



Environmental Law Update

WEB CONFERENCE SERIES

Clearing the Waters? A Discussion of the New “Waters of the U.S.” Rule

June 24, 2015



©2015 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2900, Chicago, IL 60654 • 312.832.4500



Program Speakers



Sarah A. Slack
Senior Counsel
Foley & Lardner LLP
608.258.4239
sslack@foley.com



©2010 Foley & Lardner LLP



Program Speakers



Louis J. Thorson

Associate

Foley & Lardner LLP

414.297.5776

lthorson@foley.com



©2010 Foley & Lardner LLP



Program Speakers



Richard G. Stoll

Partner

Foley & Lardner LLP

414.297.5882

rstoll@foley.com



©2010 Foley & Lardner LLP



Housekeeping

- Questions can be entered via the **Q&A widget** open on the left-hand side of your screen. We will address questions at the end of the program, time permitting.
- If you experience technical difficulties during the presentation, please visit the Webcast Help Guide by clicking on the **Help button** below the presentation window, which is designated with a question mark icon.
- The PowerPoint presentation will be available on our website at Foley.com in the next few days or you can get a copy of the slides in the **Resource List** widget.
- Foley will apply for CLE credit after the program. To be eligible for CLE, you will need to log into the On24 session and answer a polling question during the program. If you did not supply your CLE information upon registration, please e-mail it to ekemmeter@foley.com.
- **NOTE:** Those seeking Kansas, New York & New Jersey CLE credit are required to complete the Attorney Affirmation Form in addition to answering the polling question that will appear during the program. A 5-digit code will be announced during the presentation. Email the code and the form to ekemmeter@foley.com immediately following the program.



©2010 Foley & Lardner LLP



Outline

- Overview – Navigable Waters
 - Applicable Federal Law
 - What is Required for “waters of the United States”?
- WOTUS Case and Policy History
 - Relevant SCOTUS Decisions
 - Agency (EPA / Army Corps) Interpretation
- The New WOTUS Definition and What it Means
 - Bright-line Boundaries, More Regulatory Certainty
 - Expansion of Agency Authority



©2010 Foley & Lardner LLP



Clean Water Act – Overview

- CWA prohibits discharge of any “pollutant” into “navigable waters” without a permit
- Every requirement of CWA applies only to waters within CWA’s jurisdiction
- Jurisdiction is only over “navigable waters” (also known as “waters of the United States”)



©2010 Foley & Lardner LLP



Clean Water Act – Overview

- A “pollutant” can be
 - Sludge
 - Wrecked equipment
 - Rock
 - Sand
 - Industrial, municipal, agricultural waste discharged into water
 - Dredged spoil
 - Solid waste
 - Incinerator residue
 - Sewage
 - Garbage



©2010 Foley & Lardner LLP



CWA Permitted Activities

- Point source discharges
- Placement of fill
- Dredging
- Placement of structures
- Draining wetlands
- Realigning streams
- Replacement of native materials into wetland (including, potentially, material falling out of backhoe bucket, known as “fallback” or “sidecasting”)



©2010 Foley & Lardner LLP



Why Care About Federal Jurisdiction?

- Water’s jurisdictional status can have implications on/for:
 - Manufacturers
 - Developers
 - Agriculture
 - Utilities
 - Other sectors (depending on site-specific development issues)



©2010 Foley & Lardner LLP



Agencies Involved in CWA Permitting

- U.S. Army Corps of Engineers
 - Authority to require and issue permits (individual and general permits);
 - Conducts and verifies jurisdictional determinations;
 - Shares enforcement responsibilities with the EPA
- EPA
 - Responsible for developing and interpreting the substantive environmental criteria used by the Corps to evaluate permit applications (Sec. 404(b)(1) Guidelines)
 - (Like Corps) Responsible for determining jurisdiction
 - Veto Authority under Sec. 404(c)
- State agencies
 - Many states are “delegated” responsibility to implement the CWA
 - Authority over CWA waters and state-only waters

©2010 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



What Are Navigable Waters?

- CWA – “waters of the United States, including territorial seas”
- 40 C.F.R. § 230.3 (s) (EPA); 33 C.F.R. § 328(a) (Corps)
 - All waters currently used, or used in the past, or susceptible to use in interstate or foreign **commerce**, including all waters subject to ebb and flow of tide
 - All interstate waters, including interstate wetlands
 - All other waters, including wetlands, use, degradation or destruction that could affect interstate commerce
 - Territorial seas
- Subject of the new Clean Water Rule

©2010 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Where Is The Line Blurry?

