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Legal Update

Current Developments Regarding the Definition of “Waters of the United States”

On February 28, 2017, the President of the United States (President Trump) issued Executive Order (EO) 13778 stating that “it is the national interest to ensure the nation’s navigable waters are kept free from pollution, while simultaneously promoting economic growth, minimizing regulatory uncertainty, and respecting the roles of both Congress and States under the Constitution.”

It directs the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Army Corps), collectively “the agencies,” to issue a proposed rule rescinding or revising the Waters of the United States (WOTUS) Rule, also known as the 2015 WOTUS Rule, as appropriate and consistent with the law. The EO also orders both agencies to consider interpreting the term “navigable waters,” as defined in the Clean Water Act (CWA), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The CWA prohibits the discharge of any pollutant into “navigable waters” without a permit, to ensure safe drinking water, and habitats for human and aquatic life. The CWA defines the term “navigable waters” as to mean the “waters of the United States”, including the territorial seas. The 2015 WOTUS Rule, which became effective on August 28, 2015, stated that “tributaries feeding into navigable waterways are automatically protected under the [CWA], if they have a bed, a bank, and an ordinary high-water level,” but allowed for the possible increase of waters regulated by the CWA on a case by case basis.

A series of court rulings have addressed the 2015 WOTUS Rule. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a decision staying nationwide the 2015 WOTUS Rule, pending judicial review. On January 22, 2018 the Supreme Court held that the federal district courts, not the federal courts of appeal, have sole original jurisdiction to review challenges to the 2015 WOTUS Rule.

According to the agencies, the existing litigation in multiple district courts to the 2015 WOTUS Rule have led “to uncertainty and inconsistencies in the interpretation and definition of the “waters of the United States” pending rulemaking efforts. This, on February 6, 2018, the agencies issued a new rule titled “Definition of Waters of the United States” to extend the applicability date of the 2015 WOTUS Rule until February 6, 2020 “to avoid a period of uncertainty.” According to the final rule, “until the applicability of the date of the 2015 [WOTUS] Rule and subject to further action by the agencies, the agencies will continue to implement nationwide the previous (pre-2015) regulatory definition of “waters of the United States.” According to EPA Administrator Scott Pruitt, by delaying the implementation of the 2015 Rule, the agencies “intend to provide needed certainty to the regulated community during the regulatory process.”

Following the February 28, 2017 EO, the agencies are currently taking a two-step process to reconsider the 2015 WOTUS Rule. Step one consists of proposing a rule to



For more information on this Legal Update, please contact:

Héctor Reichard

reichard@reichardescalera.com
787.777.8801

Milagros Ruiz-Chaar

ruizm@reichardescalera.com
787.777.8810

Agustín F. Carbó

acarbo@reichardescalera.com
787.777.8888

rescind the 2015 WOTUS Rule and re-codify the regulatory text that existed prior to 2015. Public comments for such proposed rule concluded in September 2017 and currently under review by the agencies. Step two plan to propose a new definition that would replace the approach in the 2015 WOTUS Rule, taking into consideration the principles that Justice Scalia outlined in the *Rapanos, supra*, plurality opinion.

It is anticipated that that all these ongoing agencies actions will be subject to continuous multistate lawsuits and environmental nonprofit groups challenges, with regard to the definition of “waters of the United States.”

Our Environment Practice Group are available to assist you in this matter.

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