Moving Targets in Muddied Waters: Advising Farmers, Landowners, and Lenders Regarding Waters of the United States

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WOTUS Update: EPA Releases Highly Anticipated Final Rule to Redefine "Waters of the United States"

On December 30, 2022, the Environmental Protection Agency ("EPA") released its long-awaited rule to redefine the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA"). The term is central to the implementation of the CWA because only those waterbodies designated as WOTUS receive CWA protection. The new rules marks the third attempt by EPA to redefine WOTUS since 2015. In a press release issued by EPA, the Agency stated that it hoped the new rule would create a "durable definition" of WOTUS that would reduce uncertainty.

Background

Passed by Congress in 1972, the stated objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA implements a variety of different programs, including two permitting schemes that prevent the unpermitted discharge of pollutants or dredge or fill material into protected waters. Central to the implementation of the CWA is the term "navigable waters" which the Act uses to establish most of its programs, including its permitting provisions. Only those waters that fall under the definition of "navigable waters" will be subject to CWA protection.

The CWA broadly defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Congress did not include additional language to further define "waters of the United States." Instead, Congress left it up to EPA to pass regulations that would define the term. Ultimately, this has proved challenging for EPA. The Agency has adopted multiple definitions for WOTUS since the CWA was passed, with the definition being particularly in flux since 2015.

Prior to 2015, the definition of WOTUS had been relatively stable since 1986. Under the 1986 definition, there were roughly seven categories of waterbodies that fell under the definition of WOTUS. That included all waters which have been used or could be used in interstate or foreign commerce; all interstate waters; all other waters that could affect interstate or foreign commerce if the water was degraded or destroyed; the territorial seas; impoundments of any waters described in the rule; tributaries of any waters described in the rule; or wetlands adjacent to any waters described in the rule. Under that rule, some waters very clearly satisfied the definition of WOTUS while others, particularly wetlands, required further assessment.

In 2006, the United States Supreme Court issued a ruling in the landmark case ***Rapanos v. U.S.*, 547 U.S. 715 (2006)**. The case concerned the scope of wetlands jurisdiction under the CWA, specifically asking whether CWA jurisdiction extended to non-navigable wetlands that did not share a continuous surface connection with a navigable water. Ultimately, the Court did not reach a majority conclusion. Instead, *Rapanos* resulted in a four-justice plurality decision authored by Justice Scalia and an opinion by Justice Kennedy writing for himself. The plurality

opinion proposed a strict hardline rule for determining wetland jurisdiction under the CWA. According to the plurality, the word "waters" in "waters of the United States" should apply only to "relatively permanent, standing or continuously flowing bodies of water" such as streams, oceans, rivers and lakes. Only those wetlands which shared a "continuous surface connection" with a relatively permanent body of water would satisfy the definition of WOTUS and fall under CWA jurisdiction.

Justice Kennedy offered a different approach. In his opinion, Justice Kennedy suggested that a wetland should fall under CWA jurisdiction if it shared a "significant nexus" with a water that is already recognized as a WOTUS. A significant nexus would exist if a wetland "significantly affect[s] the chemical, physical, and biological integrity" with a recognized WOTUS. If such a significant nexus exists, the wetland would fall under CWA jurisdiction.

In the years following *Rapanos*, courts and EPA tended to apply Justice Kennedy's significant nexus test either on its own or in combination with the plurality's approach when the issue arose. However, EPA did not formally revise the definition of WOTUS in response to *Rapanos* until 2015. At that time, EPA adopted the Clean Water Rule which expanded the definition of WOTUS and attempted to clarify which waters were protected. The rule was highly controversial, and multiple lawsuits ultimately prevented it from going into effect in over half the states. When President Trump took office in 2017, he issued an executive order directing EPA to draft new regulations that would repeal the Clean Water Rule and redefine WOTUS. In 2020, EPA adopted the Navigable Waters Protection Rule which once again redefined WOTUS, this time limiting it to four discrete categories of waters. That rule was similarly controversial, and was ultimately overturned by a judge in 2021.

