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There and Back Again for WOTUS

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The Army Corps of Engineers and the US Environmental Protection Agency (EPA) on December 30, 2022, reissued a "Waters of the United States" (WOTUS) rule. The final rule will be effective 60 days after it is published in the *Federal Register*, sometime in 2023. In the meantime, the agencies are following pre-2015 *Rapanos* (547 U.S. 715, 2006) guidance that was the basis of the broad 2015 WOTUS rule and apparently the basis of this new rule.

The 2022 final rule with its preamble is more than 500 pages in a pre-publication version, but the new rule itself is only a handful of pages (33 CFR Part 328; 40 CFR Part 120). It covers many waters, including wetlands under the Clean Water Act (§404). Most of those wetlands are privately owned and may be targeted for development, farming, and other commercial activity, but they serve natural functions.

Wetlands have been physically defined for decades, based on hydrology, vegetation, and soils, although guidance on plant and soil types and hydrology indicators is needed. This has not changed under the new rule. (See p. 411 of the preamble.) The new rule only states what wetlands are federally regulated.

The new rule principally covers controversial wetlands "adjacent" to traditionally navigable waters (adjacency here means continuous, bordering, or neighboring, and a physical separation between a waterway and wetland by a levee, road, etc., does not eliminate this broad adjacency). It also covers more broadly wetlands having a "significant affect" (alone or in the aggregate with similar waters in the drainage region) on traditionally navigable waters. Clarification is offered simply by the equating of significance to "material influence" (preamble pp. 426-427) and some examples (preamble pp. 445-447). These seem more sapient than obvious.

These two options for wetland regulation are remnants of Justice Scalia's "relatively permanent or flowing" waters and Justice Kennedy's "significant nexus" *Rapanos* tests. *However, it is important to note that Justice Scalia's test was stand-alone and not a subset of adjacency; the new rule undermines Scalia's as an alternative test with other adjacency findings.*

Besides materiality, the rule offers several functions to be assessed in a significance finding, including habitat, flow, flood water attenuation, etc., and other factors to be considered, including

distance. No quantitative measurement is required. This is still a stretch for a landowner to imagine absent an agency-documented and -approved wetland delineation.

The rulemaking suggests the following WOTUS paradigm for laymen to follow (preamble pp. 461–478): is the proposed activity regulated (e.g., not normal farming); is the water regulated (adjacent or not); is the water excluded (e.g., some ditches, prior converted cropland, swales); and if the water and activity are regulated, use public guidance and tools (e.g., topographical maps, soil maps, wetland inventories, aerials) or seek an agency jurisdictional determination (JD), ask for reconsideration or appeal the JD, or apply for a general permit or individual one. Quite an expensive road map.

As the final rule awaits an effective date, the US Supreme Court in *Sackett v. EPA*, No. 2021-454, is pending a decision on which test — Scalia's or Kennedy's — is correct. Is the new rule a clone of the 2015 one, or is its tweaking not ripe for Court review?

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