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Re-Evaluating The Clean Water Rule: A Long Road Ahead

Law360, New York (March 2, 2017, 12:49 PM EST) -- President Donald Trump, on Feb. 28, signed an executive order[1] directing the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to issue a proposed rulemaking for notice and comment to rescind or revise their joint 2015 Clean Water Rule[2], also known as the Waters of the United States or "WOTUS" rule. The rule was intended to clarify the jurisdictional scope of the Clean Water Act. Shortly after the EO was issued, the EPA and the Corps issued a notice indicating their intent to review and either rescind or revise the rule.[3]

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The EO and the agencies' notice signal a potential move to substantially narrow the jurisdictional scope of the Clean Water Act. This is a critical issue for many sectors of the economy and environmental protection and has been the subject of uncertainty and litigation since the statute was enacted in 1972 — with the U.S. Supreme Court having issued three major decisions on the subject.[4]

Notwithstanding the president's high-profile announcement, however, the current uncertainty over the CWA's scope is likely to remain for the foreseeable future. Rulemaking to implement the EO is expected to take one to two years minimum, and because the issue is highly controversial, litigation over the ultimate regulation is a virtual certainty.

The rulemaking process the EO calls for poses challenging and complex issues for the agency and stakeholders. If the agencies opt only to rescind the rule, this would likely mark a return to the status quo — with the agencies determining jurisdiction based on the "significant nexus" test set forth in Supreme Court Justice Anthony Kennedy's concurring opinion in the 2006 case Rapanos v. United States[5] and elaborated in a 2008 guidance memorandum, discussed below. If the agencies opt instead to revise the rule, the EO instructs them to "consider" adopting the late Justice Antonin Scalia's plurality opinion in Rapanos,[6] which embraces a substantially narrower reading of the CWA's scope than the agencies adopted in either the Clean Water Rule or preceding regulations and guidance. Doing so would require the agencies to re-assess their longstanding interpretation of the Supreme Court's holdings in Rapanos and other decisions, setting up certain litigation.

Following challenges to the regulation, the Sixth Circuit issued a nationwide stay of the rule to

determine whether the courts of appeal or district courts had jurisdiction to hear the case.[7] The Sixth Circuit subsequently claimed jurisdiction[8], but the Supreme Court granted certiorari[9] to decide that issue — and the Sixth Circuit litigation is stayed pending the Supreme Court's decision.[10] The EO, however, directs the EPA and the Corps to notify the attorney general of the pending proposed rulemaking[11], raising the potential for a request to remand the rule to the agency. The EO thus raises questions as to whether the Supreme Court case will proceed and what consequences this will have for future challenges to any new rulemaking.

Background and the Rapanos Decision

The CWA regulates the "discharge of pollutants" to "navigable waters," which the act defines as "the waters of the United States."[12] The Clean Water Rule, promulgated in August 2015, is the latest in a long series of attempts to clarify the scope of this term. The Corps originally construed the act to apply to wetlands adjacent to navigable waters beginning with regulations in 1977, which it updated in 1982.[13] The Supreme Court upheld those regulations in 1985.[14] In 2001, the court in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC) held that Corps jurisdiction could not extend to "isolated waters" not adjacent to navigable waters.[15]

In its 2006 decision in Rapanos, the U.S. Supreme Court again took up the CWA's scope, resulting in a 4-1-4 split.[16] Writing for a plurality, Justice Scalia rejected the argument that only navigable-in-fact waters can be regulated, but identified two critical limitations on jurisdiction. First, he read the term "waters of the United States" to refer to "relatively permanent, standing or flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes" but not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[17] Second, Justice Scalia held that for a wetland to constitute a water of the United States it must have a "continuous surface connection" with an adjacent, relatively permanent body of water connected to a traditional navigable water — "making it difficult to determine where the 'water' ends and the 'wetland' begins."[18] Justice John Paul Stevens wrote for four dissenting justices, who would have upheld jurisdiction over the wetlands at issue.[19]

Justice Kennedy concurred separately, setting forth the "significant nexus" test that is at the heart of subsequent agency interpretations, including the Clean Water Rule.[20] Justice Kennedy disagreed that streams or wetlands must have a continuous surface connection to a continuously flowing body of water to be regulated. Instead, his reading extended CWA jurisdiction to those waters and wetlands that possess "a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[21] By this standard, finding a "significant nexus" requires determining whether the stream or wetland at issue has a significant impact on the water quality of nearby traditional, navigable-in-fact waters.[22]

The court's 4-1-4 split left open the question of which opinion controls. According to the court's decision in Marks v. United States, when "no single rationale" governs a five-justice majority of the court, the holding of the court "may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds."[23] However, Justice Scalia's or Justice Kennedy's test could potentially command the support of at least five justices[24] — leaving lower courts to judge for themselves whether to apply either test, or both. The nine federal courts of appeals that have considered this issue have applied Justice Kennedy's "significant nexus" test.[25]