When President Biden took office in 2021, he issued another executive order again directing EPA to review and revise the regulations defining WOTUS. After conducting an initial review, EPA announced that it would carry out a two-part rulemaking to create a new WOTUS definition. During the first part of the rulemaking, EPA repealed the Navigable Waters Protection Rule and returned the WOTUS definition to where it was prior to 2015. During the second part, EPA worked to draft a new WOTUS definition that would build on the pre-2015 definition to establish a durable WOTUS rule. The final rule announced on December 30 is the conclusion of that two-step rulemaking.

What's In the Rule?

The 2022 WOTUS rule is largely based on the pre-2015 regulations from 1986, and for the first time codifies both the significant nexus and relatively permanent standards proposed in *Rapanos*. The 2022 rule includes definitions for several other important terms such as "adjacent" and "significant affect," and codifies a variety of longstanding WOTUS exclusions. The text of the rule is divided into three parts: jurisdictional waters, exclusions, and definitions.

In the 2022 WOTUS rule, EPA identifies five categories of waters that will fall under CWA jurisdiction. Those categories are:

- Traditional navigable waters that currently are, or were used in the past, or could be used in the future for interstate for foreign commerce, including all waters that are subject to the ebb and flow of the tide; the territorial seas; and interstate waters, including interstate wetlands (collectively, "traditional navigable waters")
- Impoundments of waters otherwise identified as a WOTUS, except for impoundments of waters identified under the fifth category of WOTUS (collectively, "impoundments")
- Tributaries of traditional navigable waters or impoundments that are either: relatively permanent, standing or continuously flowing bodies of water; or that alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters (collectively, "tributaries")
- Wetlands adjacent to any of the following: traditional navigable waters; a relatively permanent, standing or continuously flowing impoundment or tributary; an impoundment or tributary if the wetlands either alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of a traditional navigable water (collectively, "adjacent wetlands")
- Interstate lakes and ponds, streams, or wetlands that do not fall into any of the above categories provided the water is either: relatively permanent, standing or continuously flowing and shares a surface connection with a traditional navigable water, impoundment, or tributary; or on its own or in combination with similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a traditional navigable water (collectively, "jurisdictional interstate waters")

These categories of WOTUS are similar to the categories identified in the 1986 rules with a few exceptions. For example, the 2022 rule limits the types of impoundments that may satisfy the WOTUS definition only to impoundments of navigable waters, tributaries, and jurisdictional wetlands. Under the 1986 rule, all impoundments of any water described as a WOTUS fell under CWA jurisdiction. Additionally, the 2022 rule incorporates both tests from *Rapanos* by requiring that tributaries, wetlands, and interstate waters either satisfy the plurality's test, or share a significant nexus with a traditional navigable water.

The second portion of the 2022 WOTUS rule lays out exceptions to the rule. These are waters that will not meet the WOTUS definition even if they fall into one of the five categories outlined above. Many of these exclusions are longstanding and have been included in previous WOTUS definitions. Importantly, the 2022 WOTUS rule maintains two exclusions relevant to agriculture: prior converted cropland, and waste treatments systems that are otherwise designed to meet CWA requirements. Prior converted cropland is defined as any area that was drained or otherwise manipulated to make production of agriculture possible prior to December 23, 1985. 40 C.F.R. § 120.2(3)(ix). If the area becomes unavailable for the production of agricultural commodities, it loses its prior converted cropland status. Other exceptions found in the 2022 WOTUS rule include ditches that do not carry a relatively permanent flow of water, artificially irrigated areas that would revert to dry land if irrigation stopped, and various artificial ponds and pools.

The final section of the 2022 WOTUS rule provides definitions for key terms within the rule itself. Some of the definitions are consistent with previous regulations while other definitions

have been codified for the first time. Importantly, the 2022 rule maintains the same definition for "adjacent" that has been in place for decades. Under the rule, "adjacent" is defined as "bordering, contiguous, or neighboring." It further explains that "wetlands separated from other waters of the United State by man-made dikes or barrier, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" This term is critical for helping to determine which wetlands fall under CWA jurisdiction.

