Fate of "Waters of the United States" Rulemaking Now Even Murkier

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The saga of the federal Clean Water Act's definition of "waters of the United States" ("WOTUS") has taken more turns recently, including a significant setback for the Trump Administration's efforts to transition away from the definition contained in the 2015 Clean Water Rule ("CWR") promulgated under the Obama Administration. As we have reported on several occasions, court decisions and agency actions over time have reshaped the meaning of WOTUS, but the spate of activity in the past year or so has made it difficult even to know which WOTUS definition is in effect in which state. The latest twists come in an EPA and U.S. Army Corps of Engineers ("Corps") supplemental rulemaking notice and in two different federal district court decisions.

First, the agencies are still proceeding with their CWR repeal-and-replace rulemaking effort. To recap this effort for perspective, President Trump's Executive Order 13778, signed in February 2017, directs EPA and the Corps to review the CWR "for consistency with . . . [Trump Administration] policy . . . and publish for notice and comment a proposed rule rescinding or revising the [CWR], as appropriate and consistent with law." In July 2017, EPA and the Corps published notice of their proposed repeal of the CWR as part of a two-step process to repeal and replace the CWR with a new regulatory definition of WOTUS. In November 2017, EPA and the Corps proposed and then issued in February 2018 a final rule suspending the effective date of the CWR until[?] February 2020 (the "Suspension Rule"). The Suspension Rule reinstated the 1980's era definition of WOTUS. More recently, based on comments received from stakeholders in 2017, case developments, and issuance of the Suspension Rule, the agencies issued on July 12, 2018 a supplemental notice of proposed rulemaking, buttressing their original repeal-and-replace rulemaking notice with more detailed analysis and reasoning and inviting further comment.

However, in an August 16 decision and order in *South Carolina Coastal Conservation League v. Pruitt* ("*SCCCL*"), a federal district court in South Carolina vacated the Suspension Rule, tripping up the agencies in their attempted fast dash away from the CWR. The court did not rule on the merits of the CWR. Instead, the court found that the agencies neglected to comply with the federal Administrative Procedure Act when promulgating the Suspension Rule by not allowing for sufficient public comment. In particular, the court concluded that the notice of the Suspension Rule did not adequately explain the effects of replacement of the CWR with the pre-CWR regulatory definition of WOTUS, foreclosed

comments on other aspects, and did not provide adequate time for stakeholders to file comments given the complex implications of the agencies' actions. The decision's net effect is that the CWR is restored in 26 states (including Virginia) and the District of Columbia. (Federal district courts in North Dakota and Georgia have already stayed the CWR in the other 24 states, including North Carolina and South Carolina.) An appeal of the *SCCCL* decision is expected.

Finally, seeking to counter the effects of the *SCCCL* decision, three states have sought relief in a pending challenge to the CWR in *State of Texas v. U.S. Environmental Protection Agency*. In that case, the states are asking a federal district court in Texas to stay implementation of the CWR nationwide. EPA and the Corps had previously intervened in that case. However, at that time, they argued against a nationwide stay based in part on the recent issuance of the Suspension Rule and pending repeal-and-replace rulemaking. However, with the Suspension Rule having been invalidated (subject to appeal), the agencies may yet change their tune. If the relief sought by the states is granted, it could mesh with the North Dakota and Georgia federal district court decisions, resulting in the CWR being stayed in all 50 states.

Assuming the *SCCCL* decision invalidating the Suspension Rule remains in effect, and unless the court in the *State of Texas* case grants a nationwide stay of the CWR, there remains a patchwork of CWR applicability across the country. This makes uniform federal Clean Water Act administration essentially impossible. With challenges of any final rule by EPA and the Corps to repeal and replace the CWR a near certainty, the current mish-mash of two different WOTUS definitions in effect across the country could continue for quite some time. Even if all states eventually are covered by a stay of the CWR, the pre-CWR definition would presumably apply nation-wide, again indefinitely. That result, however, resurrects the earlier struggles to apply through guidance documents the Supreme Court decision in *U.S. v. Rapanos* and its progeny interpreting WOTUS under the pre-CWR definition, at least until a new final rule is issued and survives the inevitable ensuing litigation. All of this underscores a key part of the Trump Administration's justification for the Suspension Rule: the need for improved regulatory certainty, albeit under the old WOTUS definition, while the courts wrangle with the CWR challenges, and EPA and the Corps work to redefine WOTUS by a new rulemaking.

Stakeholders can be expected to continue to debate and litigate the substantive merits of the CWR, the pre-CWR definition of WOTUS, and any alternatives offered by the Trump Administration, but the regulated community and landowners with wetlands still face uncertainty as to whether their projects impact regulated WOTUS and what the value of these projects and properties may be. Perhaps in this case the devil you know is better than the devil you don't, but either way stakeholders remain in regulatory and economic purgatory.

"Definition of 'Waters of the United States' – Recodification of Preexisting Rule, 83 Fed. Reg. 32227 (July 12, 2018).

***South Carolina Coastal Conservation League v. Pruitt,* No. 2-18-cv-330-DCN (D.S.C. August 16, 2018).**

***State of Texas v. U.S. Environmental Protection Agency*, Civil Action No. 3:15-cv-162, Federal Defendants' Opposition to Plaintiffs' Motions for a Nationwide Preliminary Injunction, 2 (S.D. Tx. February 14, 2018).**

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