effect. Nevertheless, commentators debate whether Judge Marquez's order alone could mean a vacatur nationwide. The DOJ has taken the position that individual district courts do not have the authority to enjoin or vacate rules on a nationwide basis under the Administrative Procedure Act ("APA").[6] The Agencies themselves made these arguments in opposition to earlier motions to invalidate regulations regarding waters of the United States.[7]

While legal experts were still examining the *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency* order, the Agencies took action. They announced that, in light of the order, the Agencies will no longer implement the NWPR across the country. Instead, the Agencies will revert to applying the pre-2015 "significant nexus" regime that the Agencies earlier signaled they would adopt by regulation.

Prior Attempts to Implement Nationwide Uniformity Pending District Court Challenges

The September 3 announcement is not the first time that the Agencies have needed to respond to district court decisions imposing disparate legal obligations in cases pending around the country. In February 2018, the Supreme Court held that courts of appeals do not have jurisdiction to consider legal challenges to the Agencies' regulations defining WOTUS.[8] As a result, a nationwide stay of the Obama Administration's 2015 Clean Water Rule ("2015 Rule") was dissolved. Preliminary injunctions entered by certain individual district courts nevertheless remained in effect. Using formal notice and comment, the Agencies then promulgated an "Applicability Rule" to delay implementation of the 2015 Rule.[9] This prevented the 2015 Rule from taking effect in states without injunctions. The Applicability Rule intended to achieve nationwide implementation of the pre-2015 significant nexus regime and prevent a "regulatory patchwork" of definitions while the Agencies substantively reconsidered the 2015 Rule.

Environmental groups and certain states quickly challenged the Agencies' Applicability Rule. A series of district courts, led by the District of South Carolina, then enjoined the Applicability Rule as arbitrary and capricious. The court's reasoning included for "refusing to allow public comment and consider the merits of the WOTUS rule and the 1980s regulation" when promulgating the Applicability Rule.[10]

Will Temporary Implementation of the "Significant Nexus" Regime Be Challenged—Again?

For now, the September 3 announcement means the Agencies are implementing a uniform definition of waters of the United States nationwide. If history is any guide, this may not be the last word. Certain states and other public advocacy entities are likely to come forward. The September 3 announcement may constitute a "final agency action" subject to legal challenge under the APA. Notwithstanding that the decision did not result from a formal rulemaking process like the 2018 Applicability Rule, it may be a sufficiently final action to permit APA review.[11] The reversal is arguably a definitive decision with widespread programmatic impact from which legal consequences will flow.[12]

The Agencies relied on the Arizona district court's order in halting implementation of the NWPR. But they gave no other basis for their return to the pre-2015 regime. In *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency,* Judge Marquez wrote that the Agencies' "concerns" with the NWPR "involve fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition of 'waters of the United States.'"[13] The order also concludes that remanding without vacatur would risk "serious environmental harm."[14] Judge Marquez did not, however, rule that the Agencies' stated "concerns" about the NWPR rose to being arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.[15] In fact, the court denied the plaintiffs' motion for summary judgment. This raises the question of how the district court had the power to "vacate" the NWPR. There was no predicate finding of a legal error to allow the court to "set aside" the NWPR under the APA.[16]

The Agencies have not themselves argued the NWPR is arbitrary and capricious or otherwise contrary to law. In fact, the Agencies did not brief the court on the merits of the NWPR prior to the remand with vacatur order in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. The Agencies did raise "concerns" regarding the NWPR's categorical exclusion of ephemeral waters. They also announced their intent to rework the WOTUS definition. Still, the Agencies have not argued that ephemeral waters plainly must fall within the scope of the term "navigable waters" in the statute.

Challengers may protest the decision as violating the APA. They are likely to argue that the NWPR "engendered serious reliance interests that must be taken into account."[17] Stakeholders across the country have been relying on the jurisdictional lines of the NWPR and existing Section 404 permits issued pursuant to the rule. Therefore, the Agencies may need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[18] In short, challengers will say that the Agencies did not sufficiently explain why they are acquiescing to a single district court decision nationwide (when the Agencies are on record saying the district courts lack that power); why the Arizona district court decision should result in vacatur of the NWPR in, for example, states where the district courts ruled remand without vacatur; and why the Agencies provided no notice and comment proceedings under the APA before discontinuing implementation of the rule nationally.