The 2022 WOTUS rule also introduces a definition for "significantly affect." According to the rule, "significantly affect" means "a material influence on the chemical, physical, or biological integrity of" traditional navigable waters. The rule goes on to outline "functions to be assessed" and "factors to be considered" when determining whether a waterbody meets the "significantly affect" standard. The functions to be assessed include: contribution of flow; trapping, transformation, filtering, and transport of materials such as nutrients or sediment; retention and attenuation of floodwaters and runoff; modulation of temperature in traditional navigable waters; and provision of habitat and food resources for aquatic species located in traditional navigable waters. The factors to be considered include: the distance from a traditional navigable water; hydrologic factors such as the frequency, duration, magnitude, timing, and rate of hydrologic connections; the size, density, or number of waters that are similarly situated; landscape and geomorphology; and climate variables such as temperature, rainfall, and snowpack. EPA will consider all of these elements when determining whether a waterbody has a sufficient significant affec" on a traditional navigable water to satisfy the definition of WOTUS.

Finally, the document accompanying the 2022 WOTUS rule outlines how EPA intends to implement the rule. Although this is not part of the rule itself, it provides insight to how EPA expects the rule to function. According to this document, EPA will begin its WOTUS analysis by first considering if a waterbody qualifies as a traditional navigable water. If so, the analysis is complete and the waterbody will be classified as a WOTUS. If the waterbody does not qualify as a traditional navigable water, EPA will next consider whether any of the exclusions to the WOTUS rule apply. If an exclusion applies, the waterbody is not jurisdictional and EPA will end its analysis. If an exclusion does not apply, EPA will determine if the waterbody is either an impoundment, a tributary, or an adjacent wetland. If the waterbody satisfies either of these definitions, then it will be considered a WOTUS. If the waterbody is not found to be an impoundment, a tributary or an adjacent wetland, EPA will move on and assess whether the waterbody could be jurisdictional under the final category of jurisdictional interstate waters. If the waterbody is found to fall under that category, then the water is a WOTUS. If the waterbody does not fall under that category, then the water is not a WOTUS and EPA's analysis is at an end.

Going Forward

At the time this article was published, the 2022 WOTUS rule has not been introduced to the Federal Register. The rule will not go into legal effect until 60 days after it is entered into the Federal Register. Until that time, the pre-2015 regulations will remain in effect.

While the 2022 WOTUS rule marks the end of EPA's most recent rulemaking process to redefine WOTUS, it does not mean that the definition is fully settled. In late 2022, the United

States Supreme Court heard oral argument in a lawsuit titled ***Sackett v. EPA***, where the Court was asked to revisit its ruling in *Rapanos*. The Court's opinion in that lawsuit is expected to issue later this year. Depending on what is in the Court's final decision it may be necessary for EPA to revisit or revise the definition of WOTUS once again. It is also likely that the 2022 WOTUS rule will face additional lawsuits that could result in further revisions.

WOTUS Update: 2023 Rule Enjoined in 27 States

Over the last month, there have been several developments in the litigation over implementation of the key Clean Water Act ("CWA") term "waters of the United States" ("WOTUS"). The definition of WOTUS is critical for implementing the CWA because only those waters that fall under the WOTUS definition will be regulated under the CWA. The Environmental Protection Agency ("EPA") is responsible for issuing regulations to define the key term, which has proven to be a challenge. Since 2015, there have been three different rulemakings to introduce new WOTUS definitions. The latest WOTUS definition, which went into effect on March 20, has been the subject of three legal challenges. Although one of the lawsuits was dismissed, the other two lawsuits have resulted in injunctions preventing the 2023 WOTUS rule from taking effect in 26 states and a temporary stay of the rule in a 27th state.

Elements of an Injunction

Currently, three separate federal courts have issued rulings on motions to enjoin the 2023 WOTUS rule from remaining in effect while the underlying legal challenges to the rule are litigated. While an injunction does not mean that the challenged rule has been overturned, it does indicate that the judge issuing the injunction has determined that the plaintiffs are likely to win on the merits of their claims.

