

Trump Issues Order for Review of Clean Water Rule

On February 28, 2017, President Trump signed an executive order directing the U. S. Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) to review the Clean Water Rule, also known as the Waters of the United States (“WOTUS”) rule, and rescind or revise the rule. Opponents of the rule declared victory while supporters opined the executive order was a disaster. But the rule has been under a judicially-imposed nationwide stay since shortly after it was promulgated and cannot be rescinded or revised by the President. The executive order itself has no immediate legal effect, but is significant because it signals the Administration intends to substantially reduce the jurisdictional scope of the Clean Water Act (“CWA”).

The WOTUS rule applies to CWA Section 404, which requires a permit from the Corps and concurrence by EPA for filling of wetlands that are determined to be “waters of the United States.” The rule also applies to CWA Section 402, which requires an EPA permit for all discharges of pollutants to “waters of the United States.” Because the CWA defines the term “pollutant” very broadly, many businesses, particularly in the agricultural community, feared the rule would bring normal activities within the jurisdiction of the CWA. As a result, the rule was highly controversial when promulgated in May 2015. EPA argued it addressed concerns of the regulated community in crafting the final rule, but most businesses and industries were unpersuaded.

Although the executive order has no immediate legal effect, it reflects the Administration’s policy regarding the WOTUS rule. Echoing the President’s campaign statements that the rule constituted disastrous overregulation, the executive order declares the federal government must keep navigable waters free from pollution while also promoting economic growth and respecting the constitutional roles of Congress and the States.

The executive order declares any rule replacing the WOTUS rule should adhere to Justice Antonin Scalia’s narrow interpretation of navigable waters in the U.S. Supreme Court’s 2006 decision in *Rapanos v. U.S.* That case split 4-1-4 with Justice Scalia

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drafting a plurality opinion, joined by three justices. Justice Scalia held that EPA and the Corps' regulatory authority under the Clean Water Act extended only to traditional navigable waters, "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and "wetlands with a continuous surface connection" to traditional navigable waters. Four justices dissented and Justice Anthony Kennedy wrote a separate opinion. Justice Kennedy adopted a much broader definition of navigable water than Justice Scalia, holding EPA and the Corps had regulatory authority if a water has a "significant nexus" to downstream traditional navigable waters.

Although the significant nexus test requires a complex and heavily fact-based analysis, it is the test that EPA and the Corps, as well as the lower federal courts, have applied for the last eleven years to determine CWA jurisdiction. In fact, when promulgating the WOTUS rule, EPA and the Corps insisted they were simply clarifying the significant nexus test. A new rule imposing Justice Scalia's narrow test would significantly reduce the number permits that EPA and the Corps could require under the CWA.

As the executive order acknowledges, mere action of the President cannot rescind or revise the WOTUS rule. Within hours after President Trump signed the executive order, Administrator Scott Pruitt circulated a draft notice for publication in the Federal Register of EPA's intent to review and rescind or revise the rule. The draft notice confirms the only procedural method for rescinding or revising the rule is through rulemaking under the federal Administrative Procedure Act, which could take years. Any attempt to rescind or revise the rule will also require EPA and the Corps to develop an administrative record justifying their decision. And any replacement for the WOTUS rule will be subject to challenge in the courts.

To act more quickly, the Administration could use the budget process to block the WOTUS rule's implementation. If the courts lift the current WOTUS rule stay or uphold the current rule, the Trump Administration's budget for EPA and the Corps could propose to withhold funds for implementation. If Congress agrees, the budget could prevent federal agencies from implementing the WOTUS rule while the Administration undertakes the lengthy effort to rescind or revise the rule.

Finally, the executive order requires EPA and the Corps to provide notice to the U.S. Justice Department of the "pending review" of the WOTUS rule so the Attorney General may, "as he deems appropriate," inform federal courts of the review. In 2015, there were numerous pending challenges to the current WOTUS rule in federal district courts and courts of appeal, including a consolidated petition for review in the Sixth Circuit. In February 2016, the Sixth Circuit held it—and not United States District Courts—had jurisdiction to hear legal challenges to the final WOTUS rule. After that decision, several district courts dismissed challenges to the rule on jurisdictional grounds. But in January 2017, the U. S. Supreme Court granted a petition for certiorari to review the Sixth Circuit's jurisdictional determination. The case is likely to be argued and decided by the end of the Supreme Court's June 2017 term.

It is unclear how review of the WOTUS rule directed by the executive order will affect

pending litigation. The Administration will attempt to keep the rule from taking effect while EPA and the Corps conduct a review and go through notice and comment rulemaking. But the Sixth Circuit or the Supreme Court may not dismiss litigation based solely on a pending review of the current WOTUS rule. And even if the Justice Department moves to dismiss or stops defending the action, states and other groups in the case could continue to defend the rule.

In the short term, the WOTUS rule remains under a nationwide stay. EPA and the Corps will continue to make determinations regarding the “waters of the United States” using Justice Kennedy’s significant nexus test without applying the WOTUS rule, just as they have since 2006. A rule applying Justice Scalia’s narrower test could be years away and will be fiercely litigated upon arrival. That may not please President Trump, but the Administration cannot alter the reality of the rulemaking process by issuing an executive order.