



THE

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THE UNCERTAIN FUTURE OF THE WATERS OF THE UNITED STATES RULE – AND ITS ENFORCEMENT

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The new Administration has clearly indicated a change in environmental priorities. One of its first targets has been the Obama Administration's controversial Waters of the United State Rule. Just as importantly, the Administration has indicated a change in focus on enforcement priorities, which could impact how the Rule is enforced.

The current saga began on May 27, 2015 when the EPA and the U.S. Army Corps of Engineers released a joint final rule to define the scope of the waters that are subject to the Clean Water Act. Most critically, the Rule revises the regulatory definition of "waters of the United States" in determining which are jurisdictional and which are non-jurisdictional. These revisions were made in light of U.S. Supreme Court rulings in 2001 and 2006, which narrowed the agencies' interpretation of the Clean Water Act. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*

of Engineers, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). The Rule was intended to replace U.S. Army Corps guidance that was issued in 2003 and 2008, as well as 2011 guidance that had not yet been finalized.

The agencies contend that the Rule's revision of the "waters of the United States" definition was consistent with legal rulings and science concerning the nexus between tributaries, wetlands, and other features to downstream water bodies. It focuses on clarifying the jurisdiction of waters located in isolated places, small and intermittent streams, and wetlands. Among the key features of the Rule is its effort to replace the need for many site-specific jurisdictional determinations with classes of waterbodies that are categorically jurisdictional pursuant to an established regulatory category. For example, "adjacent" waters, including wetlands, ponds, and lakes, that are "neighboring," are categorically jurisdictional. The Rule sets forth the analysis as to whether a water is "adjacent" and "neighboring." For

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some waters, a site-specific jurisdictional determination is still required, using the “significant nexus” test, fashioned out of Justice Kennedy’s opinion in *Rapanos*.

Following issuance of the Rule, there has been significant controversy over its breadth, the potential implications for property rights, the impacts on agriculture, and whether the Rule conflicts with the jurisdictional limitations enunciated by the U.S. Supreme Court. Almost immediately following the Rule’s issuance, industry groups and States filed legal challenges to the Rule in multiple federal courts, both at the district court and appellate court levels. Principally, these lawsuits focus on whether the Rule is consistent with the Supreme Court’s rulings and whether the Rule complies with the CWA. However, a decision on the merits has been delayed by the jurisdictional uncertainty as to which federal court should hear the case in the first instance. The Clean Water Act provides that certain agency decisions are to be challenged in the courts of appeals, but it is in dispute whether that includes the Rule. As of today, petitions for review have been consolidated in the Sixth Circuit, which placed a nationwide stay on the Rule. The jurisdictional question—which court should hear the case in the first instance—is pending before the U.S. Supreme Court, and will not be heard until the next term, beginning in October 2017. While the stay is in effect, the Corps and EPA continue to make Clean Water Act jurisdictional determinations under the 2008 guidance.

After the U.S. Supreme Court decides the jurisdictional question, it is unclear whether the appropriate federal court will have the opportunity to review the Rule’s merits. On February 28, 2017, President Trump issued an executive order entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” Section 1 of the Executive Order sets forth a policy to “keep navigable waters free from pollution, while at the same time promoting

economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.” Section 2(a) of the Executive Order provides that the Administrator of the EPA “shall review the [Rule] for consistency with the policy set forth in section 1 ... and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.” Moreover, Section 3 of the Executive Order directs the agencies to “consider interpreting the term ‘navigable waters,’ ... in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006),” which is more restrictive than the test fashioned from Justice Kennedy’s opinion.

What is abundantly clear is that the Trump Administration will have different enforcement priorities. The Trump Administration sought a significant reduction in the EPA’s budget, which while rebuffed by Congress for the current year, the White House has stated its intent to focus on programs not delegated to the States, leaving many issues to the States and, where citizen suits are available, environmental groups.

Given the Executive Order and the Sixth Circuit’s stay, it is likely that the agencies will move forward by modifying the Rule. Repeal of or revisions to the Rule will require the same processes and procedures as when it was adopted. No matter the course the agencies decide to take, litigation by industry and/or environmental advocacy groups is certain to continue. 

CORRECTIONS TO 2017 MEMBER DIRECTORY

Page 47: US Energy Development Corp. – We’d like to acknowledge US Energy made a generous donation to IOGANY in addition to adding several new members! Thank you Doug Walch, President.

Page 3: Name change; Board of Director, Jim Macfarlane

The most current list of members visit the “Members Only” section of the IOGANY’s website. Each member has a username and password. If you’ve misplaced yours, please contact us at info@iogany.org.

2017 REMAINING PIPELINE NEWSLETTER SCHEDULE

Fall – Copy Deadline:

August 15 for September Issue

Winter – Copy Deadline:

November 15 for December Issue