

## INSIGHTS

## Navigable Waters Protection Rule Vacated—EPA & Corps to Treat Vacatur as Nationwide

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The Navigable Waters Protection Rule was recently vacated by the Federal District Court of Arizona, and the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have signaled their intent to treat the district court's vacatur as invalidating the rule throughout the nation. According to recent EPA statements, until the Agencies are able to promulgate a new rule defining "waters of the United States" (WOTUS), permits and projects will be reviewed under the pre-2015 rules. This decision and the agencies' responses mark the end of the Navigable Waters Protection Rule (NWPR), a categorical approach to Clean Water Act (CWA) jurisdiction that was one of the previous administration's most significant regulatory reforms. Given the importance of the definition of WOTUS, which determines whether a water feature or wetland falls under the jurisdiction of the CWA, the agencies' decision to implement the pre-2015 rules will have a significant and immediate effect on many current permitting efforts.

Of course, other parties to the Arizona litigation may appeal or challenge the government's interpretation of the vacatur order, so it will be important to keep an eye on additional developments there.

### What Happened?

The NWPR has been a focus for the current administration [from its first day in office](#), and in [late July](#) the EPA and Corps announced that the agencies would begin the process of again revising the NWPR. But the Biden Administration's approach to pending litigation over the NWPR had been to ask courts to stay proceedings or remand the rule NWPR without vacating it. In other words, the administration asked courts to allow Corps districts and EPA Regional Offices to continue their work to implement the existing rule even as Headquarters personnel crafted a replacement. Many courts agreed to the administration's request, even though numerous environmental non-governmental organizations and tribes had challenged this administration's approach.

But in the District of Arizona, in [Pasqua Yaqui Tribe, et al. v. U.S. EPA, et al.](#), plaintiffs successfully opposed the government's request to voluntarily remand the rule without vacating it. Plaintiffs agreed that the rule should be remanded, but opposed vacatur by arguing that Arizona's intermittent and ephemeral streams would not be protected by the NWPR. The court observed that in arid states like "New Mexico and Arizona, nearly every one of over 1,500 streams assessed under the NWPR were [sic] found to be non-jurisdictional—a significant shift from the status of streams both under the Clean Water Rule and the pre-2015 regulatory regime." The court concluded that "[t]he seriousness of the Agencies' errors in enacting the

NWPR, the likelihood that the Agencies will alter the NWPR's definition of 'waters of the United States,' and the possibility of serious environmental harm if the NWPR remains in place upon remand, all weigh in favor of a remand with vacatur."

A few days after the ruling in *Pasqua Yaqui*, EPA updated its website for the [Current Implementation of Waters of the United States](#) and announced that both "agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime until further notice."

### **What Applies?**

As EPA notes, the pre-2015 regulations for WOTUS are again in effect. The categorical approach towards jurisdiction that was the hallmark of the NWPR has been removed and more stream/wetland-specific fact determinations will be necessary. The pre-2015 rules, initially promulgated in 1986, have also been modified by two Supreme Court decisions and associated agency guidance. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), the Supreme Court concluded that the Clean Water Act would not support the assertion of CWA-jurisdiction over wetlands and features that were isolated from navigable waterways. Later, the Supreme Court failed to secure a majority in *Rapanos v. United States*, with only a plurality of justices concluding that a "continuous surface connection" between wetlands/waters and a navigable waterway grounded jurisdiction. Justice Kennedy wrote a concurrence arguing that a "significant nexus," or a significant hydrological connection that need not be surficial, between wetlands/waters and navigable waters was essential—Justice Kennedy's "significant nexus" standard is viewed in some circuits as the controlling *Rapanos* decision over the plurality.

The EPA and the Corps issued guidance memoranda after both *SWANCC* and *Rapanos*, and they will likely reuse those guidance documents to shape their implementation of the pre-2015 rules to current projects and permits. These guidance documents are available on EPA's implementation page.

### **What's Next?**

Although the Administration opposed remand with vacatur, the decision in *Pasqua Yaqui* is consistent with this administration's long-term goals for the redefinition of WOTUS. In fact, the EPA and Corps announced their intention to proceed with a two-step rulemaking: step one would return the definition of WOTUS to its longstanding pre-2015 definition as modified by *SWANCC*, *Rapanos*, and agency guidance, and step two would build on that regulatory foundation. Although EPA has announced that the agencies have halted implementation of the NWPR in light of the *Pasqua Yaqui* vacatur—and arguably could skip right to a step two rulemaking—the agencies have indicated that they will still pursue both rulemakings as announced in the July press release.

We will continue to follow the administration's rulemaking—please reach out to Ann, Sara, and Daniel for more specific questions on the applicability of the rule or to participate in rulemaking processes.