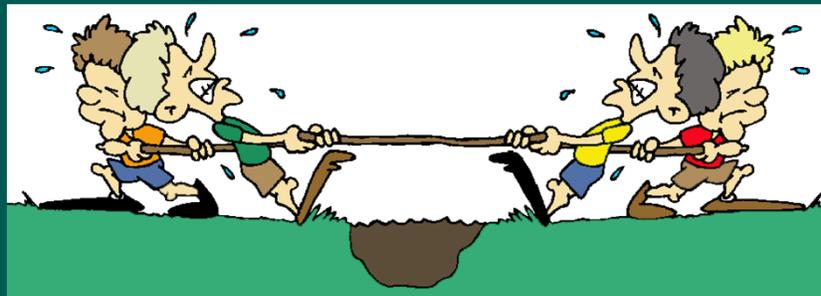
- The scope of the term “waters of the United States” is less clear with respect to wetlands or streams that:
 - Do not qualify as a traditional navigable water;
 - Are not adjacent to traditional navigable waters;
 - or
 - Do not cross state lines



©2010 Foley & Lardner LLP



Navigable Waters / Waters of the US



Defining “navigable waters” has been a tug of war between the courts and agencies



©2010 Foley & Lardner LLP



WOTUS Case and Policy History

- *United States v. Riverside Bayview Homes* (1985)
 - Rule: Wetlands *adjacent* to traditional navigable waters are covered by the CWA; wetland need not be *navigable* to be regulated; coverage of *isolated* wetlands
- Migratory Bird Rule (1986-2000)
 - Corps determined in 1986 that federal jurisdiction extended to isolated wetlands visited by migratory birds

©2010 Foley & Lardner LLP



WOTUS Case and Policy History

- *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps of Engineers* (2001)
 - SWANCC court rolled back part of *Bayview*, demanding there be some *nexus* to navigable waters
 - For federal jurisdiction to extend to isolated, intrastate wetlands, SWANCC court demanded wetland be “adjacent to” some navigable water

©2010 Foley & Lardner LLP





U.S. Supreme Court – *Rapanos/Carabell* Decisions (2006)

- Issue = whether CWA covers wetlands that do not contain, and are not adjacent to, waters that are not navigable in fact
- Supreme Court split 4-1-4
- Justices issued five separate opinions (with no one opinion being a majority) – 126 S. Ct. 2208 (2006)
- Judgments vacated and cases remanded



©2010 Foley & Lardner LLP



Scalia, Roberts, Thomas and Alito Write Plurality Opinion

- “Navigable waters” means “relatively permanent bodies of water”
 - “... at a bare minimum, [wetlands require] the ordinary presence of water”
- Scalia two-part test
 - “... relatively permanent standing or flowing body of water connected to traditional interstate navigable waters”
 - “... continuous surface connection to bodies that are ‘waters of the United States’ in their own right” – making it difficult to determine where “water” ends and “wetland” begins



©2010 Foley & Lardner LLP



Scalia, Roberts, Thomas and Alito Write Plurality Opinion

- “Relatively permanent”
 - Excludes *intermittent* and *ephemeral* streams
 - But does not necessarily exclude:
 - “Streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought”
 - Seasonal rivers that contain continuous flow during some months of the year but no flow during dry months



FOLEY & LARDNER LLP

©2010 Foley & Lardner LLP



Kennedy Writes Separate Opinion Concurring With Plurality

- Defers heavily to *SWANCC* – *significant nexus*
- Corps correctly interprets CWA to apply to *impermanent* streams
- “Nexus” exists “if the wetlands ... significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable’”



FOLEY & LARDNER LLP

©2010 Foley & Lardner LLP



Stevens, Souter, Ginsberg and Breyer File Dissenting Opinion

- Courts must defer to Corps as to what “wetland” is and what “adjacent” means
- Would have affirmed decisions in both cases



FOLEY
FOLEY & LARDNER LLP

©2010 Foley & Lardner LLP



Rapanos Rules

- Supports finding CWA coverage for a water when either:
 - A relatively permanent body is connected to traditional interstate navigable waters, and the wetland has a continuous surface connection with that water (Scalia plurality test)
 - There is a significant nexus between the wetland and navigable waters in the traditional sense (Kennedy significant nexus test)

