It's Deja Vu All Over Again With Storm Over Waters of U.S. Rule

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NEXT year will mark the 50th anniversary of the Clean Water Act, one of the nation's bedrock environmental laws. Chances are we will be no closer to resolving its jurisdictional scope. Practitioners involved in the use and management of natural resources and the compliance issues they raise will want to pay close attention, as the situation is turbulent at best.

In the early 1980s, EPA and the Army Corps adopted a definition of "waters of the United States" — found in the text of the statute but not defined further — that included a broad swath of non-navigable tributaries, adjacent wetlands, and other waters. That definition lasted nearly four decades, although it experienced rough waters in the Supreme Court. The government's approach to CWA jurisdiction was upheld in *Riverside Bayview* (1985), trimmed back in *Solid Waste Agency of Northern Cook County* (2001), and thanks to a splintered 4-1-4 decision rendered topsy-turvy in *Rapanos* (2006).

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In the aftermath of *Rapanos*, stakeholders debated which view should prevail: Justice Scalia's plurality opinion limiting jurisdiction over wetlands to those with a continuous surface connection to other waters of the United States (supported by four justices); or Justice Kennedy's concurring opinion covering all wetlands with a "significant nexus" to navigable-in-fact waters. For the most part, agencies and courts would apply the significant-nexus test, but its precise meaning proved murky.

The Supreme Court expressed frustration with this state of affairs — albeit arguably of their own making. Justice Alito lamented in *Sackett* (2012) that "for 40 years, Congress has done nothing to resolve this critical ambiguity" and "EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase." He proclaimed, "The reach of the Clean Water Act is notoriously unclear."

The Obama administration finally decided to take the plunge in 2015, issuing a major WOTUS rulemaking based on a voluminous scientific record. Scores of plaintiffs challenged the Obama rule; scores of intervenors sought to defend it. There was a small detour back to the Supreme Court to decide whether the proliferating legal challenges should be heard in the appeals courts or the trial courts in the first instance (answer: the latter). And then, an election happened. The Trump administration, fulfilling a campaign promise, issued an executive order directing the agencies to hew more closely to Scalia. The agencies repealed the 2015 regulation and replaced it with the Navigable Waters Protection Rule, scaling back CWA jurisdiction.

Scores of plaintiffs challenged the Trump rule; scores of intervenors sought to defend it. And then, once again, an election happened. This time it was the Biden administration fulfilling a campaign promise and issuing an executive order. EPA and the Corps announced an intent to proceed with new rulemakings in two stages: first to repeal, then to replace. (Sound familiar?)

Meanwhile, challenges to the Trump rule are still pending in over a dozen courts around the country. Justice Department attorneys had no interest defending the Trump rule while the Biden administration charted a new course. So the government filed a series of motions for voluntary remand, asking the courts to send the matters back to EPA for further proceedings. And, in DOJ's view, the Trump rule could stay in place in the meantime.

Safe harbor? Not so fast. In late August, Judge Rosemary Márquez of the District Court of Arizona granted DOJ's remand request, but in an unexpected twist vacated the Trump rule. The judge's order resurrected the 1980s-era definition, returning full circle to where the WOTUS journey began. Judges in other cases expressed disagreement with Marquez's remedy, since the courts had not decided the merits of the pending legal challenges.

A debate ensued as to whether Márquez's order had nationwide effect. The agencies cut it short, however, by posting a notice on their websites in September indicating that the Trump rules would no longer be enforced. EPA and the Corps announced that they, too, would return full circle to the definition of "waters of the United States" first promulgated in the early 1980s — at least for now.

Channeling Bill Murray in *Groundhog Day*, environmental practitioners find themselves back in the situation they were in for decades before 2015: a broad and open-ended WOTUS definition, subject to numerous administrative and judicial interpretations, exacerbated by a splintered Supreme Court opinion.

Peering down river, what will happen next? Will Márquez's order be appealed? Will the agencies propose new rules any time soon? Will they scale back their ambition and make minimal changes to the WOTUS definition this time around? Or will they launch into new and uncharted waters? Time to batten down the hatches once again.