An injunction is a court order requiring a person to either take or cease doing a certain action. There are different types of injunctions that are issued at different points in the lawsuit, and last for different amounts of time. Typically, when a plaintiff is suing to challenge a regulation passed by a government agency, the plaintiff will ask for a preliminary injunction which may be issued early in the lawsuit. Preliminary injunctions are usually granted before trial or oral argument with the goal of preserving the "status quo" while the underlying matter is litigated. For lawsuits challenging government rules, the status quo preserved by a preliminary injunction is typically whatever the law was before the challenged government rule was in place.

According to the Supreme Court in ***Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)**, a preliminary injunction is an "extraordinary remedy never awarded as a right." Therefore, the party seeking the injunction (usually the plaintiff) must demonstrate to the court that four required elements are satisfied. Those elements include: (1) the likelihood that the plaintiff will succeed on the merits of their claims; (2) that injunctive relief is necessary to prevent irreparable harm to the plaintiff; (3) that the threatened irreparable harm to the plaintiff outweighs any harm that injunctive relief may cause to the defendant; and (4) that injunctive relief is consistent with the public interest.

To satisfy the first element, it is not necessary for the plaintiff to show that their underlying arguments are certain to win at trial. Instead, it is enough for the plaintiff to show that they are "substantially" likely to win on the merits of their claims. In other words, the plaintiff must demonstrate that there is a more than minimal chance that their arguments are likely to succeed. While the plaintiff must satisfy all four elements of the preliminary injunction test, the first factor

is considered the most important. A court will not consider the other three factors if the plaintiff fails to show that they are likely to succeed on the merits of their claims.

If the plaintiff has satisfied the first element of the preliminary injunction test, the court will move onto the other three. To demonstrate the necessary "irreparable harm," the plaintiff must provide evidence that if injunctive relief is not granted, they will suffer an irreparable injury. While the injury does not need to have already occurred for the plaintiff to be successful on this element, it must be an injury that is real and immediate should injunctive relief not be granted. To satisfy the third element weighing the "balance of harms," the plaintiff must show that the alleged irreparable harm that they will suffer without injunctive relief is significant, while only minimal harm will occur to the defendant if injunctive relief is granted. If the court finds reasonable evidence that a preliminary injunction would unduly burden the defendant, that is grounds for the court to deny injunctive relief. Finally, to satisfy the "public interest" element, the plaintiff must show that granting a preliminary injunction would not be harmful to the public interest. Because courts recognize that the public has a strong interest in the enforcement of valid laws, in cases where the plaintiff is challenging a law or regulation, the "public interest" element will often be based in part on whether the plaintiff has demonstrated that they are likely to succeed on the merits. If the plaintiff successfully shows that they are likely to succeed in their claims that the law is invalid, it is generally considered not to be in the public interest to enforce an invalid law.

Recent WOTUS Injunctions

As of April 2023, three courts have issued orders on requests for injunctions in lawsuits challenging the 2023 WOTUS rule. Two courts granted the plaintiffs' request for a preliminary injunction, while the other court dismissed the case entirely for the plaintiffs' failure to state a valid claim. The plaintiffs in that case have appealed the court's decision to dismiss and received a temporary stay of the rule while the appeal is litigated.

State of Texas v. EPA

The first injunction against the 2023 WOTUS rule was issued on March 19, 2023, by a federal judge in ***State of Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.)**. The court began its preliminary injunction analysis by considering whether the plaintiffs had show they were likely to succeed on the merits of their claims that the 2023 WOTUS rule exceeds the authority granted to EPA by the CWA, that the rule violates the Tenth Amendment of the United States Constitution which delegates the power to regulate land and water resources to the states, and that EPA did not have clear Congressional authorization to adopt the 2023 WOTUS rule. According to the court, two aspects of the 2023 rule indicated that the plaintiffs were likely to succeed on the merits of their claims – the rule's significant nexus, and the extension of jurisdiction over all interstate waters regardless of "navigability."