FOLEY
FOLEY & LARDNER LLP

©2010 Foley & Lardner LLP



Post-Rapanos

- Which approach = controlling test?
- Nine years after *Rapanos* decided, answer is not entirely clear
- Post-*Rapanos* case law demonstrates that there is a split between the circuits again



©2010 Foley & Lardner LLP



Circuits Split Again

Circuit	Significant Nexus Test (Kennedy)	Plurality Test (Scalia)	Both Tests
1st			U.S. v. Johnson (2006); U.S. v. Agosto-Vega (2010)
2nd			
3rd		Del. Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs (2012)	U.S. v. Donovan (2011)
4th	Precon Development Corp. v. U.S. Army Corps of Eng'rs (2011); Precon Development Corp. v. U.S. Army Corps of Eng'rs (2015)		Deerfield Plantation v. U.S. Army Corps of Eng'rs (2012)
5th			U.S. v. Lucas (2008)
6th			U.S. v. Cundiff (2009)
7th	U.S. v. Gerke Excavating (2006)		
8th			U.S. v. Bailey (2009); Hawkes Co. v. U.S. Army Corps of Eng'rs (2015)
9th	N. Cal. River Watch v. Healdsburg (2007); U.S. v. Moses (2007); San Francisco Baykeeper v. Cargill Salt Div. (2007); U.S. v. Vierstra (2012)	Butte Env'l Council v. U.S. Army Corps of Eng'rs (2010)	N. Cal. River Watch v. Wilcox (2011)
10th			
11th	U.S. v. Robinson (2007)		

Note: This chart does not contain all appellate decisions regarding federal jurisdictional waters; however it is representative of each circuit's position



©2010 Foley & Lardner LLP



Agencies Attempt to Clarify – 2008 Guidance

- Joint guidance issued by EPA and Corps
- Issued June 5, 2007
- Described jurisdiction based on both *Rapanos* standards (Scalia and Kennedy)



©2010 Foley & Lardner LLP



Agencies Attempt to Clarify - Revised Draft Guidance Issued in 2011

- EPA and Corps attempt to further clarify how to identify CWA protected waters
- Claimed that jurisdictional analysis could be based on both *Rapanos* plurality and Kennedy standard



©2010 Foley & Lardner LLP



Agencies Attempt to Clarify - Draft Guidance Issued in 2011

- EPA: “Previous guidance did not make full use of the authority provided by CWA ... as interpreted by the Court”
- Sought to improve predictability and consistency of CWA application



©2010 Foley & Lardner LLP



Agencies Attempt to Clarify - Criticism of 2011 Guidance

- According to Environmental News Service
 - “... guidance document, **knows no bounds**, as the agency sees **nearly every body of water in the United States**, no matter how significant, as potentially falling within its reach” – Senator Inhofe
 - “Sen. Gibbs and 168 other House Republicans and Democrats wrote to EPA and the Army Corps to express their concerns that the agencies are **circumventing the proper regulatory process** in order to push through this **expansion of federal jurisdiction**”
- EPA/Corps withdrew guidance



©2010 Foley & Lardner LLP



WOTUS – The Stage Is Set

- Post-*Rapanos* – uncertainty about which standard applies
- Guidance – non-binding and not subject to notice and comment rulemaking
- Time and resource intensive jurisdictional determination process



©2010 Foley & Lardner LLP



Proposed WOTUS Rule

- March 25, 2014 – EPA/Corps proposed rule
- Included 3 traditional categories of waters as well as:
 - (4) All impoundments of “traditional” navigable waters
 - (5) All tributaries of “traditional” navigable waters and impoundments
 - (6) All waters, including wetlands, adjacent to waters identified in categories one through five
 - (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a *significant nexus* to a traditional navigable water



©2010 Foley & Lardner LLP



Proposed WOTUS Rule – More Questions than Answers?

- Industry and environmental groups react
- The role of “science”
- The role of states?
- Legislative “fix?”

