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The Clean Water Rule is delayed in response to U.S. Supreme Court decision

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On February 6, the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers published a final rule delaying implementation of the Obama administration's 2015 Clean Water Rule (CWR)— a landmark rule revising the definition of "waters of the United States" (WOTUS) that arguably expanded the scope of the federal government's authority under several regulatory programs, including those associated with wastewater discharges and dredge/fill activities under the Clean Water Act (CWA).

The February 6 final rule delays implementation of the CWR until February 6, 2020. 83 Fed. Reg. 5200. The final rule delaying implementation of the CWR is a significant step in the Trump administration's efforts to reconsider the Obama administration's revised definition of WOTUS. Meanwhile, the pre-2015 WOTUS regulatory regime, which has been criticized by many as inefficient and inconsistent, remains in place.

Supreme Court decision forced agencies to quickly delay applicability of CWR

The agencies' rule delaying implementation of the CWR was finalized less than two weeks after the U.S. Supreme Court's decision in *National Association of Manufacturers v. Department of Defense, et al., No. 16-299 (Jan. 22, 2018) (NAM)*, which started a countdown for the expiration of a nationwide judicial stay of the CWR. In *NAM*, the Supreme Court held that federal district courts, as opposed to federal appellate courts, were the appropriate forums for the legal challenges to the CWR. Once the Supreme Court's decision takes effect, the nationwide stay of the CWR, imposed by the U.S. Court of Appeals for the Sixth Circuit in October 2015, will be lifted and more than a dozen federal district lawsuits challenging the CWR will be revived.

After it was finalized in June 2015, more than 100 parties, including industry groups and 31 states, filed lawsuits challenging the CWR in both federal district courts and federal appellate courts across the country. Many of the challengers argued that the federal district courts had jurisdiction to hear the lawsuits, while the agencies and other parties took the position that lawsuits over the CWR belonged in federal appellate court. These legal challenges temporarily proceeded on separate tracks, leading one federal district court judge in North Dakota to stay the CWR in 13 states west of the Mississippi River. *North Dakota v. U.S. EPA*, No. 3:15-cv-59 (D.N.D. August 27, 2015) (staying the CWR in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming). The Sixth Circuit issued its nationwide stay of the CWR on October 9, 2015, and subsequently issued a split decision holding that it had exclusive jurisdiction to hear the lawsuits challenging the CWR. In *re: U.S. Dept. of Defense and U.S. EPA Final Rule: Clean Water Rule*, 817 F.3d 261 (6th Cir. 2016).

In *NAM*, the Supreme Court reversed the Sixth Circuit's decision and found that specific language of the CWA required the legal challenges to the CWR to be heard in federal district courts. The Supreme Court's decision turned primarily on its interpretation of specific language in the CWA governing judicial review of certain EPA actions. 33 U.S.C. § 1369(b)(1). Rejecting the federal government's proposed interpretations of the CWA, the court held that the CWR did not fall within the eight categories of EPA actions that can be challenged directly in federal courts of appeal. Although the Supreme Court acknowledged that its decision could lead to conflicting outcomes in the federal district courts, it held that the applicable statutory language was clear, and the justices were unpersuaded by the federal government's judicial efficiency and national uniformity arguments.

Rule delaying implementation of the CWR gives agencies time for rollback plan

The agencies justified the rule delaying implementation of the CWR based on concerns that, without a delay, the federal district court challenges to the CWR would likely lead to inconsistencies, uncertainty, and confusion among regulated parties and the public. According to the agencies, the rule delaying implementation of the CWR "establishes a framework for an interim period that avoids these inconsistencies, uncertainty, and confusion," while the agencies reevaluate the CWR as required by a February 28, 2017, executive order issued by President Donald Trump. President Trump's

executive order required the agencies to withdraw the CWR and rescind or revise the CWR's definition of WOTUS as appropriate and consistent with the law.

The agencies are engaged in a two-step process to review and potentially revise the CWR. Step One of this process would rescind the CWR and replace it with the previous regulatory text. On July 27, 2017, the agencies issued a proposed rule that would complete Step One. The public comment period for the Step One rule closed on September 27, 2017, resulting in what the agencies described as a "large volume" of comments. The agencies currently are reviewing these comments and have not yet finalized the Step One rule. In addition, the agencies have indicated that Step Two of the process will include a proposed rule addressing, and requesting public comment on, potential substantive changes to the definition of WOTUS. The agencies have not yet proposed a rule that would start Step Two of the review process.

Within hours of its issurance, environmental groups and a multistate coalition filed lawsuits asking federal district courts in New York and South Carolina to vacate the agencies' final rule delaying implementation of the CWR. The specific language and justification for the final rule delaying implementation of the CWR has sparked debate among legal scholars on whether it will hold up in court. The lawsuits challenging the delay in implementing the CWR almost certainly will be followed by litigation by environmental groups, states, and potentially other parties over the rules issued by the agencies to complete Step One and Step Two of the agencies' review process.

Expect continued regulatory uncertainty

While the agencies and challengers continue to battle over the Trump administration's efforts to roll back the CWR, industry and other regulated parties will be subject to a pre-2015 WOTUS regulatory regime that previously contributed to significant uncertainty over the scope of the agencies' authority under CWA programs that impact industry, including oil and gas. As the agencies noted in the final rule delaying implementation of the CWR, the prior WOTUS regulatory regime was implemented through the agencies' applicable guidance documents and was based on two tests established by the Supreme Court in a fractured 2006 decision in *United States v. Rapanos*, 547 U.S. 715 (2006). Many are critical of the pre-2015 regulatory regime for its case-by-case approach to determining whether an activity (e.g., construction activities related to oil and gas exploration, processing and transmission) is subject to review and approval by the agencies. Complicating matters further, federal courts throughout the country have interpreted the *Rapanos* decision differently and disagreed on the appropriate test that must be used to define a WOTUS. As the Trump administration proceeds with its efforts to roll back the CWR and potentially redefine WOTUS, industry and other regulated parties will be forced to continue operating in an uncertain legal landscape.

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