Consistent with President Trump’s February 28, 2017 Executive Order, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) announced a joint proposal representing the first step of a two-part plan to implement a more narrow “waters of the U.S.” or “WOTUS” definition. The first step, published in the Federal Register on July 27, 2017, seeks to repeal the 2015 WOTUS rule, and replace prior rules.

The second step of the plan will be to proceed with a new rule positing a more narrow WOTUS scope. Although the EPA and the USACE have not yet identified a precise timetable for this second step, it is expected to be substantively based on
former Justice Scalia’s dissenting opinion in the Rapanos decision in which he wrote that “waters of the U.S.” covers only wetlands and small waterways with a surface connection to navigable waters.

The proposed repeal does not dispute the 2015 WOTUS rule’s scientific reasoning for protecting water bodies under the Clean Water Act. Instead, the proposal appears to focus on policy, avoiding a scientific debate on whether it is appropriate to alter the scope of the Clean Water Act. For example, the proposal quotes the WOTUS rule preamble as saying: “Science does not provide bright line boundaries with respect to where ‘water ends’ for purpose of the [Clean Water Act].”

When considering a new construction project, companies, farmers, and other landowners frequently ask: Are these waters of the U.S.? This has been one of the most controversial questions ever asked under the landmark Clean Water Act, enacted 45 years ago. Developers, as well as agriculture, energy, and construction trade groups have argued that courts have interpreted the phrase too broadly. According to these groups, Supreme Court decisions in 2001 and 2006 properly narrowed the term, concluding that agencies had adopted an overly broad interpretation of the scope of their authority in a way that unreasonably infringed on property rights and prevented landowners from working on their own land.

In this first “repeal” step, the agencies propose to restore 1986 regulations and 2008 guidance to define coverage of “waters of the U.S.” by the Clean Water Act. The practical effect of the repeal would be to firmly restore the status quo while the administration works on a replacement WOTUS rule. That is, the repeal will arguably render the Sixth Circuit’s stay of the 2015 WOTUS rule moot.

If the repeal and replacement rules are finalized under this approach, we will be watching to see if they can withstand legal challenges. Comments will be due by August 28, which is the first business day 30 days after publication in the Federal Register.

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