



Rough Waters Ahead, Once Again: *A District Court Vacates the 2020 Navigable Waters Protection Rule as the EPA and Corps WOTUS Definition Rulemaking Continues*

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Sophia Amberson, Rachael Lipinski, Duncan Greene, and Jenna Mandell-Rice

On August 30, 2021, the U.S. District Court for the District of Arizona in *Pasqua Yaqui Tribe v. EPA*, Case No. 4:20-cv-00266, vacated the Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") 2020 Navigable Waters Protection Rule ("NWPR") redefining jurisdictional "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA"). The district court found "fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition" and accordingly remanded and vacated the rule. It appears that the court ruling applies nationwide, but it is possible that the ruling will only apply in Arizona.

Notably, the EPA and Corps (collectively, the "agencies") are already in the process of again revising the NWPR's definition of WOTUS and had sought a voluntary remand of the NWPR while they work on the ongoing rulemaking. However, the agencies had not sought vacatur of the NWPR. The district court's decision to vacate the NWPR, and not merely remand it, injects substantial uncertainty into ongoing regulatory and permitting decisions because it leaves open the question of what definition of WOTUS will apply pending the outcome of the ongoing rulemaking process.

Background

The WOTUS definition establishes the geographic scope for jurisdiction under the CWA, impacting a myriad of regulatory issues, such as when a National Pollution Discharge Elimination System Permit or a Section 404 permit for dredge and fill is required, or when the federal government can use specially allocated funds for pollution response. The CWA does not define WOTUS, leaving the definition open to statutory interpretation and agency rulemaking.

A series of rulemakings and court cases have complicated the question of what waters are covered under the CWA, particularly with respect to tributaries, ditches, and wetlands. For additional background, please see our previous [alert](#) on the [2020 NWPR](#), as well as our [alerts](#) on the Obama-era Clean Water Rule and associated legal challenges. The Trump administration [repealed](#) the Clean Water Rule in a 2019 rule (the "Repeal Rule") and replaced it with the NWPR in April 2020. Notably, the NWPR substantially narrowed the scope of waterbodies subject to regulation under the CWA—removing interstate streams as a separate jurisdictional category; excluding ephemeral streams and water features; requiring rivers, streams, and other natural channels to contribute flow directly or indirectly to a territorial sea or traditional navigable water; and excluding wetlands that are not adjacent to another non-wetland jurisdictional water.

Ongoing Rulemakings

President Biden's [Executive Order 13990](#) on *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (Jan. 20, 2021) directed federal agencies to review regulations issued by the Trump administration, including the NWPR. On June 9, 2021, EPA and the Corps [announced](#) their intention to revise the NWPR's definition of WOTUS. The agencies proposed to revise this definition through two separate rulemakings. The first rulemaking would restore the pre-2015 regulations, amended to be consistent with U.S. Supreme Court decisions. Although the agencies also contemplate a second rulemaking effort, the scope and effect of that rulemaking has yet to be defined. The [Federal Register notice](#) announcing the public meetings for the intended rulemakings raises issues associated with the WOTUS definition related to climate change, environmental justice interests, relevant science, and state and tribal interests.

District Court Ruling

As noted above, the court's decision focused on the NWPR, remanding and vacating that rule. The defendant agencies sought a voluntary remand of the NWPR while they work on the ongoing rulemaking to revise the WOTUS definition. Plaintiff Tribes did not oppose the voluntary remand, but also sought

vacatur. The court found vacatur appropriate based on the seriousness of the agency errors in enacting the NWPR, the likelihood that the agencies would alter the NWPR's WOTUS definition, and the possibility of serious environmental harm if the NWPR remained in place upon remand.

Impact of District Court Ruling and Ongoing Rulemakings

While the Biden administration had argued to keep the NWPR in place as the agencies proceeded with the new WOTUS rulemaking, the district court decision immediately vacated the rule. There remains a question as to whether this decision amounts to a nationwide injunction or if the ruling only applies within Arizona. The order appears to vacate the NWPR in its entirety and does not specifically limit the vacatur to Arizona. However, both the Obama and Trump administrations have previously argued that a federal court can only vacate a rule within the limits of its jurisdiction—and the Biden administration may continue to make those arguments.

The court also requested additional briefing on whether it should also vacate the Trump-era Repeal Rule. This leaves open a significant question—whether there will be a return to the 2015 WOTUS definition, or to pre-2015 regulations and guidance. Until a court determines the validity of the Repeal Rule, the agencies will likely use the pre-2015 regulations and guidance.

Additionally, the court ruling may increase the likelihood of litigation for ongoing projects that received Corps jurisdictional determinations under the NWPR. The Corps issues jurisdictional determinations that are good for five years, and it issued numerous non-jurisdictional determinations under the NWPR. If the basis for a non-jurisdictional determination is impacted by the NWPR being vacated, those non-jurisdictional determinations could potentially be subject to challenge.

The uncertainty about the scope of the district court ruling and impact on ongoing projects only increases the pressure on the agencies to provide a thorough and defensible WOTUS definition. The EPA will host its final public meeting on the ongoing rulemaking process on September 2. Public comment on the rulemaking closes on September 3. Republican lawmakers requested an extension to the public comment period as well as additional public meetings, and an expected timeline for the agencies completing the two-part rulemaking remains unclear.

For More Information

If you would like more information about the district court's decision or other issues related to implementation of the Clean Water Act, please contact Duncan Greene, Joseph Nelson, Jenna Mandell-Rice, Jonathan Simon, or any member of the firm's Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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