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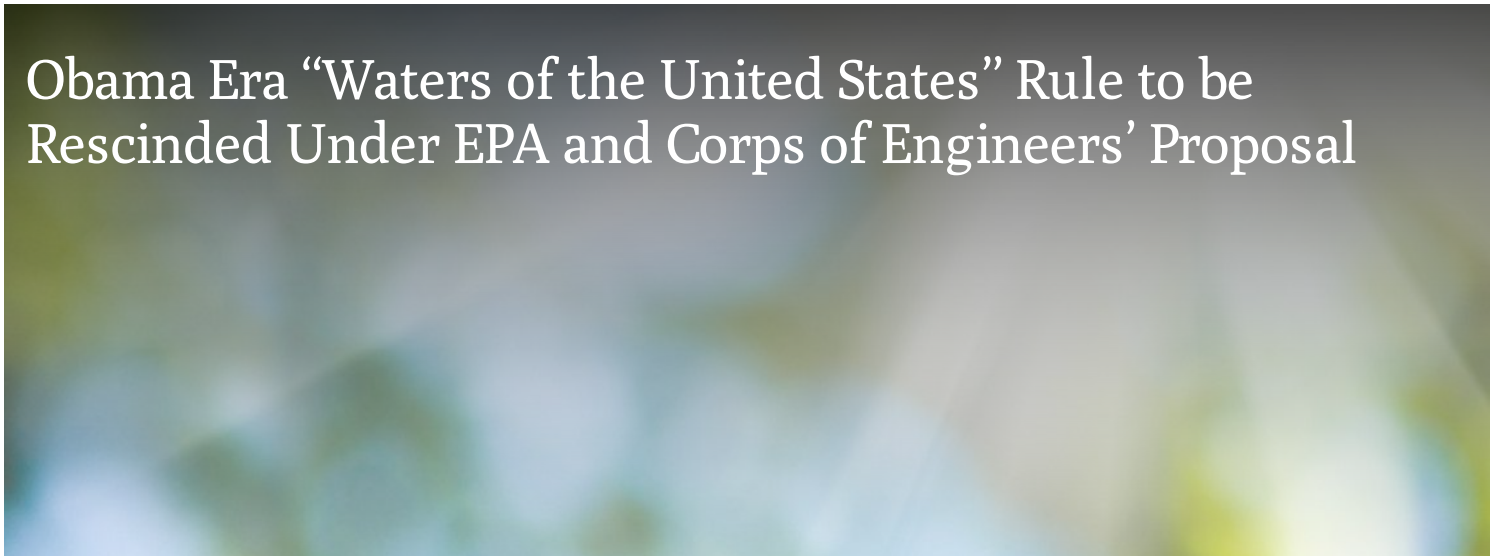
BLOG

Obama Era "Waters of the United States" Rule to be Rescinded Under EPA and Corps of Engineers' Proposal



JULY 20, 2017

On June 27, 2017, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (collectively, the agencies) announced a proposed rule (the Recodification Rule) that would rescind the current definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* The CWA makes it illegal to pollute "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311(a), 1362(7). The term "waters of the United States" was most recently defined as part of the Clean Water Rule promulgated by the Obama Administration in June 2015 (80 Fed. Reg. 37,054). The Recodification Rule was proposed in response to the February 28, 2017 executive order issued by President Trump that directed the agencies to review the WOTUS rule and rescind or revise the rule as appropriate. It further directed the agencies to "consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the [plurality] opinion of Justice Antonin Scalia in *Rapanos*." In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Scalia determined "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" 547 U.S. at 739.

The 2015 Clean Water Rule was the agencies' attempt to clarify the extent of their jurisdictional authority under the CWA. It was issued in response to three Supreme Court decisions addressing the definition of WOTUS, most recently *Rapanos*. Winston discussed the WOTUS rule status at a recent eLuncheon (see our presentation slides or listen to the presentation). As we discussed then, the Clean Water Rule was challenged immediately after it was released, which caused the Sixth Circuit to issue a nationwide stay of the rule in October 2015. That stay reverted the definition of WOTUS to the one in effect prior to the Clean Water Rule. Significantly, the Sixth Circuit's jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the WOTUS rule was also challenged because the rule did not "issu[e] or deny[] a[] permit under" the CWA, but instead defined the waters that fall within CWA jurisdiction. That challenge recently reached the Supreme Court in *National Association of Manufacturers v. Department of Defense*, docket number 16-299. Briefing is underway and the respondents' brief on the merits is due July 28, 2017.

While the Supreme Court will soon determine whether reviewing the Clean Water Rule was within the Sixth Circuit's jurisdiction, the agencies have declined to wait and are proceeding with their proposed Recodification Rule. Their change aims to "re-codify the regulations that existed before the 2015 Clean Water Rule." The agencies plan to continue using that pre-2015 definition while they "engage in a second substantive rulemaking to reconsider the definition of 'waters of the United States.'"

The Recodification Rule proposal is awaiting publication in the Federal Register. Once it is formally published, the public will have 30 days to submit comments to the EPA. EPA Administrator Scott Pruitt is currently on a multistate tour to obtain input from political leaders, farmers, ranchers, and other stakeholders on how the WOTUS rule should be revised.

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Author

Halima Nguyen, Summer Associate

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