

The EPA and Army Corps' "Waters of the U.S." (WOTUS) Rule to Become Effective on March 20

Mar 13 2023

Posted By: David P. Ruetz

Practice Area: Environmental Law and Litigation

In January of 2023, the federal Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) published in the Federal Register (see Federal Register/Vol. 88, No. 11, January 18, 2023) new rules that define which water bodies are classified under the Clean Water Act (CWA) as "waters of the U.S." (WOTUS). While this may not appear to be significant, the adoption of these rules will have major implications for how federal agencies will identify the types of water bodies that are subject to jurisdiction under the CWA. The January 18th Federal Register publication provides that these new rules will become effective on **March 20, 2023**.

The CWA is the law that provides federal agencies the authority to prohibit or limit various activities that can impact WOTUS, such as the regulation of industrial and municipal wastewater discharges to navigable waters, the dredging or filling of wetlands, and the requirement to prepare "Stormwater Pollution Prevention Plans" (SWPPP) for industrial facilities. It also is the basis for much State law water regulation.

Applicability of the CWA

To be classified as a WOTUS, a water body must be considered to be "navigable," but this term is more arcane than it might at first appear. Navigable waters as defined by the CWA includes, "waters of the United States," and has been further defined by regulation to include those waters that "are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." This approach to navigability has led some states to adopt a "saw log test" as to whether the body of water could float a saw log for commercial purposes. In other states, such as Wisconsin, the test for navigability is whether the body of water can on a recurring basis – even if intermittent – support navigation by the smallest recreational craft, such as a canoe or kayak. Therefore, navigable waters not only can include larger lakes, rivers and streams, but can also include less obvious smaller water types such as wetlands adjacent to navigable waters, and even in some instances, ditches that hold water. While the CWA provides federal jurisdiction over WOTUS, the CWA does not actually define the term WOTUS; rather, it provides authority for EPA and the USACE to define WOTUS in regulations, which since the 1970s, the agencies at various times have done.

The *Rapanos* Decision and Competing Rationales

Further, the definition of what constitutes WOTUS has been reviewed in several U.S. Supreme Court cases, but the most significant case on this subject is the 2006 case of *Rapanos v. United States*, 547 U.S. 715 (2006), in which the Supreme Court interpreted the definition of WOTUS using two separate tests. In a four-justice plurality opinion written by Justice Scalia, WOTUS was defined as "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams[,] ... oceans, rivers, [and] lakes," and "wetlands with a continuous surface connection" to a "relatively permanent body of water connected to traditional interstate navigable waters." However, Justice Kennedy applied a different approach in a concurring opinion and stated that WOTUS must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made." He added that adjacent wetlands could possess a significant nexus if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

Regulatory Attempts to Define WOTUS Following *Rapanos*

Following *Rapanos*, the agencies have at various times developed guidance for implementing the WOTUS definition. For example, in 2015, under the Obama administration, the agencies amended their regulations defining WOTUS as part of the "Clean Water Rule, which expanded the definition of which water bodies were defined as WOTUS, and included the use of the "significant nexus" test. Again, in 2020, under the Trump administration, another rule was adopted, known as the "Navigable Waters Protection Rule" (NWPR), which limited the types of water bodies that were considered WOTUS under the previous 2015 Clean Water Rule. However, in 2021, in *Pasqua Yaqui Tribe v. EPA*, (Case No. 4:20-cv-00266), the U.S. District Court for the District of Arizona vacated implementation of the NWPR nationwide. The new rules published in the January 2023 Federal Register represents the Biden administration's effort to rewrite the WOTUS rules following the vacation of the NWPR, allowing the agencies the ability to use both Justice Scalia's "relatively permanent" test or Justice Kennedy's "significant nexus" test in determining whether they have jurisdiction over water bodies.

WOTUS under the New Rule

Use of the "relatively permanent" test or the "significant nexus" test is apparent in the new rule's definition of WOTUS. The 2023 rules identify the following waters as WOTUS:

- Traditional navigable waters, the territorial seas, and interstate waters;
- Impoundments of waters otherwise identified as WOTUS;
- Tributaries of navigable waters, territorial seas, interstate waters, or impoundments if the tributaries meet the relatively permanent test or the significant nexus test;
- "Adjacent wetlands," which includes wetlands adjacent to navigable waters, wetlands adjacent to and with a continuous surface connection to relatively permanent impoundments, wetlands adjacent to tributaries that are relatively permanent, and wetlands adjacent to impoundments or tributaries which meet the significant nexus test; and
- Intrastate lakes and ponds, streams, or wetlands not listed above which meet the relatively permanent test or the significant nexus test.

The 2023 rules specifically exclude the following from the WOTUS definition, though some activities may still be subject to Wisconsin rules:

- Prior converted cropland;
- Waste treatment systems;
- Ditches (including roadside ditches) excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased.
- Artificial lakes or ponds created by excavating or diking dry land, that are used exclusively for stock watering, irrigation, settling basins or rice growing;
- Artificial reflecting pools or swimming pools, and other small ornamental water bodies created by excavating or diking;
- Waterfilled depressions in dry land incidental to construction activity and pits excavated in dry land for obtaining fill, sand or gravel unless the construction is abandoned and the water body meets the definition of WOTUS; and
- Swales and erosional features that are characterized by low volume, infrequent, or short duration flow.

Where is this Going?

While these new WOTUS rules become effective on March 20, 2023, the future of these new rules is in question as the U.S. Supreme Court is reviewing a case (*Sackett v. EPA*, 142 S. Ct. 896 (2022)) in which the legal sufficiency of the “significant nexus” test, in the context of wetland permitting, is under review. The Court’s opinion is expected to be issued after the 2023 rules becomes effective. Therefore, depending on the Court’s opinion related to the “significant nexus” test, it is possible that the 2023 rules may need to be revised. Further, in early March, a federal Congressional Committee (the House Transportation and Infrastructure Committee) approved a joint resolution to overturn the 2023 rules. In addition, several industry groups have filed suits to overturn the 2023 rules. These definitions have always been politically and scientifically contentious and we expect that to continue.

Due to the potential flux in which this new rule may ultimately be applied and considered, it will be increasingly important for the regulated public to keep abreast of which water bodies are ultimately determined to be classified as WOTUS, either by the agencies through regulation or guidance, by a U.S. Supreme Court decision in *Sackett*, and/or other legal or Congressional challenges. We will be tracking the implementation of this new rule by the agencies and related caselaw developments and Congressional challenges and will provide timely future *Legal Updates*. In the meantime, the extent of regulations of WOTUS – particularly wetlands – will continue to be very challenging.

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.