The 2015 Clean Water Rule

Under the Bush administration, the EPA and the Corps issued two joint guidance documents in 2003 and 2007 addressing CWA jurisdiction, with the latter being superseded by a third guidance issued in December 2008 (2008 Rapanos guidance).[26] The 2008 guidance addresses the application of Justice Kennedy's "significant nexus" test and, with the later stay of the Clean Water Rule, remains a key basis for implementation of the CWA today. Under this guidance, the EPA and the Corps assert CWA jurisdiction over traditional navigable waters, wetlands adjacent thereto, non-navigable tributaries of traditional navigable waters that are "relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally," and wetlands that directly abut such tributaries.[27] The agencies also assert jurisdiction on a fact-specific basis over non-navigable tributaries that are not relatively permanent, wetlands adjacent to such tributaries, and wetlands that are adjacent to but that do not directly abut a relatively permanent non-navigable tributary.[28]

The Obama administration proposed the Clean Water Rule — originally titled the "Waters of the United States" rule — in 2014[29] and finalized the rule on May 27, 2015. The final Clean Water Rule relied on both Justice Kennedy's significant nexus standard and Justice Scalia's plurality to outline the scope of "waters of the United States" under the CWA.[30] This framework replaced the 2003 and 2008 guidance documents and was intended to limit the need for case-by-case jurisdictional determinations.[31]

The Clean Water Rule defined "waters of the United States" to include eight categories of jurisdictional waters:

- Traditional navigable waters;
- Interstate waters;
- Territorial seas;
- Impoundments of jurisdictional waters;
- Tributaries;
- Adjacent waters;
- Waters still subject to case-specific "significant nexus" determinations; and
- Exclusions.[32]

The Clean Water Rule is highly controversial, with a broad array of stakeholders, states and members of Congress characterizing it as a substantial expansion of CWA jurisdiction. The EPA and the Corps defended the rule by asserting that it would reduce jurisdiction over some waters due to new exclusions, and estimated that the rule would result in, at most, an estimated increase of "4.65 percent in positive jurisdictional determinations annually."[33]

Soon after the rule was announced, numerous legal challenges were filed in multiple federal district and appellate courts based on conflicting readings of the CWA provision governing jurisdiction over challenges to the rule. Petitions for review were brought by industry groups, 31 states, and several environmental groups. The challenges filed in the courts of appeals were ultimately consolidated in the Sixth Circuit, and most of the district court challenges were put on hold.

The Clean Water Rule took effect on Aug. 28, 2015, but was only in effect for about a month before the Sixth Circuit stayed it on Oct. 9, 2015.[34] On Feb. 16, 2016, a divided panel of the Sixth Circuit claimed jurisdiction to hear the merits of the consolidated challenges.[35] On Jan. 13, 2017, the Supreme Court granted certiorari on this jurisdictional question, prompting the Sixth Circuit to hold the litigation in abeyance pending that decision.[36] Since then, the EPA and the Corps have returned to the status quo ante of implementing the prior regulatory definition of "waters of the United States" as set forth in the 2008 Rapanos Guidance[37] — meaning that the EPA and the Corps will continue making many CWA jurisdictional determinations on a case-by-case basis.

Feb. 28 Executive Order

The Feb. 28 EO directs the EPA administrator and the assistant secretary of the Army for Civil Works to "review" the Clean Water Rule.[38] Section 1 of the EO declares it to be national policy to balance environmental protection with economic growth within the federal system of government.[39] Section 2 directs the EPA and the Corps to review the Clean Water Rule consistent with that policy and to publish a proposed rule for notice and comment "rescinding or revising the rule, as appropriate and consistent with law."[40] Section 2 further directs the agencies to notify the attorney general of the review of the Clean Water Rule so that he may inform the court or courts and take appropriate actions regarding the litigation pending completion of a rescind or replace rulemaking.[41] Perhaps most notably, Section 3 of the EO directs the agencies, when developing the proposed rulemaking, to "consider" interpreting the term "navigable waters" in the CWA "in a manner consistent with the opinion" of Justice Scalia in Rapanos.[42]

The EO sets up challenging and consequential choices for the new administration. If the agencies choose only to rescind the Clean Water Rule without further action to clarify or revise the 2008 Rapanos Guidance, this will largely preserve the status quo. Under this approach, the agencies may or may not shift their approach to implementation of the current rules and guidance. Rescission without replacement therefore almost certainly means a continuation of the regulatory uncertainty regarding the CWA's scope that has existed post-Rapanos. But it also would allow greater continuity with the agencies' past regulatory practices, limited changes to the current impacts of CWA regulation on landowners and other stakeholders, and a narrower scope for litigation challenging the rule rescinding the Clean Water Rule.

