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Government Repeals Obama-Era Waters of the U.S. Rule: Major Supreme Court Decision to Come, but 'Regulatory Patchwork' Remains

On Sept. 12, 2019, the U.S. Environmental Protection Agency and the Department of the Army followed through on an early Trump administration promise to repeal a 2015 jurisdictional rule defining the scope of the government's authority under the Clean Water Act. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules (pre-publication version).

Dubbed the "Waters of the United States" (WOTUS) rule, the Obama-era regulation spawned a tide of litigation, in federal trial and appellate courts, challenging the WOTUS rule as an unlawful attempt by the EPA and the Corps of Engineers to increase the numbers and kinds of waters subject to permitting requirements. The U.S. Supreme Court ultimately weighed in, saying that challenges to the WOTUS rule belong in the federal districts courts, not the U.S. courts of appeals. *National Association of Manufacturers v. Department of Defense*, __ U.S. __, 138 S.Ct. 617 (2018).

Federal injunctions and other court action in several of the challenges led to creation of a "regulatory patchwork" with 22 states applying the new definition and more than half the states applying the pre-existing one. In its press release, the government cited ending the regulatory patchwork as one of the reasons for withdrawing the WOTUS rule.

With the WOTUS rule withdrawn, and the pre-2015 regulatory text restored, the definition of "waters of the United States" reverts to the *status quo ante*. That restoration seems unlikely to end the arguments over the scope of the Clean Water Act, however, as parties continue to squabble over the kinds of discharges and waters that fall within the law's purview.

For example, in a guidance published in April 2019, the EPA for the first time posited that pollutant discharges to groundwater are never subject to the Clean Water Act. *See* "Contradicting the Department of Justice, EPA Changes Stance on Groundwater Discharges," Greenberg Traurig E2 Law Blog (April 24, 2019). The guidance was, in part, a reaction to a series of cases involving discharges to groundwater. The Supreme Court recently granted *certiorari* in one of those cases, *County of Maui v. Hawai'i Wildlife Fund*, __ U.S. __, 139 S.Ct. 1164 (2019). Oral argument in the matter is slated for Nov. 6, 2019.

Environmental practitioners and court watchers expect a major addition to the Supreme Court canon on Clean Water Act jurisdiction by mid-2020. In the meantime, the EPA and Army Corps continue to work on a new rule defining "waters of the United States."

In December 2018, EPA and the Army proposed a new rule to define "waters of the United States" under the Clean Water Act. The proposed rule interprets the term to encompass traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.

The government received approximately 620,000 comments on the proposal, which government personnel must analyze and respond to in the final rule – making timing of the final definitional rule uncertain.

Regardless of what occurs at the federal level, the regulated universe will continue to contend with a regulatory patchwork for the control of water discharges, occasioned by varying state approaches to, among other things, defining the "waters of the state" subject to regulation under state water laws. The state definitions are almost always broader than the federal one and often expressly include groundwater.

These varying approaches can lead to confusion over which regulator an entity must consult regarding a new project or permitting problem. For example, while nearly every state has authority to administer the federal Clean Water Act's National Pollutant Discharge and Elimination System (NPDES) permitting program, most lack authority to administer the federal act's Section 404 "dredge and fill" wetlands permitting program.

The repeal of the WOTUS rule and proposal of a new federal definition of "waters of the United States" seem likely to do little to harmonize these varying state approaches. Agricultural, real estate, mining, and manufacturing interests with thorny water issues are well-advised to retain counsel with experience in both the federal and state paradigms.

In addition, and further compounding the regulatory complexity, litigation is likely to continue, first over the Sept. 12 repeal, and then, if the EPA and the Army finalize a new definition, over that rule as well.

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