The 2023 WOTUS rule incorporates the significant nexus test as a way of determining whether certain waters meet the definition of WOTUS. The test was first articulated by Justice Kennedy in the landmark case ***Rapanos v. U.S.*, 547 U.S. 715 (2006)**, but was not formally codified until the 2023 WOTUS rule. According to the judge in *State of Texas v. EPA*, the plaintiffs were likely

to succeed to the merits of their claim that the 2023 rule exceeds the CWA's jurisdiction because the significant nexus test in the 2023 rule "ebbs beyond" the significant nexus test established by Justice Kennedy. The court also determined that the inclusion of all interstate waters in the 2023 WOTUS rule regardless of navigability extends beyond the text of the CWA which uses the phrase "navigable waters" as a basis for jurisdiction. While courts have determined that CWA jurisdiction goes beyond "traditional navigable waters," they have also determined that EPA cannot read navigability out of the WOTUS definition. For those two reasons, the judge in *State of Texas v. EPA* concluded that the plaintiffs were likely to succeed on the merits of their underlying claims.

After determining that the first element of the injunction test was satisfied, the court moved onto the other three elements. The court determined that if the 2023 WOTUS rule were not enjoined, the plaintiffs would suffer irreparable harm by taking on compliance costs associated with complying with the new rule. The court concluded that such harm outweighed any harm to the defendants because the plaintiffs would be forced to spend unrecoverable resources on complying with the 2023 WOTUS rule if it went into effect while the defendants would suffer no harm if the rule were enjoined while the litigation proceeded. Finally, the court determined that since the plaintiffs had shown that they were likely to succeed on the merits, enjoining the 2023 WOTUS rule was in the public interest because "there is little public interest or efficient gained with implementing" a rule that is likely to be ruled invalid.

The injunction issued in this case applies to both Texas and Idaho.

State of West Virginia v. EPA

The first injunction against the 2023 WOTUS rule was issued on April 12, 2023, by a federal judge in ***State of West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.)**, and applies to 24 different states. Like the court in *State of Texas v. EPA*, the court in *State of West Virginia v. EPA* began its analysis by considering the plaintiffs' likelihood of success on the merits. The plaintiffs in *State of West Virginia v. EPA* raised similar claims as the plaintiffs in *State of Texas v. EPA*, and the courts offered a similar analysis of the merits of those claims. According to the court in *State of West Virginia v. EPA*, the plaintiffs were likely to succeed on their claim that the 2023 WOTUS rule went beyond the jurisdiction granted to EPA under the CWA because the rule incorrectly granted jurisdiction to all interstate waters regardless of navigability and misinterpreted Justice Kennedy's significant nexus test. Additionally, the court found that the 2023 rule raised "a litany of other statutory and constitutional concerns."

Next, the court turned to the other three elements of the preliminary injunction test. Like the court in *State of Texas v. EPA*, the court here found that the plaintiffs had demonstrated irreparable harm in the form of compliance costs. Specifically, the court highlighted various infrastructure projects that different plaintiff states had identified as likely to incur additional costs if the states had to determine whether waters located in the project areas were considered WOTUS under the 2023 rule. Additionally, the court determined that the defendant would not suffer any actual harm if the 2023 rule were enjoined, satisfying the third element of the preliminary injunction analysis. Finally, the court determined that it would be in the public interest to issue an injunction to avoid enforcement of a rule that is likely to be found invalid.

Commonwealth of Kentucky v. EPA

Only one of the three courts where challenges to the 2023 WOTUS rule were brought declined to issue an injunction. In ***Commonwealth of Kentucky v. EPA*, No. 3:23-cv-0007 (E.D. Ky.)**, the court found that the plaintiffs had failed to demonstrate an impending injury and dismissed the case as not ripe for review. The plaintiffs have appealed this ruling, and the appellate court granted a temporary stay of the rule that will last through May 10.

When a plaintiff brings a claim to court, they must show that they have the necessary standing for a court to hear their dispute. If a plaintiff is unable to demonstrate that they have standing, the court will dismiss their case. Standing is satisfied if the plaintiff shows all three of the following: (1) the plaintiff has suffered an actual "injury-in-fact" which is defined as an injury that is either concrete and particularized, or actual or imminent; (2) the injury is result of the defendant's disputed conduct; and (3) the court is capable of redressing the injury. In *Commonwealth of Kentucky v. EPA*, the court found that the plaintiffs did not have standing because the plaintiffs failed to show that they had suffered an actual injury-in-fact.

