What is a “Water of the U.S.” …. and why does it matter?

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January 2017

The controversy over the EPA's and Corps of Engineers’ final rule defining a “water of the U.S.” (WOTUS) is just the latest skirmish in a long line of legal battles on a crucial Clean Water Act (CWA) issue – what’s a “water” and what waters are subject to the Act’s regulatory provisions? Since the very beginning in 1972, this question has been a contentious one that has left the federal courts attempting to divine the intent of Congress. For their part, Congress has been content to let the administering agencies and federal courts decide this question rather than adopting any meaningful changes to the CWA. A reform-minded 115th Congress may wade into the issue, but the outcome of any action they might take is uncertain and may only further muddy the waters. And, with only a few key word changes, Congress could significantly change the number and types of waterbodies covered by the CWA.

The final so-called “WOTUS Rule” was published in June 2015 and was the culmination of several years of administrative rulemaking. The rule drew immediate criticism and legal challenges from a variety of interests, including farm groups, industry representatives, and developers. Many legislators and officials, including Iowa’s senators Grassley and Ernst as well as Governor Branstad, opined the rule amounted to an EPA land grab and exceeded the EPA's and Corps’ authority under the CWA. A Congressional Joint Resolution to rescind the final rule was vetoed by President Obama, but the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule pending a decision on the lawsuits filed by many states and interest groups.

Regardless of the Sixth Circuit’s eventual decision, the matter may once again end up in the hands of the U.S. Supreme Court. Some of the legal challenges raise procedural issues, but the legal gravamen is a familiar one - the jurisdictional reach of the CWA. The Supreme Court’s Justice Anthony Kennedy, who issued an important opinion in a pivotal case (more on that later), was recently quoted as saying the CWA is “arguably unconstitutionally vague”. The Supreme Court has narrowly split on the jurisdictional question in the past and the outcome of a new challenge is anything but certain.

Underlying the WOTUS rule skirmish is a much more fundamental issue - what should the role of the federal government be in restoring and maintaining the quality of the nation’s waters? On one side are those who feel the federal government’s role should be limited and the states can and should be trusted to collectively maintain and improve water quality with only minimal to moderate federal oversight. They maintain the WOTUS rule as published would effectively lead to federal micromanagement of states’ water and land resources, counter to Congress’ policy, as stated in the CWA, to recognize and preserve states’ primary rights and responsibilities to control pollution and to plan the development and use of their land and water resources. Congress, in passing the CWA, clearly expressed their intent to have pollution control be a joint, cooperative effort between the states and federal government and many feel the CWA has become a one-sided affair where the EPA and Corps, acting under the CWA, dictate state water quality policies.

On the other side of the issue is the argument that a strong federal role is needed to hold states’ “feet to the fire”. The Federal Water Pollution Control Act prior to the 1972 amendments was a relatively weak and ineffective piece of legislation that left much of the business of pollution control up to the states. This approach failed as the nation’s waters continued to deteriorate, necessitating passage of the CWA that established a strong federal role. The argument is that rolling back the extent of waters subject to the CWA's regulations will leave many of the nations’ wetlands and smaller streams unprotected and engender a “race to the bottom” as states compete for business and development.

1 In 1972, Congress approved amendments to the 1948 Federal Water Pollution Control Act. The 1972 and successive amendments are collectively known as the Clean Water Act even though the official title remains the Federal Water Pollution Control Act.
As many watershed project managers will testify, restoring and protecting water quality, even in the largest rivers, begins at the top of the watershed with the smallest streams and wetlands. There’s also the issue of significant state-to-state differences in water quality standards and programs in the absence of strong federal oversight that could lead to protracted interstate legal battles.

The WOTUS rule was tailored to comport with the Supreme Court’s decision in the *Rapanos* case, especially so for Justice Kennedy’s opinion, so a review of that case and some prior cases is needed to fully understand the issue. But first, a look at the Constitutional limits on the federal government’s powers and the operative provisions of the CWA are necessary to frame the legal arguments.