If the administration instead opts to replace the Clean Water Rule, it will have to determine whether and how to change its longstanding interpretation of the governing legal standard under Rapanos. The EO's directive to "consider" adopting an interpretation of "navigable waters" that is "consistent with" Justice Scalia's opinion in Rapanos would require the agencies to grapple with and possibly revisit their longstanding reading — in light of Marks — of the Kennedy opinion as representing the Supreme Court's holding in Rapanos. Adoption of the Scalia test — with its two key limitations on the scope of CWA jurisdiction described above — would represent a major reduction in the scope of CWA jurisdiction, with potentially significant impacts on the environment and currently regulated activities.

Environmental groups and others would no doubt challenge such an approach as inconsistent with Rapanos. If the agency were to preserve a role for the Kennedy significant nexus test in any replacement rule, it would have to grapple with the scientific and technical record underpinning the Clean Water Rule and the inherent complexity of the line-drawing exercise implicated by the Kennedy test. In either event, revision of the rule is likely to be highly controversial and is certain to be litigated by environmental groups and some states.

It remains unclear how the move to rescind or revise the rule will affect the case now pending before the Supreme Court regarding whether the courts of appeals or district courts have jurisdiction to hear challenges to the Clean Water Rule — or whether the administration's position in that case will shift if it proceeds. Regardless of the outcome, it will play a key role in the inevitable litigation challenging the administration's forthcoming rule to rescind or revise the Clean Water Rule.

Conclusion

The executive order begins a lengthy process to re-evaluate the Clean Water Rule that likely will take years for completion of the rulemaking and subsequent litigation. Whether the Trump Administration seeks full rescission or a replacement of the rule, there will be substantial legal risk for the agencies involved — though the nature of that risk will differ greatly between these two courses. Moreover, the extended timeline associated with the regulatory process and litigation means continued regulatory uncertainty for several years, including a continuation — at least in the near term — of the current process of case-by-case jurisdictional determinations.

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[1] Press Release, The White House, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (Feb. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic (Executive Order).

[2] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015) (Clean Water Rule).

[3] U.S. EPA, Notice of Intention to Review and Rescind or Revise the Clean Water Rule, https://www.epa.gov/cleanwaterrule/notice-intention-review-and-rescind-or-revise-clean-water-rule (last updated March 1, 2017).

[4] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); 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).

[5] Rapanos, 547 U.S. at 759–87.

[6] Executive Order, supra note 1, Sec. 3 ("In connection with the proposed rule … the administrator and

the assistant secretary shall consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States …").

[7] In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States", No. 15-3751 (6th Cir. 2015) (order granting stay), http://www.opn.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf.

[8] In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States", 817 F.3d 261 (6th Cir. 2016).

[9] Nat'l Ass'n of Mfrs. v. U.S. Department of Defense, U.S., No. 16-299, cert. granted Jan. 13, 2017, https://www.supremecourt.gov/orders/courtorders/011317zr_q8l1.pdf.

[10] In re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States", No. 15-3751 (6th Cir. 2017) (order granting motion to hold briefing in abeyance), available at http://www.eenews.net/assets/2017/01/25/document_gw_04.pdf.

[11] Executive Order, supra note 1, Sec. 2(c) ("With respect to any litigation before the Federal courts related to the final rule … the administrator and the assistant secretary shall promptly notify the attorney general of the pending review … so that the attorney general may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.").

[12] 33 U.S.C. § 1362(7).

[13] See Riverside Bayview Homes, 474 U.S. 121, 123–25 (1985).

[14] Id. at 129.

[15] 531 U.S. 159 (2001).

[16] 547 U.S. 715 (2006).

[17] Id. at 739.

[18] Id. at 742.

[19] Id. at 787–810.

[20] Id. at 759–87.

[21] Id. at 759.

[22] Id. at 772–73.

[23] 430 U.S. 188, 193 (1977).

[24] See Rapanos, 547 U.S. at 810 (Stevens, J., dissenting) (discussing the tests to be applied on remand).

[25] See Clean Water Rule, 80 Fed. Reg. at 37,056 (discussing support for agency use of the "significant nexus" analysis in the nine courts of appeals that considered the issue).

[26] See U.S. EPA, Documents Related to the Clean Water Rule, Background Information: Current Guidance on Waters of the U.S., https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (last updated Feb. 9, 2017); U.S. EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (Dec. 2, 2008), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (2008 Rapanos Guidance).

[27] Id.

[28] Id.

[29] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed April 21, 2014).

[30] See Clean Water Rule, 80 Fed. Reg. at 37,056 (discussing reliance on both the plurality opinion and Justice Kennedy's "significant nexus" test).

[31] Id. at 37,057.

[32] Id. at 37,057–59.

[33] Id. at 37,101.

[34] Supra note 7.

[35] 817 F.3d 261 (6th Cir. 2016).

[36] Supra note 10.

[37] See, e.g., U.S. EPA, Clean Water Rule Litigation Statement, https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement (last updated Oct. 13, 2016).

[38] Executive Order, supra note 1.

[39] See id., Sec. 1.

[40] Id., Sec. 2.

[41] Id., Sec. 2(c).

[42] Id., Sec. 3.