©2010 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



Final WOTUS Rule

- Prepublication version issued May 27, 2015
- Relatively significant changes from proposed rule
- Purports to “clarify and simplify” jurisdictional determinations
- Legislation already proposed to block implementation

©2010 Foley & Lardner LLP

FOLEY
FOLEY & LARDNER LLP



What's Covered? Traditional Categories

First four categories consistent with traditional application of jurisdiction:

- (1) Waters currently, previously, or potentially used in interstate commerce;
- (2) Interstate waters, including wetlands;
- (3) Territorial seas; and
- (4) Impoundments of waters otherwise defined as “waters of the United States.”



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories - Tributaries

- (5) “Tributaries” of waters in categories one through three (waters used in interstate commerce, interstate waters, and territorial seas);
- Key Definition: “Tributary”
 - A water is a “tributary” if it both (i) contributes flow to a water used in interstate commerce, an interstate water, or a territorial sea, and (ii) possesses the physical characteristics of a “bed and banks” and an “ordinary high water mark”
 - No case-by-case analysis required; waters that satisfy definition are automatically subject to CWA jurisdiction



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories - Tributaries

- Expansion of CWA Authority – Intermittent and Ephemeral Streams
 - Streams that run only after precipitation events (including snow melt)
 - If they possess “bed and banks” and “ordinary high water mark,” they are covered
 - Previously subject to case-by-case analysis



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories – “Adjacent” Waters

- (6) Waters that are “adjacent” to those listed in categories one through five (waters used in interstate commerce, interstate waters, and territorial seas, and their impoundments and tributaries)
- “Adjacent” includes “bordering, contiguous, or neighboring” waters



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories – “Adjacent” Waters

- Key Definition: “Neighboring”
 - “Neighboring” defined to include:
 - (i) all waters where any portion is located within 100 feet of the ordinary high water mark of a water in categories one through five, and
 - (ii) all waters where any portion is located both within the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a water in categories one through five
 - Again, no case-by-case analysis required; waters satisfying the definition are automatically covered



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories – Waters with “Significant Nexus” to Covered Waters

- Categories Seven and Eight
- Key Definition: “Significant Nexus”
 - Means that “a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water” in categories one through three (waters used in interstate commerce, interstate waters, or territorial seas)
 - Requires analysis of both water in question and “similarly situated” waters “in the region”
 - Waters are “similarly situated” if they “function alike and are sufficiently close to function together in affecting downstream waters”
 - “In the region” based on watershed



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories – Waters with “Significant Nexus” to Covered Waters

- (7) Certain defined categories of waters (e.g., prairie potholes, Carolina and Delmarva bays, and western vernal pools) that, when considered together, have a “significant nexus” to waters in categories one through three (waters used in interstate commerce, interstate waters, or territorial seas);
- Waters in category seven automatically determined to be “similarly situated”



©2010 Foley & Lardner LLP



What's Covered? Non-Traditional Categories – Waters with “Significant Nexus” to Covered Waters

- (8) Waters that:
 - (a) are located
 - **either** within the 100-year floodplain of a water in categories one through three (waters used in interstate commerce, interstate waters, or territorial seas), **or**
 - within 4,000 feet of the high tide line or ordinary high water mark of a water listed in categories one through five (waters used in interstate commerce, interstate waters, and territorial seas, and their impoundments and tributaries); **and**
 - (b) have a significant nexus to a water identified in categories one through three (waters used in interstate commerce, interstate waters, and territorial seas).



©2010 Foley & Lardner LLP



WOTUS – Reliance on “Science”

- Final rule based heavily on accompanying scientific report – *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015)*
- Basis for removal of case-by-base analysis for various types of waters (e.g., “tributaries,” “adjacent” and “neighboring” waters)
- Basis for definition of “significant nexus”



©2010 Foley & Lardner LLP

FOLEY & LARDNER LLP



Exemptions

- Waste treatment systems, including treatment ponds or lagoons
- Prior converted cropland
- Certain ditches that have ephemeral or intermittent flow, or that do not flow, either directly or through certain other waters
- Certain specific artificial or temporary features that revert to dry, including: artificially irrigated areas, artificial, constructed lakes and ponds, artificial reflecting or swimming pools, water filled depressions incidental to mining or construction activity, erosional features, including gullies and rills, and puddles
- Groundwater
- Storm water control features created in dry land
- Wastewater recycling structures constructed in dry land



©2010 Foley & Lardner LLP

FOLEY & LARDNER LLP



What Does the New Rule Mean?

- Fewer case-by-case agency determinations
- More bright-line boundaries
- But expansion of waters considered “navigable” or “waters of the United States”



©2010 Foley & Lardner LLP



What Does the New Rule Mean?

