Navigable Waters Protection Rule – What's Going on with WOTUS?

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Overview

The scope of the federal government's regulatory authority via the Clean Water Act (CWA) over "Waters of the United States" (WOTUS) has been controversial for many years. What's the current status of the law on this issue? It's an important issue for farmers, ranchers and rural landowners.

Status update of the regulatory definition of a WOTUS – it's the topic of today's post.

Background

The scope of the federal government's CWA regulatory authority over wet areas on private land, streams and rivers has been controversial for more than 40 years. 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 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 is that the NWPR is effective in every state. *Colorado v. United States Environmental Protection Agency, 989 F.3d 874 (10th Cir. 2021)*.

A primary aspect of the litigation involving the NWPR is whether it should apply retroactively or whether it is limited in its application on a prospective basis. For example, in *United States v. Lucero, No. 10074, 2021 U.S. App. LEXIS 6307 and 6327 (9th Cir. Mar. 4, 2021)*, the defendant, in 2014, operated a business that charged construction companies for the dumping of soil and debris on dry lands near San Francisco Bay. The Environmental Protection Agency (EPA) later claimed that the dry land was a "wetland" subject to the dredge and fill permit requirements of Section 404 of the Clean Water Act (CWA). As a result, the defendant was charged with (and later convicted of) violating the CWA without any evidence in the record that the defendant knew or had reason to know that the dry land was a wetland subject to the CWA. On further review, the appellate court noted that the CWA prohibits the "knowing" discharge of a pollutant into covered waters without a permit. At trial, the jury instructions did not state that the defendant had to make a "knowing" violation of the CWA to be found guilty of a discharge violation. Accordingly, the appellate court reversed on this point. However, the appellate court ruled against the defendant on his claim that the regulation defining "waters of the United States" was unconstitutionally vague, and that the 2020 Navigable Waters Protection Rule should apply retroactively to his case.

The NWPR was also held to apply prospectively only in *United States v. Acquest Transit, LLC, No. 09-cv-555, 2021 U.S. Dist. LEXIS 40143 (W.D. N.Y. Mar. 3, 2021)* and *United States v. Mashni, No. 2:18-cv-2288-DCN, 2021 U.S. Dist. LEXIS 123345 (S.D. S.C. Jul. 1, 2021).*

Current Challenge

Most recently, 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 the 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. Last week's opinion not vacating the NWPR allows the Administration to proceed in trying to write a new rule without bothering to defend the Obama-era rule in court.

Conclusion

The litigation involving WOTUS will continue, as will the rule-writing. Ultimately, the issue on the scope of the federal government's regulatory control over wet areas on private property as well as streams and lakes may be back before the Supreme Court.