The plaintiffs in *Commonwealth of Kentucky v. EPA* include private sector plaintiffs as well as the state of Kentucky. All plaintiffs alleged that if the 2023 WOTUS rule went into effect, they would be injured as a result of "likely" future costs associated with coming into compliance with the rule, including expending additional resources to determine whether the 2023 rule would apply to waters on their properties. The court determined that these possible future costs were too speculative to meet the definition of "injury-in-fact." According to the court, until the plaintiffs "did not identify any specific water feature or related project and explain how the [2023] rule will affect it." Therefore, the court concluded that the plaintiffs had failed to identify a "certainly impending injury." The court also considered claims raised by the state of Kentucky that the 2023 rule infringes upon its state sovereignty by expanding CWA jurisdiction to include more waters. Once again, the court found that this claim did not demonstrate an "injury-in-fact" because the state was unable to show that the 2023 rule would grant the federal government jurisdiction over land or waters "which should be in [the state of Kentucky's] exclusive control."

Because the court found that the plaintiffs did not have standing, it dismissed the case. The dismissal was without prejudice, meaning that the plaintiffs are free to refile their suit provided they resolve their issues with standing. The plaintiffs have appealed the court's decision to dismiss, and in a two-page ruling the appellate court ordered that the 2023 WOTUS rule be temporarily stayed while the appeal is litigated. The stay will last through May 10.

Going Forward

As a result of the court decisions discussed above, the 2023 WOTUS rule is currently enjoined in 27 states. Those states will apply the pre-2015 WOTUS definition while the lawsuits challenging the 2023 rule continue to be litigated.

The future of the 2023 WOTUS rule remains unclear. While the judges in both *State of Texas v. EPA* and *State of West Virginia v. EPA* have issued injunctions, the lawsuits could still take months or years to resolve. Additionally, the United States Supreme Court has yet to issue its

decision in a case it heard last October concerning the scope of CWA jurisdiction and the definition of WOTUS. That decision is expected to impact the WOTUS definition. In the meantime, it is possible that the 2023 WOTUS definition could be blocked in other states.

WOTUS Update: Breaking Down the Pre-2015 Regulatory Regime

In late August, a court in the District of Arizona issued a decision vacating the Navigable Waters Protection Rule ("NWPR"), the most recent regulation defining the term "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA"). Prior to the court's decision, the Environmental Protection Agency ("EPA") had announced that it would begin a rulemaking process to repeal the NWPR – which has only been in place since June, 2020 – and replace it with a new regulation redefining WOTUS. Since the court's decision, EPA has announced that it will cease implementation of the NWPR and will instead interpret WOTUS consistent with the pre-2015 regulatory regime until further notice in order to comply with the court's order. The pre-2015 regulatory regime is complex. It involves regulations adopted by EPA in the 1980s that define the term WOTUS, as well as memoranda issued by EPA in the 2000s regarding decisions from the United States Supreme Court that interpreted those regulations. The regulations, the Supreme Court decisions, and the subsequent memoranda must be reviewed in order to understand how EPA will be interpreting the term WOTUS until further notice.

Background

The CWA was enacted by Congress in 1972 as the nation's primary federal law regulating water pollution. The main goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To do this, the CWA established a permitting program that prohibits an unpermitted discharge of any pollutant from a point source into "navigable waters." 3. U.S.C. § 1342. Because permits for discharges are only required for those discharges made into navigable waters, the term is key to understanding which waters are subject to CWA jurisdiction. The text of the CWA defines the term navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). However, the term WOTUS is not further defined in the statute. Instead, EPA, the federal agency tasked with administering the CWA, has been responsible for defining the term. Since 1972, EPA has redefined WOTUS several times.

The most recent definition of WOTUS was adopted by EPA in 2020. The NWPR was drafted, in part, due to multiple courts across the country preventing the implementation of the previous WOTUS definition which was adopted by EPA in 2015. The NWPR was narrower than the 2015 rule, limiting what was included in the definition of WOTUS to six categories of waterbodies. This was in contrast to the 2015 rule which was broad and required a case-by-case analysis for various types of waterbodies. The 2015 rule was itself a response to decisions from the United States Supreme Court interpreting the definition of WOTUS according to regulations EPA had passed in the 1980s.