Challengers may also argue that the decision raises Constitutional and due process questions—concerns that the Agencies themselves previously asserted. "Article III limits courts to awarding only the relief necessary to remedy injuries to the plaintiffs in the case before it."[19] Many stakeholders relying on the duly promulgated NWPR were not parties to the Arizona case, nor do they live in that state. And the Clean Water Act features criminal penalties. Therefore, as to individual permits and cases under investigation, there are complex questions relating to the rule of lenity and whether any attempt to define the "notoriously unclear" reach of the Clean Water Act[20] by the *ad hoc* pre-2015 significant nexus regime might be void for vagueness. 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."[21]

Key Takeaways

- The EPA and Army Corps have halted implementation of the 2020 NWPR definition of "waters of the United States" nationwide. The Agencies will return to implementing the *Rapanos*-era "significant nexus" regime that prevailed before 2015.
- The Agencies' announcement may not be the last word on the issue, as legal challenges may follow.
- Open legal questions remain, including whether the Arizona district court lawfully "vacated" the NWPR, whether that order can apply nationwide to individuals relying on the NWPR, and whether the Agencies properly complied with the APA by ceasing implementation of the NWPR nationwide.
- Those holding or contemplating Clean Water Act Section 404 permits, jurisdictional determinations, or who otherwise have questions about the scope of Clean Water Act jurisdiction should consult with counsel about how these developments impact their legal rights and obligations.

For further information or questions about changes to the Clean Water Act "WOTUS" definition, 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 the 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] *Current Implementation of Waters of the United States*, https://www.epa.gov/wotus/current-implementation-waters-united-states.

[2] 33 U.S.C. § 1362(7).

[3] *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.

[4] *South Carolina Coastal Conservation League v. Regan, No.* 2:20-cv-01687-BHH, 2021 U.S. Dist. LEXIS 132031 (D.S.C. July 14, 2021).

[5] *Pasqua Yaqui Tribe v. United States EPA,* No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021).

[6] Mem. from Office of the Attorney General to Heads of Civil Litigating Components United States Attorneys, *Litigating Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (September 13, 2018), available at https://www.justice.gov/opa/press-release/file/1093881/download.

[7] *See, e.g.*, Agencies' Memo. Opp'g Pls' Mot. For Summ. J., at 45-47, D.I. 90, *New York v. Pruitt*, No. 1:18-cv-01030-JPO (memorandum filed Jun. 28, 2018); Agencies' Mem. Supp. Mot. Stay, D.I. 74-1, *South Carolina Coastal Conservation League v. Wheeler*, No. 2:18-cv-00330-DCN (memorandum filed Aug. 23, 2018).

[8] *Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617 (2018).

[9] 83 Fed. Reg. 5,200 (Feb. 6, 2018).

[10] *South Carolina Coastal Conservation League v. Pruitt*, D.I. 68, at 14, No. 2:18-cv-00330-DCN (Order docketed Aug. 16, 2018).

[11] *See United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

[12] *See Bennett v. Spear,* 520 U.S. 154 (1997).

[13] *Pasqua Yaqui Tribe* at *14-15.

[14] *Id.*

[15] *See* 5 U.S.C. § 706(2).

[16] *Id.*

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

[18] *Id.*

[19] Agencies' Memo. Supp. Mot. Stay, D.I. 74-1 at 12, *South Carolina Coastal Conservation League v. Wheeler*, No. 2:18-cv-00330-DCN (memorandum filed Aug. 23, 2018).

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

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

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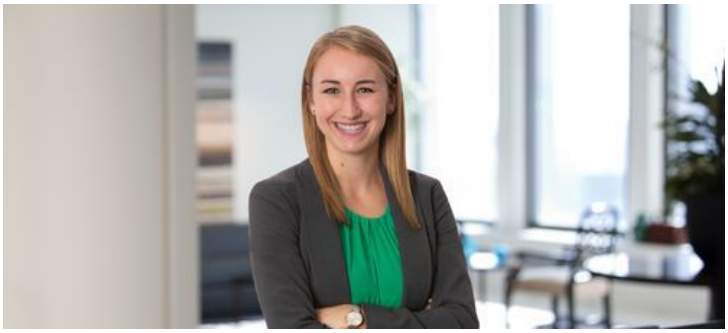

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