One of the first environmental measures the Trump administration took was issuing Executive Order 13778 directing the Environmental Protection Agency (EPA) to review and either rescind or revise the 2015 Clean Water Rule: Definition of “Waters of the United States” (WOTUS Rule). The WOTUS Rule was promulgated under the Clean Water Act (CWA), which defines the scope of CWA jurisdiction as “navigable waters of the United States.” The scope of “navigable waters of the United States” has been hotly debated in several court cases since the CWA was enacted. The WOTUS Rule sought to define which rivers, streams, lakes and marshes fell under the definition of “navigable waters of the United States.” See 80 Fed. Reg. 37054 (June 19, 2015). The WOTUS Rule took the approach of Justice Anthony Kennedy’s concurring opinion in Rapanos v. United States that navigable waters include any water body that has a “significant nexus” to navigable rivers and seas, including through biological or chemical connections. See 547 U.S. 715, 759 (2006).

Executive Order 13778 directs the administrator of the EPA and the secretary of the Army for Civil Works to review the WOTUS Rule and consider interpreting the term “navigable waters” in a manner “consistent with Justice Scalia’s opinion” in Rapanos v. United States. Justice Scalia’s definition of “navigable waters” is much narrower than Justice Kennedy’s definition; it only includes waters that contain “a relatively permanent flow” or that possess “a continuous surface connection” to waters with a relatively permanent flow. See Rapanos, 547 U.S. at 757.

Current Legal Status of the WOTUS Rule and Court Challenges

After the WOTUS Rule was finalized, several industry groups and states challenged the rule in different venues. There is an ongoing dispute over whether federal district courts or federal appeals courts should hear the case. The Sixth Circuit Court of Appeals held in February 2016 it had jurisdiction to hear the challenges and issued a nationwide stay of the rule. Since the WOTUS Rule has been stayed, EPA and the Army Corps of Engineers (Corps) continued to implement the regulatory definition of “navigable waters” that was in place prior to the WOTUS Rule.

The Supreme Court agreed in January 2017 to take up the jurisdiction question and determine the appropriate court to hear the case. On March 6, 2017, the United States filed a motion to hold the briefing schedule in the Supreme Court case in abeyance as a result of Executive Order 13778. Industry groups, environmental groups and states all opposed this motion. On April 3, 2017, the Supreme Court denied the motion to hold the briefing schedule in abeyance. Petitioners’ briefs on the merits have been filed. Respondents’ briefs on the merits are due on July 28, 2017. Oral argument has not yet been scheduled.

Regardless of what EPA’s new rule defining “waters of the United States” may look like, this jurisdictional question will still be an issue when the new rule is ultimately challenged, so the Supreme Court decision will be relevant for future challenges.

What Comes Next in Reviewing and Revising the WOTUS Rule

EPA announced it will follow a two-step process to review and eventually revise the WOTUS Rule. First, EPA and the Corps “plan to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the [WOTUS Rule].” Second, EPA and the Corps plan to propose a new
definition that would replace the WOTUS Rule, taking into consideration the principles Justice Scalia outlined in the *Rapanos* plurality opinion. EPA acknowledges on its website that both steps must go through the Administrative Procedure Act process, meaning the rule must be supported by an adequate record, and it must go through notice-and-comment procedures.

EPA and the Corps have just started this two-step process. On March 6, 2017, EPA and the Corps published a notice in the Federal Register announcing their intention to review and either rescind or revise the WOTUS Rule. See 82 Fed. Reg. 12532. On May 2, 2017, EPA and the Corps sent a proposal to repeal the WOTUS Rule to the White House Office of Information and Regulatory Affairs (OIRA). OIRA must review the proposal before it can be published in the Federal Register for public comment.

While taking these procedural steps, EPA and the Corps have been reaching out to stakeholders to discuss what a revised rule might look like. In mid-April, EPA met with state and local officials in Washington, D.C. to outline plans for replacing the WOTUS Rule. EPA presented a slideshow at the meeting. The slideshow presented three different approaches to defining “relatively permanent” waters:

- Only include perennial streams or streams that carry flow throughout the year except in extreme drought;
- Include perennial streams with “seasonal flow”; or
- Include perennial streams with another measure of flow with appropriate, implementable metrics.

**EPA also presented three different approaches for how to define wetlands with a “continuous surface connection”:**

- Only include wetlands that directly touch “jurisdictional waters”;
- Include wetlands with “some degree of connectivity” to a jurisdictional water, but limit how far the wetland could be from the water to be protected;” or
- Include wetlands that have a continuous surface connection to jurisdictional waters even if they are separated by a “non-jurisdictional feature.”

In early May, EPA sent a letter to state governors requesting their input on what bodies of water should be included in the definition of “navigable waters.” EPA plans to continue reaching out to interested stakeholders as it begins revising the rule.

**Conclusion**

Industry groups and environmentalists both recognize that reviewing and revising the WOTUS Rule will be a lengthy process. EPA must develop a technical record to support a decision to rescind and revise the WOTUS Rule in favor of a narrower definition. The new rule then must go through notice-and-comment rulemaking that will likely result in thousands of comments on the rule. Finally, once the new rule is finalized, it will be challenged in court. While it could be a years-long process, any new rule narrowing the definition of “navigable waters of the United States” that is upheld by the courts will have major impacts on industry, farmers and landowners throughout the United States.

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