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Locke Lord QuickStudy: A New Season of WOTUS: Court ?Vacates Trump-Era Navigable Waters Protection Rule

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A new season of the regulatory drama “WOTUS” dropped last week. On August 30, a federal court in Arizona granted EPA and the Army Corps of Engineers’ (Corps) (collectively, the “Agencies”) request to remand their 2020 Navigable Waters Protection Rule (NWPR) narrowly defining “waters of the U.S.” (WOTUS) under the Clean Water Act (CWA). But the court went a step further than the Agencies had requested and vacated the NWPR, rather than allowing it to stand while the Agencies work to develop a replacement. Despite some initial questions as to whether the court’s ruling would apply nationwide or be limited to the District of Arizona, it appears that the Agencies are conceding its nationwide application, effectively erasing the last six years of competing rulemakings and decisions on the topic. The Biden Administration will now be starting with a clean slate as it seeks to develop its own definition of WOTUS that can withstand the inevitable scientific and political challenges.

Previously, on WOTUS

The CWA regulates discharges of pollutants to “navigable waters,” which it defines as “waters of the United States, including the territorial seas.” The statute does not define WOTUS, but it has been defined by rulemakings and refined by numerous court decisions over the years. Since the Supreme Court’s 2006 decision in Rapanos v. United States, the “significant nexus” test established by Justice Kennedy in his plurality opinion prevailed until the Obama Administration promulgated the Clean Water Rule in 2015, which defined WOTUS much more broadly. The Trump Administration subsequently repealed the Clean Water Rule in 2019 and replaced it with the NWPR in 2020. The NWPR defined WOTUS much more narrowly than both the Clean Water Rule and the significant nexus test, including by categorically excluding ephemeral streams (those that flow only in response to precipitation events) from the definition of WOTUS. See our previous Quick Studies (here and here) for more detail and background on the NWPR and the Clean Water Rule.

Inside the Episode

The recent Arizona case, Pasqua Yaqui Tribe, et al., v. EPA, et al., involved a challenge brought by several Native American tribes against the Agencies’ 2019 rule repealing the Clean Water Rule and their 2020 promulgation of the NWPR. In response to the plaintiff’s motion for summary judgment, the Agencies filed a motion asking the court to remand the NWPR without vacatur, which would have let the 2019 repeal of the Clean Water Rule stand

and allowed the NWPR to remain in effect while the Agencies worked to develop a new WOTUS rule, as they have previously announced their intention to do, as discussed in our most recent Quick Study on this topic. The plaintiffs did not oppose EPA's request for remand, but argued that the remand should include vacatur of the NWPR. One intervening defendant opposed both remand and vacatur, while several intervening trade group defendants did not oppose remand but did oppose vacatur. The court therefore considered whether remand without vacatur was an appropriate remedy.

In considering whether it was appropriate to remand the NWPR without vacatur, the court looked to Ninth Circuit precedent which dictates that remand be granted without vacatur only in "'limited circumstances,'… such as when vacatur would risk environmental harm or when the agency could, by offering better reasoning or complying with procedural requirements, 'adopt the same rule on remand.'" The court found that neither of these circumstances applied in this case.

Addressing the risk of environmental harm, the court observed that the most serious risk of environmental harm could come from allowing the NWPR to remain in place. The Agencies had stated in their briefings that the Corps had made approved jurisdictional determinations (AJDs) under the NWPR for 40,211 aquatic resources or water features and found that approximately 76% were non-jurisdictional. They also identified 333 projects that would have required a Section 404 permit prior to the NWPR but no longer did. Due to the NWPR's exclusion of ephemeral streams, the impact of the rule was particularly significant in arid states such as New Mexico and Arizona, where nearly every one of over 1,500 streams assessed under the NWPR have been found to be non-jurisdictional.

Likewise, the court found that the errors in the NWPR were not of a type that could be cured by better reasoning or complying with procedural requirements. The court noted that an agency action is arbitrary and capricious if it directly conflicts with the conclusions of its own experts. The NWPR was finalized despite comments from the EPA's Science Advisory Board that it conflicted with established science and disregarded key aspects of a 2015 report that EPA itself had prepared synthesizing the scientific literature on the connections between tributaries, wetlands and downstream waters. Thus, the court determined that the NWPR contained serious errors. Since the Agencies had already announced their intention to expand the definition of WOTUS beyond the NWPR, and since leaving it in place would result in serious environmental harm, the court held that the "atypical remedy" of remand without vacatur was not warranted, and ordered that the NWPR be vacated and remanded to the Agencies.

Spoiler Alert – It Will Apply Nationwide

The immediate question on everyone's mind following the court's decision last week was whether the vacatur of the NWPR would apply nationwide. The court did not issue an injunction, and there is some question as to whether a district court can vacate a rule on a nationwide basis. Some felt that the Biden Administration might not want to concede that point and thus seek to limit the effect of the ruling. However, it appears that is not the approach the administration is taking.

Late last week, some Corps District Offices outside of Arizona and the Ninth Circuit began notifying parties with pending AJD requests that they have been directed to revert to pre-2015 jurisdictional guidance, i.e., the Rapanos significant nexus test. Thus, virtually overnight the scope of CWA jurisdiction has expanded substantially. While this will undoubtedly impact a vast number of pending projects, it may resolve some uncertainty that had been

nagging many developers with projects in the planning and permitting stage for which construction is still months or even a year off. Unless those projects obtained an AJD under the NWPR, they ran the risk of proceeding without a permit based on the NWPR only to have the rule changed just prior to or during construction due to a subsequent vacatur or a change in Corps policy. Now, developers have a better idea what rule will apply to their projects until the new WOTUS rule takes effect. For projects without an AJD, the significant nexus test will apply. For those with a final AJD, it should continue to apply even after the new rule is promulgated. Most AJDs state that they are valid for five years, and to date the Corps has given no indication that it will not honor those determinations. However, that could change if, for example, a project relying on an AJD is challenged on the basis that the underlying law supporting the AJD was invalid. Thus, those holding an AJD would be well-advised to consult with counsel and possibly the Corps before making any final decisions on how to proceed.

On the Next Season of WOTUS

Public comment on the proposed rulemaking for the new WOTUS rule closed on September 3. It will likely be many months before a proposed rule announcing a new definition of WOTUS is issued. The proposed rule will then be subject to additional public comment and NEPA review before being finalized. Thus, we do not expect a new rule to take effect until Q4 2022 at the earliest, and likely not until 2023. Until then, feel free to contact the authors for guidance on these issues.

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