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Treading Water

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September 6, 2018

Publication 2205

Few issues have ignited as much passion among property owners as the Waters of the United States rule (WOTUS) adopted by the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACOE) in 2015. Considered by many landowners an unprecedented attempt to control land use, WOTUS represents the latest in a series of face-offs between landowners and agencies crafting rules to implement national environmental policies.

None of this is new. Between 1970 and 1973, responding to emerging environmental challenges, a spate of legislation stitched together a foundation for national environmental policies. The results of those efforts continue to shape land use decisions today.

First, the National Environmental Policy Act (NEPA) focused on land use decisions that involved expenditures of federal funds. It posited a policy obligating federal agencies to prepare environmental impact statements. The act also created the Council for Environmental Quality.

The Takeaway

Since taking effect in 2015, the controversial Waters of the United States rule has hit a number of legal snags. The rule is currently blocked in some states, and a replacement rule has been submitted to the White House for review, a process that could take several months.

Then, in quick succession, came the Clean Air Act (CAA) in 1970, Clean Water Act (CWA) in 1972, and Endangered Species Act (ESA) in 1973. Along with these measures, Senator Henry Jackson of Washington proposed an ambitious National Land Use Policy Act (NLUPA) to support and coordinate land use planning across the country. NLUPA included provisions for an agency charged to work with states to establish land use plans. Presumably, the agency would have worked to coordinate environmental policy by encouraging states to establish plans in line with objectives of the various

environmental policy acts. However, seen as "national land use planning," NLUPA met furious opposition and never passed. Thus, the CAA, CWA, and ESA became the platform for addressing environmental issues without the NLUPA. Many landowners celebrated the demise of NLUPA.

Response to Regulations

Through the intervening decades, the broadly supported acts that did pass have sparked confrontations with property owners as their private land management plans ran afoul of rules and regulations designed to implement the legislation.

In Texas, for example, landowners rebelled when word spread that the U.S. Fish and Wildlife Service planned to declare a broad expanse of the Texas Hill Country a critical habitat for the endangered golden-cheeked warbler under ESA. Tempers blazed, politicians scrambled, and a Fish and Wildlife official even relocated out of state amid concerns about his personal safety. Ultimately, Travis County and the City of Austin developed the Balcones Canyonland Conservation Plan to obtain an incidental take permit for activity that might result in habitat destruction. Developers could participate in that permit by paying a fee. With this path to development, the furor ebbed.

The CWA called for state agencies to develop plans to limit harmful discharges by developing Total Maximum Daily Load (TMDL) plans for impaired rivers and streams. Under the provisions of the act, states developed the plans, then the EPA reviewed and approved or disapproved them. To control runoff of pollutants, plans focused on point source polluters like large industrial plants plus the diffused nonpoint source polluters such as individual farmers fertilizing fields and pastures. The shift to scrutiny of nonpoint source pollution pitted dairies against golf courses and lawns as bureaucrats toiled to meet requirements.

Landowners near the Bosque River seethed at the idea that the plan might prohibit currently available land management practices. In addition, landowners in other watersheds worried that TMDLs on nearby streams could eventually affect them as well. Ultimately, the Texas Commission on Environmental Quality devised a plan, and TMDLs faded as an issue.

Defining Which Waters Require Permits

Over time, each environmental measure has sparked confrontations between groups affected by enforcement measures only to fade as landowners adjusted to the outcome. Most recently, the CWA sparked a nationwide outcry among landowners as the EPA and ACOE adopted WOTUS, a rule defining which waters require permits under the act, dramatically expanding its jurisdiction.

That rule followed a Supreme Court judgment known as a "plurality decision" in the 2006 case of *Rapanos v. United States*. Normally, Supreme Court rulings decide the outcome of a case and specify the rationale for reaching that particular determination in a published opinion. When the majority of justices agree with it, that opinion becomes a legal precedent that lower courts must follow in deciding cases. However, when a majority agrees to a particular outcome but disagrees on the rationale for making that ruling in a 4-1-4 vote, the decision becomes a no-clear-majority decision that bears no clearly accepted role in setting precedents for lower courts. The Rapanos case dealing with Clean Water Act issues resulted in a 4-1-4 plurality decision with the definition of what constitutes waters of the United States under the act.

As with many issues before the Court, the liberal wing (Bryer, Ginsburg, Souter, and Stevens) voted to affirm lower court rulings based on a broad interpretation of waters subject to the CWA. They would have held Rapanos liable for violating the CWA. However, the conservative wing (Roberts, Alito, Scalia, and Thomas) voted to vacate lower court rulings. Justice Scalia penned an opinion for the four relying on a restrictive definition of jurisdictional waters.

Rounding out the judgment, Justice Kennedy voted with the conservative justices to vacate the lower court decision but not because he agreed with Justice Scalia's opinion. Instead, Kennedy argued for a much more expansive definition of jurisdictional waters that would greatly expand the reach of the CWA. Waters adjacent to traditionally navigable waters also should come under jurisdiction, he asserted, if they had a "significant nexus" to the traditional navigable waters such that their condition could adversely affect those waters. However, he noted that none of the courts had applied a test to see if the wetlands in question met this criterion. While disagreeing with the reasoning in the plurality opinion, he voted to vacate the lower court decision.

For a discussion of the Rapanos case and its subsequent role in defining jurisdictional waters, read "Navigating Watershed Changes" by Judon Fambrough and Dan Hatfield at www.recenter.tamu.edu. As that article explains, the

far-reaching rules envisioned by EPA and ACOE developed in the years following the Rapanos decision, informed by the knowledge that Justice Kennedy appeared to be prepared to vote with the liberal Justices given the right circumstances. The new rule envisioned expansion of jurisdictional waters to cover land previously deemed beyond the control of CWA. That rule implied that many landowners would need a permit before undertaking activities that might affect the newly defined WOTUS.

The potential expansion of land use control sparked outrage among landowners across the nation, inciting fierce, vocal opposition. Several lawsuits challenged the rule resulting in the Federal Sixth Circuit Court issuing an injunction against implementation in 2015. Therefore, the EPA adopted the expanded rule in spring 2015, and it took effect August 28, 2015. However, the Sixth Circuit blocked implementation with a nationwide stay in October 2015. The EPA under President Trump began to rewrite the rule in early 2017. The new rule sought to reinstate the definition of jurisdictional waters used before 2015.

As 2018 began, matters stood in this state of limbo with the approved rule becoming effective but implementation blocked by the injunction prohibiting enforcement. Landowners breathed a sigh of relief while environmentalists chafed at the delay. Then, on January 22, in the *National Association of Manufacturers v Department of Defense Et. Al.*, the Supreme Court unanimously overturned the Sixth Circuit's injunction, deciding that the matter belonged at the Federal District court level. The Sixth Circuit dissolved the stay and sent the matter back to the district courts.

This meant that the rule, in effect since 2015, could immediately apply across the country. However, some federal judicial districts ordered stays in the states under their jurisdiction. So the rule remained blocked in those states. Further, in November 2017, the EPA and the ACOA proposed to delay the effective date of the rule until 2020. That action prompted several states to sue to compel immediate enforcement of the 2015 rule. Undeterred, the EPA and ACOA presented a draft of the new WOTUS replacement to the White House on June 15, 2018.

Meanwhile, Justice Kennedy has retired.

To keep up with the latest news on WOTUS go to: https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/wotus-rule.html.

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