



2020 WOTUS Rule Misses the Goldilocks Zone. But is it Too Hot or Too Cold?

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05.04.2020

Regulatory agencies frequently find themselves making decisions in the face of widely divergent viewpoints. Much like the heroine of the “Three Bears” nursery tale, these agencies often try to find a position that is “just right” at balancing the various interests. Unlike Goldilocks, the agencies are not always the final arbiter of whether they hit that elusive mark.

Such was the case when on April 21, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) issued the much anticipated Navigable Waters Protection Rule, attempting to redefine the controversial term “waters of the United States.” The rule (hereinafter 2020 WOTUS Rule), followed a 2019 “part-one” rulemaking that rolled back a major redefinition of the term from 2015. The 2020 WOTUS Rule excludes a number of categories of waters from Clean Water Act protections that were either expressly or implicitly protected under the more expansive 2015 WOTUS Rule. Among the exclusions in the 2020 WOTUS Rule are: groundwater; ephemeral water features including rills, swales and ephemeral streams; artificial lakes and ponds that are not jurisdictional impoundments and are constructed in uplands; stormwater control features; and ditches that are not traditional navigable waters.

Given the litigious history of both the 2015 and 2019 rulemaking, the 2020 WOTUS Rule was anticipated to be challenged immediately upon publication, and several lawsuits have already been filed challenging the new rule. Interestingly, plaintiffs filing claims against EPA and USACE have alleged the new rule is both too lax to provide adequate environmental protections, and too strict in attempting to regulate waters which the United States Supreme Court has previously determined to be outside the protections of the Clean Water Act.

On April 29, 2020, the South Carolina Coastal Conservation League and a coalition of environmental groups, filed a complaint in United States District Court for the District of South Carolina challenging the

2020 WOTUS Rule for lacking a “fair grounding in statutory text and evidence.” The complaint alleges the new rule strips away protections from ephemeral streams and some intermittent and perennial streams that have been protected under past definitions. The complaint also alleges the new rule expands the definition of “waste treatment systems” (an excluded category of waters) such that numerous large recreational lakes would be excluded from protections under the Clean Water Act. The Plaintiffs assert that the 2020 WOTUS Rule abandons the “significant nexus” test laid out in *Rapanos v. United States*, 547 U.S. 715 (2006), and the rulemaking is arbitrary and capricious and a violation of the Administrative Procedures Act.

In a similar filing on May 1, a coalition of 17 states including California and New York filed suit claiming the 2020 WOTUS Rule impermissibly excludes waters that are statutorily protected, and improperly adopts the plurality opinion from *Rapanos* (Justice Scalia’s “relatively permanent body of water connected to traditional interstate navigable waters” standard), which is inconsistent with the Clean Water Act’s text, structure, and purpose. The states argue that the new rule’s rejection of the long-held “significant nexus” standard, which gained the support of a majority of the justices in *Rapanos*, is arbitrary, capricious, and lacking in any scientific or factual basis.

Providing a contrasting view of the rulemaking, the New Mexico Cattle Growers’ Association filed an action in federal court in New Mexico alleging that the 2020 WOTUS Rule runs afoul of *Rapanos* and the *Solid Waste Agency of North Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) decisions by redefining the term “navigable waters” in a manner more expansive than Supreme Court interpretation of the Clean Water Act would allow. The supplemental complaint, filed April 27, amended the Plaintiff’s pending challenge of the 2019 “part-one” rulemaking and alleges the 2020 WOTUS Rule attempts to readopt and recodify regulatory definitions from the 1986 Clean Water Act Regulations, which have been rejected by Supreme Court precedent. Among other issues raised, the Cattle Growers’ Association expressed particular concern with the potential regulation of non-navigable intermittent and perennial tributaries under the 2020 WOTUS Rule, which the Plaintiff contends could constitute “the merest trickle,” and which may occur on private property and at the outer edges of any watershed, remote from any navigable-in-fact waterbody. Citing SWANCC, the Plaintiff argued that while the Clean Water Act does regulate some waters that are not navigable-in-fact, the term “navigable” must provide some limitation on what is regulated. The potential for regulation of these tributaries, as well as adjacent wetlands, isolated ponds, and other waters with nebulous connections to navigable-in-fact waters exceeds the scope of the Clean Water Act, according to the complaint.

The 2020 WOTUS Rule was set to become effective on June 22, 2020. Given the legal battles ahead, it is virtually certain the effective date will be delayed, and it is likely numerous additional challenges will join the fray. How many will claim the rule is too hot or too cold remains to be seen.

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