**The U.S. Constitution**

A good place to start is the 10th Amendment:

> “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”

In other words, the federal government has only the powers the states specifically delegated to it when they ratified the Constitution and its amendments; all other powers are reserved for the states or the people. Nowhere does the Constitution specifically delegate the power to regulate waters to the federal government, so where does Congress find that grant of authority? The answer lies in Section 8 of Article I of the Constitution that delegates Congress the power:

> “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

More generally known as the commerce clause, this provision provides the federal government with a powerful regulatory tool and is at the center of the Act’s jurisdictional issue. The commerce clause has been used by the federal government to regulate a wide range of activities that sometimes have only a seemingly indirect and tenuous relationship to interstate commerce, including limiting how much wheat a farmer could grow (even though it was not being sold across state lines) and banning the growing of marijuana for personal use. In general, the Supreme Court has supported the commerce clause’s “long arm”. And, federal laws trump any conflicting state law due to the Constitution’s supremacy clause.

One of the earliest water-related applications of the commerce clause involved navigable streams. Much of the commerce between states in the early days of this country was carried out by boats traversing coastal and inland waters. Any actions that would interfere with interstate navigation or make interstate waterways less navigable could be viewed as interfering with interstate commerce and, thus, the federal government asserted the power to regulate navigable waterways as a legitimate exercise of its commerce power. Through various court decisions over the years, waters subject to the federal government’s navigation powers were determined to include waters that:

- were historically or are presently are used for commercial navigation in interstate commerce;
- could be used for commercial navigation in interstate commerce if reasonable navigational improvements were made; as well as
- tributaries to such navigable waters if an action on the tributary would affect the navigability of the navigable water.

Especially notable is that the navigation power could be used to regulate activities on non-navigable streams if such activities would affect (i.e. have a nexus with) navigable streams. The Rivers and
Harbors Appropriation Act of 1899, for instance, called upon the federal government’s navigation power to regulate activities on non-navigable streams. Section 13, sometimes known as the Refuse Act, prohibited among other things the discharge of refuse matter of any description, other than liquid matter flowing from sewers and streets, into a tributary of a navigable water where it would float or be washed into a navigable water.

Section 10 of the Rivers and Harbors Act established a permit system, administered by the Corps of Engineers, that regulated construction in navigable waterways. Section 13 is no longer relevant, but Section 10 is alive and well and the Corps requires Section 10 permits for construction in the following Iowa rivers:

- the Mississippi and Missouri for their entire length along Iowa’s eastern and western borders,
- the Des Moines River from its mouth to Ft. Dodge,
- the lower three miles of the Iowa River, and
- the lower five miles of the Big Sioux River.

These river segments are “traditionally navigable” as they relate directly to the federal government’s navigation powers derived from the commerce clause. ²

The Clean Water Act

The CWA also draws on the federal government’s power to regulate interstate commerce as the constitutional authority for its regulatory provisions. The rationale is that water pollution in one state can have a significant effect on water quality in adjacent and downstream states, which in turn affects interstate commerce. The regulatory provisions of the Safe Drinking Water Act, the Clean Air Act, and other federal environmental laws also draw on this authority.

Much of the regulatory muscle of the CWA is found in Section 301. That section makes it unlawful for any person to discharge any pollutant unless such a discharge complies with that section and various other sections of the CWA, including sections 402 and 404. “Pollutant” is broadly defined in the CWA and, at first look, Section 301 appears to give the federal government broad and all-encompassing powers over all pollutant discharges, regardless of their source or the waters affected by the discharge. However, an important limitation on this power is found in the CWA’s definition of a “discharge of a pollutant”. By definition, this term is limited to the addition of any pollutant to navigable waters from a point source. In turn, “navigable waters” are defined simply as “waters of the United States, including territorial seas”. Read in the context of these definitions, Section 301 prohibits the discharge of any pollutant from any point source to a water of the U.S. unless authorized by and compliant with relevant sections of the CWA. The meaning of “navigable waters” was well known in 1972 as it related to the federal government’s traditional navigation powers, so Congress apparently saw a need to redefine it more broadly it as “waters of the U.S.” for the purpose of the CWA.

