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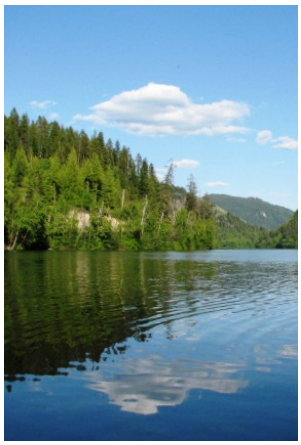

EPA Proposed Rule to Rescind Definition of "Waters of the United States"

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On June 27, 2017, the U.S. Environmental Protection Agency and the Army Corps of Engineers ("Agencies") unveiled a proposed rule that would rescind the definition of the term "waters of the United States" under the Clean Water Act ("CWA"), commonly referred to as the "WOTUS Rule." The WOTUS Rule, which defines the scope of federal jurisdiction under the CWA, was adopted by the Agencies under the Obama Administration in a 2015 rule titled "Clean Water Rule: Definition of 'Waters of the United States'" (80 Fed. Reg. 27054, June 29, 2015). As explained in previous alerts circulated in 2014, 2015, 2016, and 2017, the "WOTUS" rule has far-reaching implications for project developers across the energy, water, agricultural, construction, and transportation sectors. Under the 2017 rule proposed by the Agencies under the Trump Administration, the Agencies would rescind the WOTUS Rule and "re-codify the regulations that existed before" the WOTUS Rule.

The proposed rule is the first step in a two-step process intended to review and revise the definition of "waters of the United States" pursuant to President Trump's February 28, 2017 Executive Order titled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States Rule" (the "Executive Order"). The Agencies indicate that they will, in the second step, pursue a separate notice and comment rulemaking to conduct a substantive re-evaluation and development of the definition of "waters of the United States." According to the Agencies, the intention of this first step is to provide certainty regarding the scope of CWA jurisdiction "on an interim basis" while the Agencies proceed with the second step: the Agencies' substantive review of the "appropriate scope" of the definition of "waters of the United States."

Background

Immediately after the WOTUS Rule was issued in 2015, the rule was challenged by industry, environmental groups, states, and others in more than two dozen cases in multiple federal district courts and appellate courts. On October 9, 2015, the Sixth Circuit granted a stay of the WOTUS Rule, effective nationwide, pending the court's resolution of the question of whether it has jurisdiction over the case. *In re E.P.A.*, 803 F.3d 804, 807 (6th Cir. 2015). In February 2016, the Sixth Circuit determined that the courts of appeals, rather than district courts, had jurisdiction over the WOTUS Rule. *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016).

On January 13, 2017, the U.S. Supreme Court agreed to resolve jurisdictional wrangling over which federal court should hear challenges to the WOTUS Rule. The Supreme Court's decision to hear the appeal was issued on the same day the Obama administration filed its 300-page brief with the Sixth Circuit Court of Appeals defending the WOTUS Rule.

The Executive Order

President Trump's Executive Order requires the Agencies to review the WOTUS Rule for consistency with a stated policy finding it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles played by Congress and the States under the Constitution." It directs the agencies to initiate a new rulemaking process for the WOTUS Rule, by "publish[ing] for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." Finally, the Executive Order directs the Agencies, in this rulemaking, to "consider interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)."

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Rapanos and the Scalia Opinion

The Supreme Court's 2006 decision in *Rapanos v. U.S.* addressed the question of whether the Court's prior holdings addressing "waters of the United States" should be interpreted to include not only wetlands that are directly adjacent to navigable waters, but also wetlands adjacent to ditches and manmade drains that eventually drain into traditional navigable waters.

After reviewing two decisions by the Court of Appeals that had affirmed the Agencies' jurisdiction over such waters, a majority of the Justices in *Rapanos* agreed to remand both cases to the appellate court for further proceedings, but a majority could not agree on the grounds for remand. The Court's 4-1-4 decision included multiple opinions, including a "plurality" opinion authored by Justice Scalia, two concurring opinions authored by Chief Justice Roberts and Justice Kennedy, and two dissenting opinions authored by Justice Stevens and Justice Breyer.

The two *Rapanos* opinions with the most legal significance are Justice Scalia's plurality opinion, which announced the judgment of the Court, and Justice Kennedy's concurring opinion, which concurred in the judgment but not in the rationale underlying the plurality opinion.

