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Environmental Strategies Focus

March 2017

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President Trump signs executive order directing federal agencies to scrap Obama's Clean Water Rule – what it means in practice and in Wisconsin

The Executive Order

On Feb. 28, 2017, the Trump administration issued an executive order (Executive Order) directing the United States Environmental Protection Agency (U.S. EPA) and the United States Army Corps of Engineers (Corps) to review and "rescind or revise" the final rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37054 (June 29, 2015) (referred to herein as the "Clean Water Rule" or "WOTUS" rule). The Executive Order identifies a national interest of "ensur[ing] that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the States under the Constitution."

The Executive Order directs the U.S. EPA and Corps to communicate with state Attorneys General involved in litigation regarding the Clean Water Rule and take appropriate measures consistent with the rescission or revision of the Clean Water Rule. Finally, the Executive Order states that, for future rulemaking, the U.S. EPA and Corps shall consider the term "navigable waters" "in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)" (as described herein).

Context of the Executive Order

Making national news as an action to "undo" an Obama regulation that was vilified by property rights advocates, ranchers, oil and gas producers, golf and resort developments, and fertilizer and pesticide producers, the Executive Order marks the latest chapter in the troubled waters the WOTUS rule has navigated.

In reality, however, the status quo to which we return if the Clean Water Rule is only rescinded – and not replaced – will itself be a muddy landscape. Importantly, rescission of the WOTUS rule places the regulatory landscape back to the "post-*Rapanos* pre-WOTUS" days, which was largely a time that lacked clarity, relying primarily on case-by-case determinations of the "significant nexus" of a given land feature to an accepted navigable water.

The net change will be negligible because shortly after its June 2015 promulgation, the Clean Water Rule was challenged on multiple legal fronts and, in an Oct. 9, 2015 decision, the Sixth Circuit Court of Appeals stayed, or blocked, implementation and

application of the Clean Water Rule on a nationwide basis. Dispute over which federal court had first dibs on the WOTUS stay led the United States Supreme Court to grant certiorari to determine the proper forum. Now, however, part of the Executive Order appears to send the rule back to U.S. EPA to initiate rulemaking – the future is as clear as a black muddy river.

Lack of clarity gives rise to WOTUS rule

Originally published by the U.S. EPA on June 29, 2015, the WOTUS rule sought to resolve 20 years of confusion and conflict concerning the scope of the federal government's Clean Water Act (CWA) jurisdiction.

The 1972 CWA authorizes the U.S. EPA to regulate activities affecting "navigable waters," defined in the CWA as "waters of the United States, including the territorial seas." Because Congress passed the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," courts, including the Supreme Court, had approved U.S. EPA's exercise of jurisdiction over waters beyond those that are "navigable in fact," a term that generally means capable of commercial or recreational navigation.

Activities affecting waters of the United States are very often subject to federal and state regulation. For example, at the federal level, the Corps considers applications and issues permits under CWA Section 404 for proposals to place fill in regulated wetlands - roughly synonymous with "Waters of the United States." As part of the same permitting process, the Wisconsin Department of Natural Resources (WDNR) considers applications and issues "water quality certification" as the state stamp of approval on Corps-approved 404 permits.

Prior to the development of the Clean Water Rule, courts approved the U.S. EPA's extension of CWA jurisdiction to upstream waters, headwaters and wetlands, and waters that significantly affect the chemical, physical and biological integrity of downstream waters.

The judicial interpretations were not always clear and consistent, such as in these seminal Supreme Court wetlands decisions:

- In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Bayview*), a unanimous Supreme Court decision held that the federal government's jurisdiction extends to "adjacent wetlands" because such wetlands (even though non-navigable) are "inseparably bound up" with the navigable waters to which they are adjacent. This represented a substantial extension of the reach of the federal government's CWA jurisdiction.

- In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court considered whether the reach of the federal CWA extends to "isolated" nonadjacent wetlands which are periodically alighted on by migratory birds. The argument was that the birds themselves or the people who travel across state lines to view and hunt these birds created a notion of interstate commerce to bring such isolated wetlands under federal control. The *SWANCC* Court answered the question in the negative and identified that there must be a "significant nexus" between the wetland and other navigable waters or other regulated waters of the United States.

- Finally, five years after *SWANCC*, the Supreme Court considered whether the CWA regulation extends to wetlands connected to navigable waters via ditches or man-made drains in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). In that case, Justice Antonin Scalia stated, in a plurality opinion, that he considered the concept of "navigable waters" to refer to "relatively permanent, standing or flowing bodies of water 'forming geographic features' that are described in ordinary parlance as streams . . . rivers [and] lakes" – not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." He added that for a wetland to be a "Water of the United States," there must be a "continuous surface connection" with another water body rendering it "difficult to know where the 'water' ends and the 'wetland' begins."

  However, Justice Kennedy's concurring opinion, which ultimately has stood as the commonly applied takeaway

from *Rapanos*, provided that the linchpin of CWA jurisdiction is a "significant nexus" between any water body and a downstream jurisdictional navigable water.

