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WOTUS Whiplash

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The ongoing saga of how to define 'waters of the United States' (WOTUS) continues.

In this latest installment, we have, in effect, time-traveled back to 2008. The United States Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Corps") recently wrapped up virtual public meetings to receive input from interested stakeholders to revise the long-debated WOTUS definition under the 2020 Navigable Waters Protection Rule ("2020 Rule"). The 2020 Rule replaced the 2015 Clean Water Rule. But only one week after the meetings concluded, the agencies announced they are halting implementation of the 2020 Rule and will interpret the WOTUS definition "consistent with the pre-2015 regulatory regime until further notice."

What caused this about-face? On August 30, 2021, an Arizona federal district court issued a decision vacating the 2020 Rule to avoid purported serious environmental harm. The Arizona case was not the first or only legal challenge to the 2020 Rule. The EPA and the Corps could have chosen to allow current regulations to remain in place until a new WOTUS definition is authored, as they indicated they would in the June 2021 "Notice of Public Meetings Regarding Waters of the United States." Instead, the EPA and the Corps folded.

The EPA and the Corps' new-old approach—applying the "pre-2015 regulatory regime" while they continue with rulemaking—means taking a step back in time to their 2008 response to the United States Supreme Court's 2006 *Rapanos* decision. That response was to apply the case-by-case "significant nexus" analysis to prove or disprove hydrologic connectivity for those seeking a permit from the Corps to impact WOTUS under Section 404 of the Clean Water Act. Dusting off the 2008 Guidance, it appears that relatively permanent tributaries and ephemeral streams are back under agency jurisdiction, and the "significant nexus" test will be applied to non-navigable tributaries and adjacent wetlands.

The question remains as to whether an Arizona federal court decision can effectively repeal the 2020 Rule in North Carolina. Setting that issue aside, those with interests in real estate development, agriculture, manufacturing, and others engaging in land-disturbing activities will, unfortunately, see the speed with which jurisdictional determinations flow slow to the trickle of an intermittent stream. If the agencies' response to the Arizona court's decision secures a nationwide repeal, then perhaps replacement rulemaking can begin with greater speed. Regardless, the predictability that the regulated community yearns for has been muddied yet again.

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