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² Many states, including Iowa, have their own definitions of navigability which are specific to their own state powers and laws. “Navigable” in this document is specific to the federal definition.

³ The CWA defines a point source as any discernable, confined and discrete conveyance. Specifically included in the definition are any ditch, channel, pipe and concentrated animal feeding operation from which pollutants are or may be discharged. Agricultural stormwater discharges and irrigation return flows are specifically excluded. Point sources have also been determined to include municipal separate storm sewer systems (MS4s) and construction sites.
Section 402 (NPDES - National Pollutant Discharge Elimination System) is the workhorse of the CWA insofar as controlling what is traditionally thought of as pollution from domestic and industrial waste. This section allows the EPA to authorize point source discharges not otherwise authorized under sections 318 (aquaculture) or 404 (dredge and fill material). Such authorized discharges must, at a minimum, meet “technology based” effluent limitations. For instance, municipal sewage treatment plants must meet standard secondary treatment effluent limits as defined by EPA rules. If the effluent would result in the exceedance of water quality standards for the receiving water, more stringent “water quality based” effluent limits must be determined on a case-by-case basis.

In states that have EPA-approved NPDES permit programs, the EPA can suspend its permitting activity, although the EPA maintains oversight and can object to and “take over” an individual state-issued permit as well as rescind program primacy for due cause. States must have authority under their own state laws and constitution to carry out the NPDES permit program; a primacy agreement with the EPA does not carry with it a delegation of the federal commerce power. Most states have assumed NPDES primacy for all, or a major portion of, the NPDES program.

Section 404 (Permits for Dredged or Fill Material) is the CWA permit program that has borne the brunt of many CWA attacks and is the lightning rod for the current WOTUS rule skirmish. This section authorizes the Corps of Engineers to issue permits for the “...discharge of dredged or fill material into navigable waters at specified disposal sites.” Although the Corps is the primary permitting agency, the EPA has concurrent authority to develop guidelines for issuing permits and can object to and deny a Section 404 permit upon a finding the permit would have an adverse environmental impact. The Corps is also authorized to issue general permits on a state, regional or nationwide basis for categories of activities of a similar nature if such activities, separately or cumulatively, would cause only minimal adverse environmental effects. The intent of the general permit authority is to authorize minor activities that might otherwise have to obtain an individual Section 404 permit, which requires public notice and can lead to lengthy, and expensive, delays.

Section 404 also lists a number of activities such as normal farming and ranching activities, construction of upland soil and water conservation practices, maintenance of drainage ditches, etc., that not are subject to either Section 404 or 402 permit requirements, with some caveats and qualifications.

Like the NPDES program, states can assume primacy for the Section 404 permit program, but very few states have done so. States do, however, have a voice in that Section 401 of the CWA requires states to certify that a federal permit authorizing a discharge of a pollutant will not violate state water quality standards. States have used this 401 certification responsibility to deny, restrict or otherwise modify Section 404 individual and general permits.

Another section of the CWA of some interest in the WOTUS debate is Section 303 - Water Quality Standards. To be compliant with the CWA, states must adopt water quality standards for the navigable waters in their state and submit those standards to EPA for review and approval. The EPA cannot legally require states to do so, but if it finds a state’s standards are not compliant with the CWA, it can then adopt standards that would be used in carrying out the CWA in that state. Third parties have often used Section 303 provisions to force the EPA to require states to revise and strengthen their standards. Section 303 is also home to the so-called impaired waters and TMDL provisions, which require that states identify those navigable waters where imposition of point source technology-based effluent limits will not be sufficient to achieve water quality standards and calculate a total maximum daily load limit for the pollutant causing the water’s noncompliance (i.e., impairment). The impaired waters and TMDL provisions have seen their own share of court battles over both procedural and technical issues.