Prior to formally adopted the NWPR, EPA had issued a final regulation repealing the 2015 rule. By doing so, EPA returned to the regulatory regime that had been in place before the 2015 rule was passed, meaning that for a limited period of time EPA was interpreting WOTUS according to the 1980s regulations and memoranda issued by the agency in response to Supreme Court decisions. When the Arizona district court vacated the NWPR, it caused the legal definition of

WOTUS to revert to what it had been before the NWPR went into effect. This means that until EPA adopts a new WOTUS definition, or until it is ordered by a court to do differently, EPA will be interpreting WOTUS according to the 1980s regulations and accompanying memoranda.

1980s Regulations

In 1980, EPA issued a final regulation to redefine WOTUS. This was only the second time that EPA had done so. By 1982, the Army Corps of Engineers ("Corps"), which administered the dredge and fill program under the CWA, had also adopted the 1980 definition.

According the 1980 rule, WOTUS is defined as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(b) All interstate waters, including interstate "wetlands;"
(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;
(e) Tributaries of waters identified in paragraphs (1) – (4) of this definition;
(f) The territorial sea; and
(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) – (f) of this definition.

40 C.F.R. 122.2 (1981). Under this definition, some waters are more easily identifiable as falling under CWA jurisdiction than others. For example, it is obvious that the Mississippi River would qualify as a WOTUS because it has both been used to facilitate interstate commerce, and is an interstate water. Additionally, the Pacific Ocean would clearly be a WOTUS because it is a territorial sea. However, identifying waters that were located entirely within the boundaries of one state but still fell under the jurisdiction of the CWA because their degradation or destruction would affect waters that crossed state lines proved to be a challenge. Particularly when it came to wetlands. That confusion ultimately resulted in lawsuits that made their way to the United States Supreme Court for further clarification.

Rapanos v. United States

Perhaps the most important case interpreting the definition of WOTUS is the Supreme Court decision in ***Rapanos v. U.S.*, 547 U.S. 715 (2006)**. In *Rapanos*, the court considered whether a series of wetlands fell under the jurisdiction of the CWA. Of the wetlands at issue, one emptied into a man-made drain that itself emptied into a creek which eventually emptied into Lake Huron. Another was connected to a drain that shared a surface connection with the Tittabawassee River, and the third wetland shared a surface connection with the Pine River which flows into Lake Huron. At question was whether CWA jurisdiction extended to nonnavigable wetlands that did not abut a navigable water.

Although many hoped that the Supreme Court's decision in *Rapanos* would bring clarity to the definition of WOTUS, there was no single, unified standard that came out of the case. While five of the nine justices agreed on the outcome, they did not agree on the legal reasoning behind the outcome. Instead, a four-justice plurality opinion authored by Justice Scalia, and an opinion by Justice Kennedy writing for himself offered two alternative methods for determining whether a water was jurisdictional.

The plurality decision proposed a more strict, black-and-white rule for determining whether a water was a WOTUS. According to the plurality, the word "waters" in "waters of the United States" should be taken to mean only "relatively permanent, standing or continuously flowing bodies of water" such as stream, oceans, rivers, and lakes. This would exclude any waterbody through which water flows only intermittently or ephemerally, and would only include wetlands if the wetland had a "continuous surface connection" to another WOTUS.

The test authored by Justice Kennedy took a different approach. According to Justice Kennedy, the CWA required a more flexible approach. He suggested that the jurisdiction of each water should be determined on a case-by-case basis, and that jurisdiction should be based on whether the water in question has a "significant nexus" to a water that has been used for interstate commerce. For wetlands, a significant nexus would exist if the wetlands "significantly affect the chemical, physical, and biological integrity" of another WOTUS. In that case, the wetland would be considered a WOTUS and would fall under the jurisdiction of the CWA.

