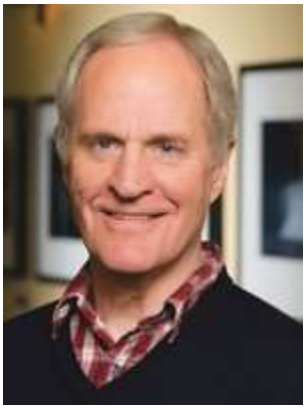
Expert Analysis - Series

EPA In The Trump Era: Making Sense Of Waters Of The US

By **Larry Jensen**
February 20, 2018, 5:03 PM EST

Since President Donald Trump took office just over one year ago, much has changed at the U.S. Environmental Protection Agency. In this Expert Analysis series, former EPA general counsels discuss some of the most significant developments and what they mean for the future of environmental law in the U.S.


Larry Jensen

Since 1972, the Clean Water Act has regulated the discharge of pollutants and the placement of fill into "navigable waters," which are defined by the act as "the waters of the United States." What has never been clear is the extent to which certain non-navigable waters, like ephemeral tributaries to navigable waters, or certain aquatic features, like wetlands, may be considered "waters of the United States." Hoping to resolve the issue once and for all, the Obama administration in June 2015 published the "Clean Water Rule: Definition of Waters of the United States," which is known as the WOTUS rule.[1] However, the courts almost immediately stayed the effectiveness of the WOTUS rule, and, in one of his first official acts, President Donald Trump ordered the WOTUS rule rescinded and replaced. Regardless of the outcome of the Trump administration's replacement effort, the 46-year controversy over the meaning of the phrase "waters of the United States" is likely to continue for many years to come.

The WOTUS Rule

A primary purpose of the WOTUS rule was to clear up the confusion caused by the U.S. Supreme Court's 2006 decision in Rapanos v. United States.[2] In that case, the court held that the Army Corps of Engineers had exceeded its authority under the Clean Water Act by determining that wetlands located 20 miles away from a navigable stream are "waters of the United States" simply because they are adjacent to ditches or man-made drains that intermittently empty into the navigable stream. Unfortunately, a majority of justices, while agreeing that the Corps had not applied the correct standard in making its determination, could not agree what the correct standard is. Justice Antonin Scalia, who wrote the plurality opinion for the court, concluded that only tributaries that are "relatively permanent, standing or flowing bodies of water," and only wetlands with a continuous surface connection to a "water of the United States," and thus indistinguishable from it, may be considered "waters of the United States." Justice Anthony Kennedy, on the other hand, concluded that whether remote wetlands may be considered "waters of the United States" depends on whether they

have a “significant nexus” to a “water of the United States,” and that wetlands possess the requisite “significant nexus” if they “either alone or in combination with similarly situated wetlands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”[3]

The Obama administration seized on Justice Kennedy’s “significant nexus” test as the guiding principle for a new definition of “waters of the United States,” one that would replace the 1986 definition, parts of which had been called into question or invalidated by various judicial decisions.

Based on a scientific review of the extent to which certain types of waters or aquatic features may have a “significant nexus” to navigable waters, the Obama administration adopted a rule that divided waters into three basic categories for purposes of Clean Water Act jurisdiction:

1. Waters that are jurisdictional in all instances — These waters include traditionally navigable waters, interstate waters and territorial seas. In addition, the Obama administration concluded that all of the following waters, by definition, have a “significant nexus” to the waters listed above and are therefore jurisdictional without further analysis: (a) all tributaries to the waters listed above, which are defined as all waters that contribute flow, either directly or indirectly, to one of the waters listed above, and that have a discernible bed and banks and an ordinary high water mark; (b) all waters, including wetlands, ponds and lakes, that are “adjacent” to the waters listed above or to their tributaries, with “adjacent” being defined as bordering, contiguous to or neighboring (as defined in the rule); and (c) all waters that connect segments of a water, or are located at the head of a water, listed above or its tributaries.

2. Waters that could be jurisdictional — These waters include Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands that are determined, on a case-specific basis, to have a “significant nexus” to traditionally navigable waters, interstate waters or territorial seas. They also include all waters located within the 100-year floodplain, or within 4,000 feet of the high-tide line or ordinary high water mark, of traditionally navigable waters, interstate waters or territorial seas, when they are determined, on a case-specific basis, to have a “significant nexus” to such waters.

3. Waters that are never jurisdictional, like converted croplands, waste treatment systems, certain ditches and groundwater.