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4 General permits can only be issued for a maximum period of five years.
Federal Court Decisions

The Corps initially resisted the notion that the Section 404 program required permits for anything other than traditionally navigable waters (i.e., those subject to Section 10 permit requirements). An early federal District Court decision rejected that approach and ordered the Corps to adopt regulations for all waters of the U.S., not just those considered navigable in the traditional sense. Citing the significant workload increase, the Corps then proposed regulations that effectively exempted activities on headwater streams, isolated waters and small lakes. Congress amended the CWA in 1977 and formally authorized the Corps to issue general permits as described above. The Corps’ exclusion of headwaters, small lakes, and various isolated waters from Section 404 permit requirements then morphed into nationwide permits that basically authorized dredge and fill activities on those same waters with little or no limitations, basically a de facto exemption of those waters from Section 404 permit requirements.

The Corps’ initial nationwide permits for headwaters, small lakes and isolated waters also ran into headwinds. Over the succeeding years, lawsuits and other forces resulted in the Corps narrowing the scope of the nationwide permits. The essence of many of these challenges was that the activities authorized by the nationwide permits were not necessarily of a similar nature and the Corps could not show they would, either separately or cumulatively, result in minimal adverse environmental effects.

Today, the Corps has over 50 nationwide permits in effect as well as a number of regional and statewide permits. These permits are narrowly written for specific activities and contain conditions limiting the scope of the project. None of the nationwide permits amount to a carte blanche authorization for activities on headwater streams.

Although the Section 404 jurisdictional path is littered with court challenges, there are three Supreme Court decisions that are especially important to the WOTUS rule development.

**Riverside Bayview (1985).** This case involved filling and development in wetlands adjacent to a lake, the lake being a water that was, in fact, navigable in the traditional sense. In a unanimous decision, the Supreme Court ruled the Corps’ asserted Section 404 jurisdiction was appropriate, and that such wetlands adjacent to a water otherwise considered a jurisdictional water are also “waters of the U.S.” In doing so, the court looked at the genesis of the CWA and opined the term “navigable” as used in the CWA was of limited import and that Congress clearly intended the jurisdictional scope of CWA to extend beyond the traditional definition of navigable waters. The court acknowledged that not all wetlands may be vitally important to water quality in an adjacent waterbody, but the Corps should be given deference in making that jurisdictional determination and whether to issue a permit.

**SWANCC (2001).** The SWANCC (Solid Waste Agency of Northern Cook County) case involved mined-out, water-filled, sand and gravel pits that SWANCC proposed to fill. They were not wetlands, nor were they connected by surface water to any nearby streams, lakes, or wetlands (i.e. they were truly isolated, not part of any natural stream system). The Corps asserted Section 404 jurisdiction solely by virtue of the fact they were used by migratory waterfowl, which was a jurisdictional factor at that time. Migratory waterfowl cross state borders and waterfowl hunting is big business, so destruction of such waters could be considered as interfering with interstate commerce.

In a 5-4 decision, the Supreme Court vacated the migratory bird rule. The majority ruled that the basis for the assumed jurisdiction, the use by migratory birds, was beyond the intent of Congress as expressed in the CWA. The Chief Justice acknowledged the term “navigable” as used in the CWA was of limited import (as per Riverside Bayview) but felt it did show what Congress had in mind as its authority for the CWA - its power over traditionally navigable waters. As the waters in question did not have a connection or nexus with any navigable-in-fact waters,

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5 Not all the nationwide permits are valid for all states, as some states have denied Section 401 certification for a particular nationwide permit.
jurisdiction was not justified under the CWA. Justice Stevens, in a dissenting opinion, argued the majority’s opinion ignored nearly 30 years of executive branch and judicial interpretation of “waters of the U.S.”. The SWANCC decision put truly isolated waters and wetlands out of the jurisdictional reach of the CWA.

**Rapanos (2006).** The Rapanos case was actually two separate cases (Rapanos and Carabell) that were consolidated by the court. Both involved wetlands in Michigan. The Corps asserted Section 404 jurisdiction and was challenged (Rapanos had already filled some of the wetlands on his property, Carabell had not). The jurisdictional question eventually ended up at the Supreme Court.

