

E – O U T L O O K

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2017

Environmental & Natural Resources Law Section

Issue 1

OREGON STATE BAR

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POTUS UNDOES WOTUS, ON TO SCOTUS

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With a flourish of his pen, on February 28 President Trump signed Executive Order No. 13,778, aimed at dismantling the ill-fated Waters of the United States (WOTUS) rule. The rule was the latest attempt by EPA and the Army Corps of Engineers to bring some clarity to the limits of federal authority under the Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). Clarity in this area has been elusive, and though many were unhappy with the rule, no one benefits from the current state of confusion.

The uncertainty begins with the Clean Water Act, which Congress said applies to "navigable waters" and then helpfully defined "navigable waters" to mean "waters of the United States." 33 U.S.C. § 1362(7). The agencies and the courts have struggled ever since to figure out when wetlands are jurisdictional. The courts have not helped. In *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006), a 5-4 majority of the Supreme Court found that the government had overreached, but could not agree as to why. Justice Scalia, writing for a plurality of the Court, would limit jurisdiction to "relatively permanent, standing or continuously flowing bodies of water," excluding intermittent or ephemeral channels and most drainage ditches. *Id.* at 739. In a concurring opinion, Justice Kennedy invoked a "significant nexus" test whereby jurisdiction should apply if a hydrologic connection between a wetland and a navigable water could be demonstrated. *Id.* at 779. Later courts have tried to follow both tests, with mixed results.

The Trump Executive Order directs EPA and the Corps to "consider" interpreting the term "navigable waters" consistently with Justice Scalia's opinion in *Rapanos*. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017). Justice Scalia's test is a lot easier to apply: If you can see the water or the land goes squish under your feet, there is jurisdiction. Justice Kennedy's

test requires a case-by-case review and exercise of professional judgment. The WOTUS rule focused more on the Kennedy test to indicate how the government would make its jurisdictional determinations.

The Executive Order has no immediate effect on the WOTUS rule and is only the start of a very long administrative and, inevitably, judicial process. EPA and the Corps have announced their intent to implement the Executive Order in two steps. First, the agencies are seeking to repeal the WOTUS rule and re-codify the regulation that was in place before the rule. Second, the agencies plan to propose a new definition consistent with Justice Scalia's approach in *Rapanos*. Both steps are rulemakings subject to the Administrative Procedure Act, 5 U.S.C. §§ 551-559, for which the agencies must publish a notice of proposed rulemaking and accept public comments. *See* 5 U.S.C. § 553. The rulemakings themselves are certain to be controversial. And, both rulemakings will certainly attract legal challenges.

In the short term, repealing the WOTUS rule will likely not have significant practical effects. The rule has been stayed nationwide since 2015, when the Sixth Circuit responded to numerous petitions challenging the rule. *In re EPA and Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015). The agencies have relied on Bush-era guidance to implement *Rapanos* in the meantime. In the long term, however, a new rule adopting Justice Scalia's approach would be a considerable policy change. Justice Kennedy's "significant nexus" test has been part of jurisdictional determinations during both the Bush and Obama administrations. Justice Scalia's test would significantly roll back federal jurisdiction under the Clean Water Act—which, indeed, is exactly the Trump Administration's intent.

Before becoming EPA Administrator, as Oklahoma Attorney General, E. Scott Pruitt was a frequent critic of and litigant against the agency he now leads. His criticisms included challenges to the WOTUS rule. His role going forward will be somewhat more circumscribed. In a memo to his senior staff dated May 4, 2017, Mr. Pruitt recused himself from involvement in the multitude of cases in which Oklahoma was a party, including challenges to WOTUS. That recusal statement, however, does not limit Mr. Pruitt's reshaping of WOTUS policy in the Administration's image, and he no doubt will take the leading role.

EPA and the Army Corps have already initiated the process. In April, the agencies began consultations with state and local government associations to develop a new policy. In May, the agencies sent letters to state governors, requesting input on how a reduced federal jurisdictional role would affect states. And, as of this writing, the agencies had just submitted a proposed regulation repealing the WOTUS rule to the Office of Information and Regulatory Affairs (OIRA), a preliminary step to publishing a notice of proposed rulemaking in the Federal Register.

Meanwhile, litigation related to the WOTUS rule continues to work its way through the courts, despite the Trump Administration's policy shift. Following the Sixth Circuit's 2015 stay of the rule, that court concluded that it has subject matter jurisdiction under the Clean Water

Act to hear substantive challenges to the rule. *In re U.S. Dep't of Defense & U.S. Envtl. Protection Agency Final Rule: Clean Water Rule*, 817 F.3d 261 (6th Cir. 2016). An industry group has taken that decision to the Supreme Court, which granted certiorari in January. See *Nat'l Ass'n of Manufacturers v. Dept. of Defense, et al.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3340 (U.S. Jan. 13, 2017) (No. 16-299). The federal agency respondents moved for the court to hold the briefing schedule in abeyance, in light of the Trump Executive Order, but the Supreme Court denied that motion in April. The Court will hear the case this fall.

The upshot is, we are unlikely to see a resolution during a Trump first term. In the meantime, property owners still would like to develop their property, and the government still has to apply the law. The Trump Executive Order gives direction that a new WOTUS rule should follow the Scalia test, but that doesn't reflect the way jurisdictional determinations are made today. Suffice it to say that the Kennedy significant nexus test will still be in play for the near-to-intermediate term, and a prudent developer will include a wetlands determination as a key part of the due diligence for the project.

E-Outlook May, 2017

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