- Additional regulatory obligations for facilities located near newly covered “waters of the United States”:
 - Spill prevention, control, and countermeasure (“SPCC”) plans
 - Release reporting under Comprehensive Environmental Response, Compensation and Liability Act
 - Wastewater/storm water discharge permits
- More development projects potentially subject to CWA permitting requirements
- Decrease in, or more overlap with, state regulatory authority



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- Vast bulk of national EPA final rules go exclusively to U.S. Court of Appeals for the D.C. Circuit
- But not WOTUS; judicial review might end up there, but many other courts just as likely
- WHY not automatic D.C. Circuit?



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- For any final federal agency rule (like WOTUS), general presumption under Administrative Procedure Act (APA): rule subject to judicial review
- If organic statute behind rule does not specify where judicial review will proceed, judicial review must be initiated in federal *district* court (almost 100 around the US) – jurisdiction falls under 28 U.S.C. §1331 (general federal question jurisdiction)
- Organic statutes for many federal agencies have no provisions specifying where judicial review must be initiated – so lots of judicial review of federal rules is initiated in district courts



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- EPA's statutes generally provide for direct Court of Appeals review of final rules and other actions (11 courts of appeals in U.S., plus D.C. Circuit)
- Several EPA statutes provide exclusive jurisdiction in D.C. Circuit for nationally applicable final rules (CAA, RCRA, SDWA, CERCLA, TSCA)
- CWA is different – recent law review article correctly says: “confusing and messy”



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- CWA §509 provides that judicial review of certain types of final rules (and other actions) must be initiated at Court of Appeals level:
 - (A) standards of performance under section 306,
 - (B) determinations pursuant to section 306(b)(1)(C),
 - (C) effluent standards, prohibitions, or pretreatment standards under section 307,
 - (D) determinations as to a State permit program submitted under section 402(b),
 - (E) effluent limitations or other limitations under section 301, 302, 306, or 405,
 - (F) permit issuance/denials under section 402, and
 - (G) individual control strategies issued under section 304(l)



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- CWA §509 does not provide that any of these specified rules/actions must be reviewed exclusively in D.C. Circuit if nationally applicable – review can proceed in any of 12 U.S. Courts of Appeals
- WOTUS is nationally applicable – so if it were CAA, RCRA, etc. rule: slam-dunk, review would go to D.C. Circuit and D.C. Circuit only
- But WOTUS is CWA – so question becomes: is WOTUS one of those few types of rules that CWA §509 says must have judicial review initiated in Court of Appeals?



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- Under plain words of §509, WOTUS certainly does not appear to be one of those specified types
- But mixed case law in various circuits and Supreme Court leaves room for debate (EPA alludes to this in last paragraph of WOTUS preamble)
- To be protective, many parties will probably file both in a Court of Appeals and in a District Court



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- Common to “forum shop,” so probably will see filings in several different District Courts and several different Courts of Appeals
- U.S. Judicial Panel on Multidistrict Litigation serves as forum to transfer (by random pick) all District Court cases to one District Court and all Court of Appeals cases to one Court of Appeals
- But no such mechanism for resolving District vs. Court of Appeals issue except judicial decisions that may end up in the Supreme Court
- “Confusing and messy” for sure



©2010 Foley & Lardner LLP



WOTUS Judicial Review: Certain, But Where?

- “Preclusion” lurking in the weeds?
- CWA §509(b)(2) –
- “Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.”



©2010 Foley & Lardner LLP



Questions & Answers



©2010 Foley & Lardner LLP



Contact Information

Sarah A. Slack
Senior Counsel
608.258.4239
sslack@foley.com

Louis J. Thorson
Associate
414.297.5776
lthorson@foley.com

Richard G. Stoll
Partner
414.297.5882
rstoll@foley.com



©2010 Foley & Lardner LLP



Thank You!

- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week <http://www.foley.com/environmental-law-update-clearing-the-waters-a-discussion-of-the-new-waters-of-the-us-rule/>
- Past Environmental Law Update Web Conference materials available at: <http://www.foley.com/environmental/?op=events>
- CLE questions? Contact Ellie Kemmeter at ekemmeter@foley.com
- We welcome your feedback. Please take a few moments before you leave the Web conference today to provide us with your feedback



©2010 Foley & Lardner LLP