Litigation on the WOTUS Rule

Thirty-one states, and many industries and landowners, immediately challenged the WOTUS rule in both circuit and district courts, claiming that certain of its provisions exceed the authority granted in the Clean Water Act over “waters of the United States.” The various circuit court challenges were consolidated in the Sixth Circuit, which issued a nationwide stay of the WOTUS rule in late 2015.[4] However, on Jan. 22, 2018, the Supreme Court ruled that the circuit courts lacked jurisdiction to hear the challenges to the WOTUS rule.[5]

Given the Supreme Court's decision, the litigation focus will now shift to the cases that have been filed in the district courts. In August 2015, a district court in North Dakota issued a preliminary injunction of the WOTUS rule that stays its implementation in the 13 plaintiff states in that case.[6]

The Effort to Rescind and Replace the WOTUS Rule

Shortly after taking office, on Feb. 27, 2017, President Trump issued an executive order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'" The order directs the U.S. Environmental Protection Agency and the Army Corps of Engineers to review the WOTUS rule for consistency with the policy set forth in the order, which is "to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory certainty, and showing due regard for the roles of the Congress and the States under the Constitution." At the completion of such review, the EPA and the Corps are directed to issue a proposed rule rescinding or revising the WOTUS rule as appropriate and consistent with law, and, in doing so, to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's opinion in Rapanos.

Since the issuance of the executive order, the EPA and the Corps have taken three steps to fulfill the order's mandate. First, on July 27, 2017, the agencies "proposed a rule to rescind the 2015 [WOTUS] Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 [WOTUS] Rule (82 FR 34899)."[7] The comment period on this proposed rule closed Sept. 27, 2017.

Second, the agencies initiated a formal process of consultation with elected state and local officials and with Indian tribes, which is required before they can propose a replacement for the WOTUS rule. The comment period on this consultation process is now closed.

Third, on Feb. 6, 2018, the EPA and the Corps published a rule that extends the applicability date of the WOTUS rule to Feb. 6, 2020.[8] Adoption of the new applicability date preserves the current regulatory status quo while the agencies determine how to revise the WOTUS rule. Pending any revisions to the WOTUS rule, the agencies will "continue to implement the previous regulatory definition of 'waters of the United States' to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance."[9] This is fully consistent with the way the agencies have been exercising their authority since the Sixth Circuit issued its (now-defunct) nationwide stay of the WOTUS rule in late 2015. Adoption of the applicability date should eliminate the need for the several district courts in which challenges to the WOTUS rule are pending to decide whether injunctive relief from the rule is necessary.

What Lies Ahead

Assuming that the Trump administration is successful in both rescinding and replacing the WOTUS rule, the issue for the courts to resolve will be essentially the same as the one considered in Rapanos: Does the phrase "waters of the United States" refer only to "waters" — i.e., only to "relatively permanent, standing or continuously flowing bodies of water" that are "described in common parlance" as streams, oceans, rivers or lakes — and to wetlands

that have a “continuous surface connection” to such waters (and thus cannot readily be distinguished from them), as Justice Scalia concluded, or does the broad purpose of the Clean Water Act to protect the chemical, physical and biological integrity of the nation’s waters convert any aquatic feature into a “water of the United States,” so long as it has a “significant nexus” to a traditionally navigable water, as Justice Kennedy concluded? It is a safe bet that the ultimate answer to that question will depend, not so much on the text of the Clean Water Act or on the actual connections between the various features of aquatic ecosystems, but on the composition of the Supreme Court when the next Rapanos-like case ends up there.

Lawrence J. Jensen is a shareholder in the Washington, D.C., office of Brownstein Hyatt Farber Schreck LLP. He previously served as EPA general counsel, and as assistant administrator for water, with responsibility for implementing the nation's Clean Water Act and Safe Drinking Water Act programs.

[1] 80 FR 37054, June 29, 2015).

[2] 547 U.S. 715 (2006).

[3] Id. at 780.

[4] National Assn. of Mfrs. v. Department of Defense, 817 F. 3d 261 (6th Cir. 2015).

[5] National Assn. of Mfrs v. Department of Defense, ___ U.S, --- (2018).

[6] State of North Dakota et al. v. US EPA, No. 15-00059 (D.N.D. Aug. 27, 2015).

[7] 82 Fed. Reg. 55543.

[8] 83 Fed. Reg. 5200 (Feb. 6, 2018)

[9] Id.