Under Justice Scalia's plurality opinion, CWA jurisdiction would extend only to "relatively permanent, standing, or continuously flowing bodies of water" connected to traditional navigable waters, and to wetlands with a continuous surface connection to such relatively permanent water. The plurality opinion states that jurisdictional waters do not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

In contrast, Justice Kennedy's concurring opinion announced an alternative rationale for remanding to the Court of Appeals. Under Justice Kennedy's opinion, CWA jurisdiction would extend to wetlands adjacent to waters that have a "significant nexus" to traditional navigable waters. Justice Kennedy's "significant nexus" test is generally seen as extending federal jurisdiction further than Justice Scalia's "relatively permanent" test.

In Post-*Rapanos* decisions by the United States Courts of Appeals, the courts have generally followed Kennedy's opinion as controlling, although some have determined that both Kennedy and Scalia's option may apply. Some courts have cited to applicable precedent in *Marks v. United States*, 430 U.S. 188 (1977), which held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." Other courts have reached their conclusions under other rationales and reasoning.

In developing the 2015 WOTUS Rule, the Obama Administration asserted that it was following Justice Kennedy's "significant nexus" test, and it gave little consideration to Justice Scalia's plurality opinion. By requiring that the Agencies consider interpreting the term "navigable waters" in a manner that is consistent with Justice Scalia's *Rapanos* opinion, President Trump has directed the Agencies towards a narrower interpretation of "waters of the United States."

Next Steps

The Agencies now propose to replace the stayed 2015 definition and re-codify the exact same regulatory text that existed prior to the WOTUS Rule. The Agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation "the legal *status quo*" as an interim first step, pending the Agencies' substantive rulemaking process. The Agencies clarified that this rulemaking does not undertake any substantive reconsideration of the pre-2015 "waters of the United States" definition. The Agencies are not soliciting comment on the specific content of the regulations or the scope of the definition of "waters of the United States" that the Agencies should ultimately adopt in step two of the rulemaking process. Stakeholders affected by the WOTUS Rule should, however, prepare to submit comments in the near future.

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Practical Implications

For the regulated community, the Agencies' proposed rule will make little practical difference, at least in the short term. As the Agencies have recognized, the rule will merely "codify the legal status quo," so it will not change the interpretation of "waters of the United States" that has been applied by the Agencies since the Sixth Circuit granted its nationwide stay of the WOTUS Rule. The Agencies' claim that the proposed rule will provide "certainty" is based on the possibility that the Supreme Court might reverse the Sixth Circuit's jurisdictional ruling, which could result in a lifting of the nationwide stay.

Moreover, if the proposed rule is issued, it will almost certainly be challenged in court, leading to continued uncertainty. Thus, the regulated community will probably not see long-term certainty until after the Supreme Court has ruled on the substance of the "waters of the United States" definition – which, under the proposed rule, will not happen until the Agencies complete their rulemaking process proposed as part of the Agencies' "second step."

Potential Legal Challenges

In the proposed rule, the Agencies claim that they have authority to rescind the definition in the WOTUS Rule "so long as the revised definition is authorized under the law and based on a reasoned explanation," citing the Supreme Court's decision in *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("*Fox*"). In *Fox*, a 5-4 decision, the majority held that agencies "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one"; instead, "[i]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."

Challenges to the proposed rule are likely to focus on these questions raised in *Fox*: Is the proposed rule permissible under the CWA; and are there "good reasons" for it? In *Fox*, the Supreme Court was divided on the issue of how closely the Court should scrutinize agencies' reasons for reversing their positions, and legal scholars are similarly divided on the issue of whether the Agencies' proposed rescission of the WOTUS Rule would survive a challenge in light of *Fox*.

In particular, it is unclear whether the rule is permissible under the CWA in light of the Supreme Court's ruling in Rapanos and other rulings addressing "waters of the United States." It is also unclear whether the Supreme Court would find the Agencies' stated reasons for rescinding the rule to be "good" enough. Will the Court find that the Agencies' stated goal of providing certainty is a "good" reason for the proposed rule when the Sixth Circuit's stay remains in place, and further litigation is nearly certain? Will the Court consider the merits of the WOTUS Rule, and the scientific record created by the Agencies under the Obama Administration, in determining whether the stated reasons for rescission are "good" reasons?

In the long term, litigation over the proposed rule will have little direct impact on the scope of CWA jurisdiction, but that litigation could indirectly affect the Supreme Court's ultimate resolution of the "waters of the United State" issue. That final resolution will not occur until after the Agencies have completed the lengthy "second step" described in the proposed rule by issuing another rule setting forth a new definition for "waters of the United States," and that rule has been litigated to finality – a process that could take years.

For more information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact Duncan Greene, Joseph Nelson, Brent Carson, Sheri Spang, or any member of the firm's Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372. Follow us on Twitter @VanNessFeldman.