The Rapanos case resulted in a 5-4 decision, but the only thing the majority agreed on was to remand the cases to the lower court for further review. The Rapanos decision is more accurately described as a 4-1-4 decision. Five separate opinions were filed. The minority agreed with the lower court’s holding that the wetlands in question were jurisdictional “waters of the U.S.”, citing the history of the CWA and prior judicial decisions such as Riverside Bayview.

The plurality (four Justices) generally agreed the term “navigable water” in the CWA went beyond the traditional definition of navigability, but opined the phrase “waters of the U.S.” only includes relatively permanent, standing or continuously flowing bodies of water, and not channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. Additionally, a wetland would only be jurisdictional if it had a continuous surface connection to an adjacent stream that met the “relatively permanent” test. Implicit in the plurality’s opinion was the assumption that if Congress had meant “water” to mean anything other than its meaning in normal usage, it could have defined it more broadly. Iowa’s water quality statute, for instance, defines “water of the state” very broadly to include any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water, surface or underground.

Justice Kennedy, in a separate opinion, opened the jurisdictional door potentially wider than the plurality’s “relatively permanent” body of water tests, but at the same time provided a more constricted view of the CWA’s jurisdictional underpinnings. He agreed CWA jurisdiction potentially extended beyond traditionally navigable waters, but felt Congress’ use of the term “navigable water” should be given due recognition. Justice Kennedy argued a water or wetland constitutes a jurisdictional water if it singularly or in combination with similarly-situated ones in the region have a “significant nexus” to waters that are navigable in fact or could reasonably be made so (i.e., traditionally navigable waters). By “significant nexus”, he meant having an effect on the chemical, physical, or biological integrity of a traditionally navigable water. Further, a water would not be jurisdictional if such effects were speculative or insubstantial. Absent more specific regulations, the Corps would have to make the significant nexus finding on a case-by-case basis.

Kennedy’s test suggests he gave a great deal of recognition to the term “navigable” as his significant nexus test is inextricably tied to water quality in traditionally navigable waters. If the administering agencies could not show a significant effect on a traditionally navigable water that might lie hundreds of miles downstream, those tributaries and adjacent waters would not be jurisdictional waters, even if they met the plurality’s permanent water test. That rationale is reminiscent of the federal government’s long-established navigation powers to regulate activities on non-navigable tributaries only if could be shown those activities would affect the navigability of navigable-in-fact waters.

**The Post-Rapanos Conundrum**

Supreme Court decisions are binding (i.e., they are the “law of the land”), so the EPA and Corps had a legal duty to implement the court’s decision after it was handed down. Justice Stevens, writing for the minority in the Rapanos case, noted it was the court’s normal practice that when a matter was sent back to a lower court for further proceedings, it would be pursuant to a specific mandate from the court. The view that the term “navigable” imposed virtually no restraint on the jurisdictional reach of
the CWA was no longer defensible, as it was the minority’s opinion in both the Rapanos and SWANCC cases. Given the different tests proposed by the plurality and Justice Kennedy, a clear mandate was missing. The Rapanos case left the EPA and Corps in a quandary as to how to implement the fractured nature of the Supreme Court’s opinions.6

A hypothetical, but realistic, example can highlight the difficulty of implementing the Supreme Court’s opinions in the Rapanos case:

There is a wetland in a cropped field in north-central Iowa, a feature often described as a prairie pothole. The prairie pothole has standing water during part of the year in some years. When there is standing water, migratory waterfowl and shorebirds can be found around and on the water. During extremely wet years, some amount of water flows from the prairie pothole overland into a nearby waterway. That waterway was a small drainage swale prior to settlement, but a drainage district deepened and widened it to facilitate drainage of nearby lands. In local parlance, the waterway would be considered a drainage district ditch. This waterway or “ditch” normally carries only tile drainage flow. The water from this ditch flows into a natural stream, which in turn flows into a larger stream -call it No Name Creek, thence into the West Fork of the Des Moines River and, eventually, into the Des Moines River.

