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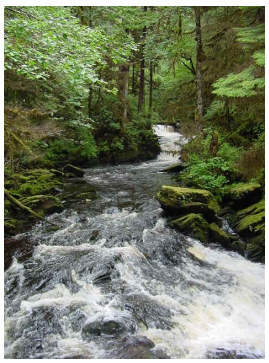

Federal Agencies Repeal Obama-Era Clean Water Rule

SEPTEMBER 17, 2019

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On September 12, 2019, the United States Army Corps of Engineers (the "Corps") and the Environmental Protection Agency (collectively, the "Agencies") announced a final rule (the "Repeal Rule") that rescinds the definition of "Waters of the United States" under the Clean Water Act ("CWA") adopted by the Obama administration in 2015 (the "WOTUS Rule"). As explained in previous Van Ness Feldman alerts, the 2015 WOTUS Rule expanded federal control over tributaries, adjacent waters, wetlands, and other water bodies.

The Agencies describe the Repeal Rule as reestablishing "national consistency across the country by returning all jurisdictions to the longstanding regulatory framework that existed prior to the WOTUS Rule, which is more familiar to the agencies, States, Tribes, local governments, regulated entities, and the public while the agencies engage in a second rulemaking to revise the definition of 'Waters of the United States.'" As a practical matter, the Repeal Rule returns the definition of the "Waters of the United States" to the pre-2015 regulatory text and allows for implementation under the Agencies' guidance issued after the Supreme Court's decision in *Rapanos v. United States*. The Repeal Rule becomes effective sixty days from its date of publication in the Federal Register.

Background

Since its enactment under the Obama Administration, the WOTUS Rule has been the subject of numerous legal challenges. After a change in administration, the Agencies reversed course and took a series of actions to repeal and replace the WOTUS Rule. Pursuant to Executive Order 13778, titled "Restoring the Rule of Law, Federalism, and Economic Growth by reviewing the 'Waters of the United States' Rule," the Agencies developed a two-step process, which would (1) repeal the WOTUS Rule; and, (2) replace the WOTUS Rule with a new, more streamlined, rule. In June 2017, the Agencies issued notice of a proposed rule that would repeal the WOTUS Rule and recodify the pre-2015 regulations. In July 2018, the Agencies issued a supplemental notice of proposed rulemaking, which clarified the original notice and sought additional public comment.

In a separate but related proceeding, the Agencies issued a proposed rule in early 2018 (the "Applicability Rule") that attempted to delay for two years (until 2020) the implementation of the WOTUS Rule. The Applicability Rule did not survive judicial scrutiny due to deficiencies under the Administrative Procedure Act and, as previously reported, was enjoined in South Carolina *Coastal Conservation League v. Pruitt* and later vacated nationwide in *Puget Soundkeeper Alliance v. Wheeler*.

After the vacatur of the Applicability Rule, the WOTUS Rule continued to be litigated in numerous federal district courts. This litigation resulted in a patchwork of injunctions in which the WOTUS Rule has been effective in 22 states and the District of Columbia but enjoined in 27 states.
In December 2018, the Agencies released a proposed rule to redefine the meaning of "waters of the United States" (the "Replacement Rule"), thus commencing "step two" of their two-step process. It is anticipated that the Replacement Rule will be acted upon later in 2019 or early 2020.

The Repeal of the WOTUS Rule

The Agencies released the Repeal Rule on September 12, 2019. The Agencies have articulated four reasons why the repeal is warranted, which largely mirror a recent district court ruling. First, the Agencies stated that the WOTUS Rule went beyond its authority under the Clean Water Act as determined by Justice Kennedy's significant nexus test in *Rapanos.* Second, the Agencies stated that the WOTUS Rule gave insufficient weight to the policy articulated in section 101(B) of the CWA, which recognizes that the states should play a significant role in protecting and preserving the Nation's waters. Third, the Agencies expressed concerns about potentially exercising their authority under the CWA and the Constitution in a way that might encroach on traditional State land-use planning authority. Finally,

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the Agencies found the WOTUS Rule to be procedurally defective and lacking adequate record support regarding distance-based limitations.

Practical Implications

The Replacement Rule has the potential to change the outcome of site-specific determinations made by the Agencies regarding whether or not they have jurisdiction over particular water bodies under the CWA, which are called "Jurisdictional Determinations" ("JDs"). The Replacement Rule could have implications not only for JDs requested in the future, but also for existing JDs issued under the WOTUS Rule as well as currently-pending JD requests.

- **Future JD requests:** Until any final action on the Replacement Rule, the pre-2015 regulatory text and existing *Rapanos* guidance will be the controlling framework for jurisdictional determinations ("JDs") issued in the near future, as long as the Repeal Rule is effective. As explained below, however, litigation over the Repeal Rule could result in an injunction that prevents the Agencies from implementing it.

- **Previously-issued JDs:** In the case of existing JDs that were issued under the WOTUS Rule, however, the Repeal Rule does not automatically change such previously-issued JDs. JDs are generally valid for a period of five years from the date of issuance unless there are new circumstances that warrant revision. While the Repeal Rule does not automatically trigger review or repeal of a previously-issued JD, a party who received a JD under the WOTUS Rule has the option to request that the Corps revisit its determination prior to the five-year expiration date and apply the now governing regulatory text. An applicant might ask the Corps to revisit a JD where the JD was based on an element the WOTUS Rule that has been expressly eliminated under the Repeal Rule. For example, a JD that was based on the WOTUS Rule would have asserted jurisdiction over an ephemeral stream regardless of whether the stream passed Justice Kennedy's significant nexus test. Were the Corps to reassess that JD based on the Repeal Rule, the Corps could conclude that the ephemeral stream had no significant nexus, and therefore the Corps did not have jurisdiction under the Repeal Rule.

- **Pending JD requests:** The other notable practical effect of the Repeal Rule is that applicants who still have a JD application pending will have that determination made under the pre-2015 regulatory text and *Rapanos* guidance.

While the Repeal Rule removes the patchwork of regulations across the United States, it is likely to be the subject of legal challenges. Environmental groups and certain states, such as California and New York, are expected to challenge the decision and may seek a preliminary injunction of the Repeal Rule before it becomes effective. Depending on the scope of any successful injunction, the WOTUS Rule could continue to be effective in those 22 states and the District of Columbia, where the 2015 WOTUS Rule has not been enjoined. Further, in all scenarios, continued litigation is a near certainty, and the Repeal Rule could be vacated, remanded, or upheld. Thus, the regulated community will face continued uncertainty regarding the geographic scope of the CWA in the near-term.

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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