

## Uncertainty Over ‘Waters of the U.S.’ Definition Continues, as Federal Court in Arizona Vacates 2020 Rule

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The U.S. District Court for the District of Arizona on August 30 vacated the 2020 [Navigable Waters Protection Rule](#) (NWPR) that redefined “waters of the United States” for purposes of Clean Water Act jurisdiction, effectively reinstating the definition in effect prior to 2015. Under that prior definition, many ephemeral streams and isolated wetlands that were not subject to federal jurisdiction under the NWPR will again be subject to case-by-case determinations of their status. The case, *Pasqua Yaqui Tribe v. EPA*, CV-20-00266-TUC-RM (D. Ariz.), is one of several challenging the NWPR, and the outcome leaves unanswered questions about the scope of the court’s ruling and the potential for inconsistent regulations across the nation.

The current administration had already stated its intention to reconsider the NWPR, which was issued by the prior administration, and had asked multiple courts to remand the rule without vacatur, leaving the NWPR in effect pending a new rulemaking. The *Pasqua Yaqui* court granted the request for remand but sided with the plaintiffs in also granting vacatur, finding that the possibility of “serious environmental damage” if the rule were left in place outweighed the potential disruption and regulatory uncertainty from vacating the rule. As the court noted, the current administration has expressed substantial concerns about the NWPR and has identified hundreds of projects that would have required Clean Water Act permitting under prior versions of the rule but are not subject to federal jurisdiction under the NWPR, especially in the arid West.

The court did not rule on plaintiffs’ challenge to the 2019 regulation that rescinded the 2015 “Clean Water Rule” and reinstated the pre-2015 definition of waters of the United States. For the moment, this appears to leave the pre-2015 rule in place, at least where the order is given effect. Under the pre-2015 rule and the Supreme Court’s fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006), ephemeral streams and many wetlands require a fact-specific “significant nexus” analysis by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency to determine whether they are waters of the United States. However, the *Pasqua Yaqui* court said it would entertain further proceedings related to the 2019 regulation.

The status of the NWPR nationwide is complex and unclear. Shortly after the decision in *Pasqua Yaqui* was announced, the U.S. District Court for the District of Massachusetts remanded a similar challenge without vacating the rule as “the most prudent step” given ongoing related litigation. In July, the U.S. District Court for the District of South Carolina remanded a challenge to the NWPR without vacatur. The U.S. District Court for the District of New Mexico is currently considering competing requests to remand the NWPR with and without vacatur. And the Tenth Circuit Court of Appeals, which covers much of the arid West, recently reversed a Colorado district court decision enjoining the NWPR. The federal government could attempt to limit the effect of the *Pasqua Yaqui* vacatur order to Arizona, as it has done with similar rulings in the past, but potential appeals could further complicate the picture. When the dust settles, different parts of the nation may be left with different rules while the Corps and EPA work on a new definition of waters of the United States that is, in turn, certain to face legal challenge, continuing the regulatory uncertainty that has existed at least since the 2015 Clean Water Rule faced a barrage of lawsuits with varied outcomes.

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