The question, then, is which of these “waters” is a “water of the U.S.” using the jurisdictional tests of Rapanos and earlier decisions? The Des Moines River below Ft. Dodge is considered a traditionally navigable water, so there’s no question it is a CWA jurisdictional water.7 The West Fork Des Moines normally has flowing water and would be considered a jurisdictional water under the “relatively permanent” test of the Rapanos plurality, at least for some considerable distance upstream from its confluence with the main stem. The same might be true of No Name Creek or the tributary to No Name Creek, but at some point, a jurisdictional line would have to be drawn to satisfy the “relatively permanent” test. Drawing this jurisdictional line would require some judgement as to where the flow in these streams becomes intermittent or ephemeral, not necessarily an easy task. What is clear, however, is that the prairie pothole wetland would not be considered a jurisdictional wetland under the plurality’s test, as it does not have a continuous surface connection with a nearby jurisdictional stream.8

Justice Kennedy’s “significant nexus” test introduces additional uncertainty. It would be hard to deny that water flowing in the West Fork, alone or in combination with the East Fork Des Moines, doesn’t have a significant effect on water quality in the Des Moines River downstream of Ft. Dodge. The question arises as to whether the water in No Name Creek and its tributaries, along with other similar tributaries in the region, has a significant effect on water quality in the Des Moines River below Ft. Dodge. And, of course, such effects cannot be speculative or insubstantial. An argument could be made that even the prairie pothole wetland is a jurisdictional water as it has a periodic surface connection with the adjoining waterway and downstream tributaries (i.e., it is not truly “isolated”) and it and similar wetlands in the area may perform valuable functions in trapping sediment, nutrients, and other pollutants that might otherwise end up in the Des Moines River. Occasional use of the wetland by migratory birds would not be a jurisdictional factor due to the SWANCC decision.

The above scenario demonstrates the difficulty in making CWA jurisdictional determinations that conform to the Supreme Court’s Rapanos decision. Yet, the Corps and EPA were faced with developing criteria to make post-Rapanos jurisdictional determinations. Additionally, such criteria would have to

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6 Upon remand, the Rapanos and the Carabell cases were settled out of court.

7 Although not currently used for commercial navigation in interstate commerce, the Des Moines from its mouth to Ft. Dodge was historically considered navigable, subject to the federal government’s navigation powers.

8 This prairie pothole may be considered a wetland under the federal farm program’s “swampbuster” regulations. Any CWA-related judicial findings would not affect the farm program regulations, as the farm program restrictions are based on the Constitution’s spending clause, not the commerce clause.
be applicable across the nation, including streams in the West that are often dry but carry large volumes for short periods of time.

The Corps and EPA developed guidance to implement the Rapanos opinions, but Congress, the courts, as well as many other interests demanded they develop formal rules to provide more certainty and clarity. Over the ensuing years, draft rules were developed and first published as proposed rules in April 2014. Extensive public comments as well as scientific information were considered and a final rule was published in June 2015. Of the 75 pages of the Federal Register containing the final rule, 52 pages are devoted to the preamble which explains the background and rationale for the final rule.

In general, the final rules established eight categories of waters. Four categories, such as traditionally navigable and interstate waters and impoundments thereof, are considered jurisdictional by rule in all cases. Another two categories, tributaries (to traditionally navigable waters) and adjacent waters, are also considered jurisdictional by rule. All streams that have definable beds and banks and ordinary high water marks are considered tributaries. The final two categories include features like Iowa’s prairie potholes that require case-specific jurisdictional determinations. Also identified in the rule are features that are not jurisdictional like ditches that are not part of any naturally-occurring stream system and carry intermittent or ephemeral flows.

Many of the critics of the final rule contend the rule constitutes an expansion of the jurisdictional reach of the CWA, while the EPA and Corps maintain the rules narrow the scope of waters covered compared to previous regulations. As to whether the rules clarify jurisdiction or further muddy the waters, there are strong opinions on both sides.

