

## Environmental LAW

### U.S. EPA and Corps of Engineers work to repeal 2015 waters of the U.S. rule

On Feb. 28, 2017, President Donald Trump issued an Executive Order directing the U.S. Environmental Protection Agency (EPA) and the Corps of Engineers to review and rescind the 2015 “waters of the United States” rule that was issued under the Clean Water Act. The rule has been subject to protracted litigation nationwide at the federal District and Court of Appeal level where it has been challenged by various industry, agriculture and development groups as well as affected states. The rule has been subject to stays in several courts; on Jan. 22, 2018, the Supreme Court held that the Courts of Appeal do not have jurisdiction to review challenges to the rule. Thus, although the Sixth Circuit had issued a nationwide stay of the 2015 rule, litigation will have to proceed at the federal District Court level.

Since the Executive Order, the agencies have determined to take a two-step process regarding the waters of the US rule. Step one is the repeal of the 2015 rule and recodification of the regulation in place prior to 2015, as discussed in this article. Simultaneously, step two is a substantial analysis and revision of the definition of the water of the U.S. rule. In April 2017 the agencies reached out to state and local officials, as well as Native American tribes, to solicit issues and concerns prior to proposing a new rule.

The specter of litigation and uncertainty over challenges and the repeal process lead the two agencies to add an applicability date to the 2015 rule. Specifically, the agencies provided that the 2015 rule will not be applicable until Feb. 20, 2020, so that the agencies will have time to address regulatory revisions to the waters of the U.S. rule. In the interim, the pre-2015 rule will remain in place so that the regulated community has some certainty as the regulatory process unfolds.



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To accomplish the first step, the agencies issued a proposed rule on June 27, 2017 to repeal the 2015 rule and re-codify regulatory text that was in place prior to 2015. On June 29, 2018 the agencies signed a supplemental notice of proposed rulemaking clarifying that the plan is to permanently repeal the 2015 rule entirely.

Until the rule is revised, the agencies will continue to implement the program under the 1986/1988 regulatory definition of “waters of the U.S.” Although there are several categories of what is included in this definition, the most common categories in 40 CFR 230.3(s) “waters of the US” are: (1) waters that are currently used, were used in the past or may be used in foreign or interstate commerce; (2) all interstate waters including interstate wetlands; (3) all other waters such as rivers, streams, wetlands, prairie potholes, natural ponds, etc., which if degraded could affect interstate commerce; (5) tributaries of waters identified in the rule; and (7) wetlands adjacent to waters falling within the definition.

Not surprisingly, the pre-2015 rule was also subject to significant litigation. The Supreme Court addressed aspects of the rule in *Rapanos v. United States* and *Carabell v. United States* in 2008. The agencies developed implementation guidance as to when jurisdiction would be asserted over waters and wetlands based on the Court’s holdings. Based on the guidance, the agencies will assert federal jurisdiction over the following waters: traditional navigable waters, wetlands adjacent

to traditional navigable waters, non-navigable tributaries of such waters that are relatively permanent, and wetlands that directly adjoin such tributaries.

Further, under the prior guidance, the agencies will perform fact specific reviews to determine whether a significant nexus exists with a traditional navigable water for the following: non-navigable waters that are not year-round, wetlands adjacent to such tributaries, and wetlands that are adjacent to but not directly abutting a permanent non-navigable tributary. In undertaking the analysis, the EPA and Corps will apply the significant nexus review by assessing flow characteristics and functions of the tributary, and the functions performed by the wetlands that are adjacent to the tributary, to determine whether they significantly impact the chemical, physical and biological integrity of the traditional navigable waters downstream. In addition, the significant nexus review will consider hydrologic and ecologic factors.

The CWA “waters of the U.S. rule” is a complicated rule that has a broad impact on Americans seeking to buy, sell, develop and use property in proximity to waterbodies and wetlands. The level of interest, commentary and litigation is significant and will continue as the regulatory revision process unfolds over coming months. While the end result and definition remain to be worked out, EPA and the Corps have implemented a plan to provide some degree of certainty to the regulated community during the course of the process.

*Subsequent to the submission of this article, on Aug. 16, the District Court in South Carolina issued a nationwide stay in a case brought to challenge the agen-*

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*agencies' rule adding the 2020 applicability date. As a result, the court issued a nationwide stay mandating that the agencies apply the 2015 waters of the U.S. rule in the 26 states that have not otherwise stayed the rule. The agencies and co-defendants are reviewing the decision and*

*will likely appeal. The decision underscores the patchwork nature of challenges and the need to review and finalize the revised rule to provide certainty to the regulated community, states and municipalities.*

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