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EPA and Corps Seek Additional Comment on Proposal to Repeal Definition of WOTUS

JULY 18, 2018

Jenna Mandell-Rice, Brent Carson, Duncan Greene, Joseph Nelson, and Sophia Amberson

On July 12, 2018, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers ("Agencies") issued a supplemental notice seeking additional comment on their 2017 proposal to repeal 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 March 2014, June 2015, May 2016, March 2017, July 2017, November 2017, January 2018, and February 2018, the WOTUS Rule has far-reaching implications for project developers and landowners across the energy, water, agricultural, construction, and transportation sectors.

Under the 2017 rule proposed by the Agencies under the Trump Administration, discussed here, the Agencies would repeal the WOTUS Rule and "re-codify the regulations that existed before" the WOTUS Rule. The Agencies' supplemental notice seeks additional comment regarding that proposal.

The Supplemental Notice

The stated purpose of the Agencies' supplemental notice is to "clarify, supplement and give interested parties an opportunity to comment on certain important considerations and reasons for the agencies' proposal." The notice strengthens the documentary record and rationale supporting the Agencies' repeal proposal.

At the heart of the supplemental notice are the Agencies' proposed conclusions:

- That "administrative goals of regulatory certainty would be best served by repealing the 2015 Rule";
- That "the 2015 Rule exceeded the agencies' authority under the CWA";
- That "the 2015 Rule may have altered the balance of authorities between the federal and State governments" in violation of the CWA;
- That "many features that are categorically jurisdictional under the 2015 Rule. . . test the limits of the scope of the Commerce Clause…";
- That " the definitional changes in the 2015 Rule [may have had] a more substantial impact on the scope of jurisdictional determinations . . . than acknowledged in the analysis for the rule . . ."; and
- That "regulatory certainty may be best served by repealing the 2015 Rule [because the] 2015 Rule creates significant uncertainty for agency staff, regulated entities, and the public, which is compounded by court decisions [in litigation challenging the 2015 Rule] that have increased litigation risk and cast doubt on the legal viability of the rule.

The validity of these and other conclusions will be the central issues in the litigation that is certain to follow if the Agencies finalize their proposal.

The Agencies stated that, if their proposal to repeal the WOTUS Rule is finalized, they would "recodify the prior regulation in the CFR" and to apply the prior definition "until a new definition of CWA jurisdiction is finalized. They would "continue to implement those regulations, as they have for many

years, consistent with Supreme Court decisions and practice, other case law interpreting the rule, and informed by agency guidance documents." The Agencies acknowledge that the prior regulations (promulgated in 1986 and 1998) have been criticized, "the longstanding nature of the regulatory framework and its track record of implementation makes it preferable until the agencies propose and finalize a replacement definition." In other words, "[t]he current regulatory scheme for determining CWA jurisdiction is 'familiar, if imperfect.'"

In response to comments submitted on the Agencies' 2017 proposal to repeal the WOTUS Rule, the Agencies also clarified that they were not, as suggested by some commenters, "restricting their opportunity to provide such comments either supporting or opposing repeal" of the WOTUS Rule.

Practical Implications

For the regulated community, the Agencies' proposed rule will make little practical difference, at least in the short term. The 2015 Rule continues to be subject to a preliminary injunction issued by the District of North Dakota as to 13 States: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, Wyoming, and New Mexico. The 2015 Rule also is subject to a preliminary injunction issued by the U.S. District Court for the Southern District of Georgia as to 11 more States: Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. The U.S. District Court for the Southern District of Texas is considering preliminary injunction motions filed by parties including the States of Texas, Louisiana, and Mississippi. Ohio, Michigan, and Tennessee are seeking a preliminary injunction in the U.S. District Court for the Southern District of Ohio. 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 the Agencies have been applying since the 1980s.

Additionally, the Agencies have, in the interim, issued a related rule that sought to delay the implementation of the WOTUS Rule for two years (the "Suspension Rule"). The Suspension Rule, which went into effect in February of 2018, delays the implementation of the WOTUS Rule until 2020. In the meantime, the definition of the "waters of the United States" reverts back to the 1980s regulation. The Suspension Rule is currently being challenged in three separate lawsuits in United States District Courts: one in the Southern District of South Carolina and two in the Southern District of New York.

Moreover, if the proposed rule to repeal the 2015 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 agencies issue a new rule and the Supreme Court issues a decision on the substance of the "waters of the United States" definition.

Potential Legal Challenges

The Agencies claim that they have authority to repeal 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 repeal 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 contrast to the initial proposed rulemaking to repeal the 2015 Rule, the agencies have, in this proposal, provided significantly more substantive reasoning for their repeal proposal.

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Next Steps

The Agencies will accept comments on their supplemental notice through August 13, 2018.

In the meantime, the Agencies are soliciting comments on whether other alternatives to a full repeal – such as revising specific elements of the WOTUS Rule, issuing revised implementation guidance and implementation manuals, and proposing a further change to the applicability date of the WOTUS Rule – would fully address "potential deficiencies in and litigation risk associated with" the WOTUS Rule. They are also evaluating options for revising the definition of "waters of the United States."

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, 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.

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