The various federal court decisions on the jurisdictional reach of the CWA have created a near-impossible task for the EPA and Corps to identify jurisdictional waters with any precision and clarity that satisfies everyone. The common thread running through all of these judges’ decisions over the years can be summarized by the phrase “This is what we think Congress meant.” Some members of Congress and many others point their fingers at the EPA and Corps, the EPA and Corps point their fingers at the federal courts, and the federal courts, quite correctly, point their finger at Congress. Justice Kennedy’s comment about the CWA being arguably unconstitutionally vague is close to, if not directly on, the mark.

The CWA’s jurisdictional ambiguity is understandable from the perspective of 1972. Passage of the 1972 amendments was anything but certain and was achieved only with House and Senate overrides of President Nixon’s veto. Getting control of municipal and industrial discharges was the main objective at that time, and the jurisdictional ambiguity was likely a byproduct of the legislative sausage-making process - no one wanted to bring up potential jurisdictional problems that might scuttle the entire effort. Congress has, however, had over 40 years to make changes to clarify the jurisdictional issue, but has been unwilling or unable to do so.

What now?

The Sixth Circuit has stayed the final rule pending a decision, likely due sometime in 2017, on the legal challenges. Until then, the Corps is using their pre-WOTUS rules and guidance to make jurisdictional determinations (JDs). The Supreme Court recently ruled JDs constitute a final agency action under federal administrative law and can be appealed to the courts (i.e., someone contesting a JD would not have to go through the potentially time-consuming permit process to initiate judicial review).

The Sixth Circuit could conceivably vacate the rule, based either on procedural errors or alleged differences with the Supreme Court’s Rapanos decision, and tell the EPA and Corps to go back to the drawing board. Or, it could uphold the rule, in which case its decision would likely be appealed to the Supreme Court. With the death of Justice Scalia, who authored the Rapanos plurality opinion, and considering Justice Kennedy’s post-Rapanos remarks, the outcome of any Supreme Court decision is uncertain and may be years away. Or, the Supreme Court could simply refuse to hear the appeal.

Congress could, of course, make legislative changes to the CWA to clarify their intent. Vacating the WOTUS rule would do little, in and of itself, to eliminate the jurisdictional ambiguity. Eliminating the term “navigable waters” throughout the text of the CWA and replacing it with “waters of the United
States and territorial seas” would signal an intent to include waters to the full extent allowed under the commerce clause. The Supreme Court never said the migratory bird rule at issue in the SWANNC case was beyond the reach of the commerce clause; it simply said the rule was beyond what Congress intended.

A reform-minded, Republican-majority Congress would likely go the other way and want to pare back the extent of waters covered by the CWA. Senator Ernst indicated a desire to continue to pursue measures to counteract the CWA’s regulatory overreach and the Whitehouse’s website indicated a commitment to eliminating “harmful and unnecessary policies” such as the WOTUS rule. Leaving the “navigable water” term in place and eliminating the definition thereof as “waters of the U.S.” would signal an intent to significantly shorten the jurisdictional reach of the CWA, but the issue would then be how to protect traditionally navigable waters without also protecting their tributaries. Justice Kennedy recognized this conundrum in his “significant nexus” opinion.

The CWA jurisdictional issue has typically been debated and litigated in the context of the Section 404 program. The terms “navigable waters” and “waters of the U.S.” are not specific to that section; they are also applicable to other sections of the CWA such as 303 (water quality standards) and 402 (NPDES) as well. Any changes should also be evaluated in terms of how they would affect other portions of the CWA.

It is also important to keep in mind the following points:

• The CWA does not regulate nonpoint sources of pollution.
• Agricultural stormwater discharges, normal farming and ranching activities, construction of upland soil and water conservation practices, and maintenance of drainage ditches are specifically exempted from CWA permit requirements.
• The final WOTUS rule specifically lists various features that are not jurisdictional and others that may not be, depending on a site-specific analysis.
• The requirement to obtain a Section 404 permit does not, in and of itself, prohibit an activity, and many minor activities are covered under a Corps general permit.

At this point, the path ahead is anything but clear and the administering agencies will have to muddle through, doing the best they can and being criticized for whatever they do.