Updates
June 29, 2017

Agencies Release Proposed Rule to Rescind Obama-Era Clean Water Rule

The Environmental Protection Agency and the U.S. Army Corps of Engineers released a proposed rule on June 27, 2017, that will rescind the Obama administration's 2015 Clean Water Rule and recodify the pre-2015 regulations that it replaced. The proposed rule will be published in the *Federal Register* in the coming days, which will start a 30-day public comment period.

Rescinding the Clean Water Rule will have no immediate practical effect on regulated entities because the U.S. Court of Appeals for the Sixth Circuit blocked the rule from going into effect while the court resolved challenges to its legality. This action, however, is the first step in the agencies' two-step process to redefine the scope of federal jurisdiction under the Clean Water Act. The second step will be to promulgate a new rule defining "waters of the United States," which, depending on the changes, could significantly affect the regulated community.

Background

The Clean Water Act provides federal jurisdiction over "navigable waters," which is rather unhelpfully defined as "waters of the United States." This definition is critically important because it determines which water bodies are subject to federal permitting requirements and which waters are beyond federal authority. The absence of a statutory definition has bedeviled the agencies and courts for years. Most recently, in 2006, the U.S. Supreme Court issued a fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006), about the scope of "waters of the United States." Justice Scalia, writing for the plurality, stated that the Clean Water Act should only cover "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and "wetlands with a continuous surface connection to" those waters. *Id.* at 738. Justice Kennedy authored a concurring opinion in which he asserted that the act should additionally apply to those streams and wetlands that have a "significant nexus" to a navigable water. After the fractured *Rapanos* decision, there has been uncertainty among the lower courts about which jurisdictional test controlled. The agencies and most courts have generally opted to apply Justice Kennedy's more expansive "significant nexus" test.

Clean Water Rule

In an attempt to clarify the scope of Clean Water Act jurisdiction post-*Rapanos*, the EPA and the Corps jointly published the Clean Water Rule on May 27, 2015. The controversial rule relied almost exclusively on Justice Kennedy's "significant nexus" test from *Rapanos* to broadly define the scope of "waters of the United States," ignoring the Court's hints about the limits of legislative power under the commerce clause. Thirty-one states and numerous private parties challenged the validity of the rule in various district and appellate courts, with the appellate court cases ultimately consolidated in the U.S. Court of Appeals for the Sixth Circuit. On October 9, 2015, the Sixth Circuit issued a nationwide stay of the rule pending judicial review, and, on February 22, 2016, the court ruled that it had jurisdiction to consider challenges to the rule. The U.S. Supreme Court agreed to review the Sixth Circuit's jurisdictional ruling in its next term, which begins in October 2017.

Trump Administration Actions

President Trump's administration has moved fast to rescind and replace the Clean Water Rule. President Trump signed Executive Order 13778 on February 28, 2017, which directed the EPA and the Corps to review the Clean Water Rule, and consider replacing it with a definition of "navigable waters" consistent with Justice Scalia's plurality opinion in *Rapanos*. On March 6, 2017, the EPA and the Corps published a notice of intent in the *Federal Register* that explains their plans to proceed in two steps: they will first rescind the Clean Water Rule and then will promulgate a new rule to define "waters of the United States." The proposed rule to rescind the Clean Water Rule and recodify pre-2015 regulations is the first of these two steps.

Implications of the Forthcoming Rule

Rescinding the Clean Water Rule will have no immediate practical effect on regulated entities because the rule has been stayed by the Sixth Circuit since 2015. By recodifying pre-2015 regulations, the proposed rule will restore the status quo that existed before the Clean Water Rule was promulgated and that controlled while the Clean Water Rule has been stayed. Members of the public will have 30 days to comment on the proposed rule after it is published in the *Federal Register*. Once a final rule rescinding the Clean Water Rule takes effect, courts will likely dismiss challenges to the Clean Water Rule as moot.

The more significant rulemaking will be the agencies' forthcoming rule to define "waters of the United States." The agencies have indicated that they will consider a definition that places greater emphasis on the role of states in protecting water quality, and is consistent with Justice Scalia's plurality opinion in *Rapanos*. This future rule could significantly narrow the federal government's jurisdiction under the Clean Water Act. Such a rule would also likely be subject to legal challenges from environmental groups, who may argue that it is unsupported by science, and is inconsistent with Justice Kennedy's opinion in *Rapanos*.

In the meantime, the EPA and the Corps will continue to rely on pre-2015 regulations, agency guidance documents and their interpretations of Supreme Court precedent to determine the scope of federal jurisdiction under the Clean Water Act. Entities from all sides, including both industry and environmental groups, have argued that this regulatory scheme does not provide enough clarity and certainty.

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