After the Supreme Court released its decision in *Rapanos*, lower courts have struggled to determine which test to apply when analyzing CWA jurisdictional disputes. When the Supreme Court agrees only on the outcome of the case, but not on the legal basis for that outcome, previous Supreme Court rulings have specified that lower courts must follow the judgment which interprets the law in the narrowest manner. However, this has been some dispute over whether the plurality approach, or the Kennedy approach provides a narrower interpretation of the CWA. So far, courts that have addressed the issue have either applied Justice Kennedy's significant next test either alone or in combination with the plurality's test. No court has yet to apply the plurality test on its own. For its part, EPA has tended to apply the Kennedy test.

Interpreting Memorandum

Along with lower courts, EPA also had to determine the appropriate way to implement WOTUS following the *Rapanos* decision. In 2008, EPA and the Corps issued a joint guidance document directing both agencies on how to interpret the definition of WOTUS in light of *Rapanos*. In that

guidance document, EPA and the Corps divided waterbodies into three general categories: (1) waters that the agencies will assert CWA jurisdiction over; (2) waters that the agencies will determine CWA jurisdiction over after determining whether they have a significant nexus with another WOTUS; and (3) waters that the agencies would generally not assert jurisdiction over. Additionally, the memoranda detailed how EPA and the Corps would apply the significant nexus standard.

Of the waters that the agencies would continue to assert CWA jurisdiction over, EPA included traditionally navigable waters, wetlands adjacent to those waters, non-navigable tributaries of traditionally navigable waters that are relatively permanent, and wetlands that directly abut those tributaries. As always, EPA defined traditionally navigable waters as "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." In other words, those waterbodies that could be use to ship goods or otherwise facilitate interstate commerce remained clearly jurisdictional under the CWA. EPA would also continue to assert CWA jurisdiction over wetlands that were "bordering, contiguous, or neighboring" traditionally navigable waters. Such wetlands do not need to have a continuous surface connection with a navigable water. While a continuous surface connection with a navigable water is enough to bring a wetland under CWA jurisdiction, wetlands that are physically separated from jurisdictional waters by man-made barriers, natural river berms, or beach dues would also fall under CWA jurisdiction. So would wetlands that share a scientifically-supported ecological connection with a jurisdictional water. EPA also continued to find that non-navigable waterbodies whose waters flow into a traditionally navigable water either directly or indirectly were clearly jurisdictional, as were the wetlands that shared a continuous surface connection with those non-navigable waters.

Waters identified by the 2008 memorandum as requiring a case-by-case analysis to determine whether the water fell under CWA jurisdiction included non-navigable tributaries that were not relatively permanent, wetlands adjacent to such tributaries, and wetlands that are adjacent to but do not directly abut a non-navigable tributary. According to the memorandum, EPA and the Corps would analyze such waters by assessing "the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters." In other words, the jurisdiction of these waters would be determined according to their chemical, physical, and biological relationship with traditionally navigable waters. To determine that relationship, the agencies noted that they would evaluate both hydrologic and ecologic factors.

Finally, the memorandum stated that neither EPA or the Corps would assert CWA jurisdiction over the following: swales or erosional features such as gullies or small washes that receive a low or infrequent volume of water; and ditches that were "excavated wholly in and draining only uplands" and that do not have a permanent flow of water. Those waters would typically not be considered WOTUS and therefore would not fall under CWA jurisdiction.

Conclusion

After the decision from the federal district court in Arizona, it appears that the NWPR will no longer be used to determine whether a water is a WOTUS. Instead, EPA and the Corps will revert to the regulatory regime that was in place prior to 2015, which consists of the 1980s regulations and some key memoranda. Under that regime, some waters should be readily identifiable as WOTUS, while others will require additional analysis. Traditionally navigable waters, such as the Mississippi River, will fall under CWA jurisdiction. Additionally, any non-navigable tributaries of navigable waters, and any wetlands that abut those tributaries or share a "significant nexus" with a navigable water will also be jurisdictional. From there it gets less clear. Other waters will require EPA or the Corps to perform an analysis to examine the flow characteristics and functions of the water to determine whether it is a WOTUS.

EPA is in the process of drafting new regulations to replace the pre-2015 regulatory regime. Until that point, unless something changes, EPA and the Corps will likely continue to interpret WOTUS according to the pre-2015 regime.