CLIENT ALERT

What's Next for Clean Water Act Jurisdiction: Implications and Options That Flow from the Clean Water Rule Executive Order and EPA-Corps Notice

Mar.08.2017

In the first of what promises to be a series of reversals of Obama-era EPA regulations, President Trump (through an executive order) and EPA and the Army Corps of Engineers (through a Federal Register notice) last week each announced the intention to rescind or revise the Obama Administration's controversial and embattled Clean Water Rule. The 2015 rule, which is currently stayed nationwide under an order from the United States Court of Appeals for the Sixth Circuit, codified EPA's and the Army Corps of Engineers' Clean Water Act jurisdiction over a wide array of water bodies, including normally dry landscape features that rarely contain water. The White House has indicated its intention to implement a much more restrictive vision of Clean Water Act jurisdiction. The move to undo the 2015 rule may well succeed in killing it, but what will replace it is unclear.

The extent of jurisdiction under the Clean Water Act has long befuddled courts, regulators, and landowners. The statute provides for jurisdiction over "navigable waters," which in turn are defined as "the waters of the United States." 33 U.S.C. § 1362(7). In 2006, the Supreme Court attempted to define "waters of the United States," but failed to reach a consensus. A plurality opinion, written by Justice Scalia, concluded that waters of the United States only includes waters "containing a relatively permanent flow" (including "seasonal rivers") and wetlands with a "continuous surface connection" to such waters. *Rapanos v. United States*, 547 U.S. 715, 757 (2006). Justice Kennedy, in a concurring opinion, articulated a more expansive standard, writing that waters of the United States could include those waters or features that are shown to have a "significant nexus" to actually navigable waters. *Id.* at 787. (The four dissenting justices would have adopted an even *more* expansive definition of "waters of the United States." Because those dissenters, if forced to choose, would likely adopt Justice Kennedy's test over Justice Scalia's, EPA, many legal scholars, and some courts have concluded that Justice Kennedy's concurrence, with its "significant nexus" test, is the controlling opinion in the case.)

Since shortly after the *Rapanos* decision was issued, the EPA and Army Corps of Engineers have relied on guidance that implemented Justice Kennedy's view of "significant nexus." The 2015 Clean Water Rule likewise aims to further interpret Justice Kennedy's views, which it uses to support the extension of Clean Water Act jurisdiction to a wide variety of landscape features many people would not consider to be "waters" at all. Thirty-one states, plus industry groups and a number of other interested parties, have since challenged the 2015 rule in district courts and courts of appeals nationwide. A federal district judge in North Dakota stayed the 2015 rule before it took effect in 13 states. The challenges in the courts of appeals were consolidated in the Sixth Circuit, which found that it has exclusive jurisdiction over challenges to the 2015 rule and stayed its implementation soon after it took effect. The Supreme Court recently granted certiorari to address whether challenges to the 2015 rule must be brought in a district court or directly in a U.S. Court of Appeals.

Changes Announced – the Executive Order and EPA-Corps Notice

President Trump's February 28 executive order declares a policy of keeping navigable waters pollution-free while "promoting economic growth, minimizing regulatory uncertainty," and taking a more restrictive view of the federal government's power to

regulate under the Clean Water Act. To this end, the executive order directs the EPA Administrator and Assistant Secretary of the Army for Civil Works (the head of the Army Corps of Engineers, although the office is currently vacant) to review the 2015 rule and to propose a new rule rescinding or revising it. The order further commands EPA and the Corps to "consider" defining the statutory term "navigable waters" in keeping with Justice Scalia's test in his *Rapanos* opinion—a more restrictive view of jurisdiction than what even many of the 2015 rule's opponents had previously advocated. Finally, the order also directs the Attorney General to take action as he sees fit to inform the courts reviewing the 2015 rule of the new administration's intentions to rescind or revise it.

Also on February 28, EPA Administrator Pruitt and Douglas Lamont, a senior Corps official performing the duties of the Assistant Secretary of the Army for Civil Works, issued a "Notice of Intention to Review and Rescind or Revise the Clean Water Rule," largely echoing the President's executive order. Messrs. Pruitt and Lamont indicated that the EPA and the Corps would review the 2015 rule and issue a proposed rule to revise or rescind it, and there are indications that the agencies will move forward under an ambitious timeline. In doing so, the agencies will consider adopting Justice Scalia's interpretation of "navigable waters." The joint EPA-Corps notice also starts to lay out the agencies' legal argument by invoking Supreme Court precedents to support their authority to revise or rescind the 2015 rule not on the basis of new evidence or context, but because of a change in policy.

What's Next?

There will be no drastic changes to the Code of Federal Regulations in the short term, at least until a new final rule rescinding or revising the 2015 rule is promulgated. Because the 2015 rule is currently stayed, the 2008 guidance (which was in place prior to the promulgation of the 2015 rule) will continue to govern EPA's and the Corps' decisions until that 2015 rule is revised or replaced or a court vacates the stay against its implementation. The Department of Justice has already begun notifying courts of the joint EPA-Corps notice. While the fate of the Supreme Court's review of the district court/appellate court jurisdiction issue is unclear, there is a high likelihood that the lower courts will hold off on further litigation proceedings until the EPA's and the Corps' rulemaking process is complete. Because the statute, *Rapanos* opinions, and current guidance leave great leeway for interpretation, however, we could well see changes in the way the Corps determines Clean Water Act jurisdiction in individual cases that precede official promulgation of a new rule.

In the longer term, EPA and the Corps likely will publish a proposed rule, which will be followed by a comment period and then a final rule. Environmental groups and the group of states and the District of Columbia currently supporting the 2015 rule in court will surely challenge any attempt by the new administration to revise or rescind it. The EPA-Corps notice correctly observes that Supreme Court precedent allows the executive branch to rescind or repeal final regulations, such as the 2015 rule, based on changes in policy. However, the decisions the notice cites[1] make clear that the administration must provide sufficient rationale for such policy changes and may not be able to ignore, without justification, particular facts in the administrative record in promulgating a new rule.

In addition to the potential for a new rule to be held up—at least temporarily—in court, there is some uncertainty as to the procedural steps the administration will take to rescind or revise the 2015 rule. The executive order and EPA-Corps notice appear to present two options: First, EPA and the Corps could engage in a two-step process and first issue a rule that simply rescinds the 2015 rule, leaving the previous guidance in place. For such a rule to satisfy legal scrutiny, the administration may

only need to justify its change in policy concerning the 2015 rule, which has already been met with skepticism in the courts. Assuming the rescission's success, the administration could then take the second step and issue a proposed rule for comment to take the place of the repealed 2015 rule.

Under the second option, the government could attempt to rescind and replace the 2015 rule in one consolidated step, through promulgation of a single new rule. This approach is both swift and riskier, as repeal of the 2015 rule might be tied to the fate of the replacement rule. If a court found that the agencies, in crafting the specifics of the replacement rule, failed to consider important facts or to otherwise properly support their decision, the court could remand the entire rule, including repeal of the 2015 rule, back to the agencies to try again. As of yet, it is unclear which path the administration will choose to take.

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