The *Bayview*, *SWANCC* and *Rapanos* decisions left the regulated community with an unclear understanding of CWA regulation over waters of the United States, leading to an inefficient process of case-specific analyses of particular waters and wetlands to determine possible jurisdiction, and, therefore, much litigation.

The 2015 Obama Clean Water Rule

After failed interim guidance from the U.S. EPA and Corps, the federal government sought to promulgate a final rule on waters of the United States that would be easier to understand, more predictable, and more consistent with law and peer-reviewed science. The WOTUS rule reflected the U.S. EPA's consideration of over one million public comments on the scope of its jurisdiction of navigable waters.

The WOTUS rule broke down waters of the United States subject to CWA jurisdiction into eight types and four basic groups:

The first group consisted of waters that are "jurisdictional by rule" and always subject to CWA jurisdiction – (i) **navigable waters**, (ii) **interstate waters**, (iii) **territorial seas**, and (iv) **impoundments** of such jurisdictional waters.

The next jurisdictional group was "**tributaries**," "waters that are characterized by the presence of physical indicators of flow – bed, banks and ordinary high water mark – and that contribute flow directly or indirectly to traditional navigable water or the territorial seas." Controversially, "ditches" constructed in tributaries, or that in certain circumstances drained wetlands, were subject to regulation. However, ditches that flowed only after precipitation were excluded from regulation, as were "ephemeral streams" that did not have a bed and banks and ordinary high water mark.

The third group of WOTUS jurisdictional waters was **adjacent waters**, which include wetlands, ponds, lakes, oxbows, impoundments and similar water features, that have an impact on the chemical, physical or biological integrity of the downstream navigable waters, and therefore meet the Kennedy significant nexus standard.

The final group of waters subject to the WOTUS rule was waters that did not fit into the other categories but that, alone or in combination, could have a significant nexus to other regulated waters of the United States based on **case-specific** analyses.

The WOTUS rule did clarify waters that were not waters of the United States, including treatment ponds or lagoons, prior converted cropland, ditches with ephemeral flow, ditches that do not flow into another regulated water, irrigated areas, artificial lakes and ponds, groundwater, and stormwater control features. By its very nature, however, the "significant nexus" standard embraced by the fourth group of WOTUS waters requires a legal – and commonly subjective – evaluation, and one that is subject to dramatically conflicting points of view. The Clean Water Rule went part of the way to clarifying how certain waters would fall within or outside of the scope of federal jurisdiction, but now will be a relic in the attics of the U.S. EPA and Corps.

Implications for Wisconsin

The State of Wisconsin has a robust and complex water regulatory program overseen and managed by the WDNR. The scope of the Wisconsin program springs from the Northwest Ordinance and the Wisconsin Constitution, builds upon an expansive public trust doctrine, and extends to shorelands, shoreland-wetlands, activities near navigable waters of the state, including grading on the bank, enlarging and connecting to navigable waters, building near or over waters of the state, maintenance and replacement of nonconforming structures, floodplains, wetlands, dams, bridges, drainage and irrigation ditches and more.

In 2001, when the United States Supreme Court issued its decision in *SWANCC*, one surprising consequence was that as many as one million acres of isolated wetlands in Wisconsin fell into a regulatory gap in coverage, because the then current Wisconsin regulatory system depended upon federal jurisdiction, and upon the Corps' consideration of and issuance of

nationwide and individual permits, before the WDNR would review and approve such permits through the Wisconsin "water quality certification" program. Wisconsin hustled to adopt legislation to redefine its jurisdictional reach over wetlands that had been subject to federal jurisdiction as of Jan. 8, 2001, the day before the *SWANCC* decision (which the state legislature creatively called a "federal wetland"). The "belt and suspenders" language of the Wisconsin wetlands statute (Wis. Stats. § 281.36), which defaults back to "the way things were" as of the day before *SWANCC* changed everything, appears to have sufficient redundancy to maintain WDNR jurisdiction over pre-*SWANCC* wetlands. It is unlikely, therefore, that any federal rollback that narrows the definition of "waters of the United States," for the purposes of the CWA and the Corps' wetlands program, will have a significant impact of the current WDNR regulatory jurisdiction.

Takeaway

The obvious thrust of the current administration's Executive Order is to narrow the federal government's CWA jurisdiction of certain waters. Some have suggested that the process to promulgate replacement rulemaking – and the litigation that is sure to follow – could span beyond the four-year tenure of the current administration. In the meantime, until further clarification is promulgated, in order to define the federal scope of jurisdiction over certain tributaries, adjacent waters and other wetlands, landowners, federal agencies (the Corps and U.S. EPA) and, as necessary, state agencies (like the WDNR) will be compelled to rely upon the subjective, case-by-case evaluations of the Justice Kennedy Rapanos concurring opinion "significant nexus" standard in order to assess the relationship of such water features to another, more distinct navigable water.

Godfrey & Kahn has extensive experience representing parties in regard to wetlands and water regulation matters across the state and before and in communication with the U.S. EPA, the Corps and the WDNR. Please feel free to contact any member of the Energy and Environmental Strategies team if you have any questions regarding this complex topic.

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