

Trump Executive Order Starts Review and Potential Revision of the "Waters of the United States" (WOTUS) Rule

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On February 28, 2017, President Trump signed an Executive Order directing the review and reconsideration of the final rule re-defining “waters of the United States” under the Clean Water Act (“CWA”), commonly called the “WOTUS Rule.” The WOTUS Rule was issued during President Obama’s tenure on May 27, 2015, by the EPA and the U.S. Army Corps of Engineers (“USACE”) (collectively the “Agencies”).

The WOTUS Rule has far-reaching implications for project development and operations across the energy, water, construction, building, agricultural and transportation sectors. Most prominently, the WOTUS Rule adopted an expansive view of the types of wetlands and other waterbodies to be considered “waters of the United States,” triggering the need for federal permits or authorizations prior to engaging in activities within, or affecting, jurisdictional waters.

Background

Immediately after the WOTUS Rule was issued in 2015, the rule was challenged by industry, environmental groups, states, and others in more than two dozen cases in multiple federal district courts and appellate courts. On October 9, 2015, the Sixth Circuit granted a stay of the WOTUS Rule, effective nationwide, pending the court’s resolution of the question of whether it has jurisdiction over the case. *In re E.P.A.*, 803 F.3d 804, 807 (6th Cir. 2015). In February 2016, the Sixth Circuit determined that the courts of appeals, rather than district courts, had jurisdiction over the WOTUS Rule. *In re U.S. Dep’t of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016).

On January 13, 2017, the U.S. Supreme Court agreed to resolve jurisdictional wrangling over which federal court should hear challenges to the WOTUS Rule. The Supreme Court’s decision to hear the appeal was issued on the same day the Obama administration filed its 300-page brief with the Sixth Circuit Court of Appeals defending the WOTUS Rule.

The Executive Order

President Trump's Executive Order requires the Agencies to review the WOTUS Rule for consistency with a stated policy finding it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles played by Congress and the States under the Constitution." It directs the agencies to initiate a new rulemaking process for the WOTUS Rule, by "publish[ing] for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." Finally, the Executive Order directs the Agencies, in this rulemaking, to "consider interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)."

***Rapanos* and the Scalia Opinion**

The Supreme Court's 2006 decision in *Rapanos v. U.S.* addressed the question of whether the Court's prior holdings regarding whether "waters of the United States" should be interpreted to include not only wetlands that are directly adjacent to navigable waters, but also wetlands adjacent to ditches and manmade drains that eventually drain into traditional navigable waters.

After reviewing two decisions by the Court of Appeals that had affirmed the Agencies' jurisdiction over such waters, a majority of the Justices in *Rapanos* agreed to remand both cases to the appellate court for further proceedings, but a majority could not agree on the grounds for remand. The Court's 4-1-4 decision included multiple opinions, including a "plurality" opinion authored by Justice Scalia, two concurring opinions authored by Chief Justice Roberts and Justice Kennedy, and two dissenting opinions authored by Justice Stevens and Justice Breyer.

The two *Rapanos* opinions with the most legal significance are Justice Scalia's plurality opinion, which announced the judgment of the Court, and Justice Kennedy's concurring opinion, which concurred in the judgment but not in the rationale underlying the plurality opinion:

- Under Justice Scalia's plurality opinion, CWA jurisdiction would extend only to "relatively permanent, standing, or continuously flowing bodies of water" connected to traditional navigable waters, and to wetlands with a continuous surface connection to such relatively permanent water. The plurality opinion states that jurisdictional waters do not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.
- In contrast, Justice Kennedy's concurring opinion announced an alternative rationale for remanding to the Court of Appeals. Under Justice Kennedy's opinion, CWA jurisdiction would extend to wetlands adjacent to waters that have a "significant nexus" to traditional navigable waters.

In developing the 2015 WOTUS Rule, the Obama Administration asserted that it was following Justice Kennedy's "significant nexus" test, and it gave little consideration to Justice Scalia's plurality opinion, which would more narrowly limit the Agencies' jurisdiction over wetlands as "waters of the United States." By requiring that the Agencies consider interpreting the term "navigable waters" in a manner that is consistent with Justice Scalia's *Rapanos* opinion, President Trump has directed the Agencies towards a narrower interpretation of "waters of the United States."

Next Steps

Because the WOTUS Rule already has become final, any change to the rule requires that the Agencies comply with the notice-and-comment requirements of the federal Administrative Procedure Act and to provide a “reasoned explanation” for changing course. The EPA has already [announced](#) that it “intends to immediately implement the Executive Order and submit a Notice of Proposed Rulemaking to withdraw and replace the rule.” Stakeholders affected by the WOTUS Rule should prepare to submit comments in the near future. In the meantime, the Agencies are expected to continue to follow their [December 2, 2008 Guidance 2008](#) to determine whether federal permits are needed for work in ditches, streams, wetlands, and other water bodies.

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