WOTUS Debacle Likely to Continue With New Rule



Melissa Reynolds

Partner
801.799.5875
Salt Lake City
melreynolds@hollandhart.com



Ashley Peck

Partner
801.799.5913
Salt Lake City
aapeck@hollandhart.com

Insight — 05/21/2020

Bloomberg Law

The Navigable Waters Protection Rule attempts to define “waters of the United States” for determining federal jurisdiction under the Clean Water Act, but Holland & Hart attorneys say the rule will unlikely achieve its goal of clarity. They examine the rule's efforts and look at its future as litigation begins.

The Navigable Waters Protection Rule (final rule), published on April 21, represents the latest attempt by the Environmental Protection Agency and the Army Corps of Engineers to define “waters of the United States” for purposes of determining federal jurisdiction under the Clean Water Act (CWA).

The final rule is the second of two steps aimed at replacing a 2015 final rule that also sought to define the term. Although the final rule aims to provide clarity, its new jurisdictional tests could add to the confusion that has plagued this issue for decades.

Its future is also uncertain—several states and organizations have already challenged the final rule in several district courts, including the New Mexico Cattle Growers' Association, the Conservation Law Foundation, California, the Conservation Law Foundation, and the South Carolina Coastal Conservation League. The plaintiffs in one such case (*California v. Wheeler*) have already filed a motion for a nationwide preliminary injunction of the final rule. In addition, House Democrats have introduced legislation that would prohibit the EPA administrator from implementing or enforcing the final rule if passed.

The outcome of the litigation—at the preliminary injunction stage and beyond—could lead to disparate holdings throughout the country, similar to what has happened with the 2015 rule. The extensive scientific analyses underlying the 2015 rule are also very likely to be revived in the litigation challenging the final rule. In short, the only certainty with CWA jurisdiction at this point is continued uncertainty.

The 2015 rule more broadly defined “waters of the United States”—defining some key water types such as defined wetlands and tributaries as “jurisdictional by rule;” excluding narrow categories of waters as non-jurisdictional; and creating a third category of waters which required an in-

depth, case-by-case “significant nexus” analysis to determine jurisdictional status. The 2015 rule faced numerous legal challenges, many of which have yet to be resolved.

Repeal and Replace

The Trump administration began a multistep process to repeal and replace the 2015 rule upon taking office in January 2017 and has already encountered litigation challenges along the way. The final rule is the final step by the EPA and Corps in the repeal and replace process.

The final rule attempts to add clarity to the regulatory regime by setting forth four categories of “waters of the United States.” It also delineates 12 categories of waters that are excluded from the definition.

Generally, the four categories of jurisdictional waters are: (1) territorial seas and traditional navigable waters; (2) perennial and intermittent tributaries; (3) lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands that are adjacent to other jurisdictional waters. The final rule eliminates the site-specific “significant nexus” test for any category of waters.

Under the final rule, tributaries must be perennial or intermittent, and must contribute surface flow to a traditional navigable water or territorial sea in a typical year. However, the term “typical year” as defined in the rule may be difficult to apply and will likely lead to inconsistency in application.

In addition, ditches, which are otherwise excluded from the definition of “waters of the United States” can be considered “tributaries” if they “relocate[] a tributary, [are] constructed in a tributary, or [are] constructed in an adjacent wetland as long as the ditch is perennial or intermittent and contributes surface flow to a traditional navigable water or territorial sea in a typical year.”

Finally, the final rule eliminates jurisdiction over “ephemeral features that flow only in direct response to precipitation,” removing jurisdiction over many waters in the arid West. However, in contrast to the proposed rule, even though ephemeral features themselves are not jurisdictional, they will not eliminate jurisdiction over an upstream jurisdictional water, as long as they provide a surface water connection to a downstream jurisdictional water in a typical year.

Expanded Jurisdiction

The final rule's approach to wetlands has also been modified from the proposed rule and will likely extend jurisdiction to more wetlands. Under the final rule, wetlands that are “adjacent” to other jurisdictional waters are considered “waters of the United States.” An adjacent wetland is now defined as one that touches another jurisdictional water, is flooded by another jurisdictional water in a typical year, is separated from other jurisdictional waters by a natural feature, or is separated from other jurisdictional waters by an artificial feature that allows a direct surface

water connection to the jurisdictional water in a typical year.

Because the original proposal would have extended jurisdiction only to those wetlands that had a *continuous surface water connection* to a jurisdictional water, the EPA and Corps acknowledge that this expands jurisdiction over certain wetlands. The agencies' original proposal would have eliminated jurisdiction for an estimated 51% percent of wetlands throughout the U.S., according to U.S. Geological Survey estimates.

Although the final rule potentially creates more clarity, determining whether certain waters are jurisdictional or not under the final rule will still require a detailed site-specific analysis to apply the definitions of “typical year” and “adjacent.”

The final rule is slated to go into effect on June 22—but given the litigation and the fact that plaintiffs in *California v. Wheeler* have already filed a motion for a nationwide preliminary injunction, only time will tell whether, for how long, and in which states the final rule will ultimately have legal effect.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Ashley Peck is a partner in Holland & Hart's Salt Lake City office, focusing her practice on complex environmental compliance, litigation, and enforcement matters, particularly water quality issues.

Melissa Reynolds is an environmental litigator at Holland & Hart. She helps client navigate enforcement issues involving natural resources, with an emphasis on water quality and water rights.

Originally published by INDG in Bloomberg Law online May 21, 2020. Reproduced with permission from Copyright 2020 The Bureau of National Affairs, Inc. (800-372-1033) www.bloombergindustry.com. Further duplication without permission is prohibited.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ

depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.