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# Uniformity or More Chaos : EPA Finalizes Rule Repealing Obama Administration's Definition of "Waters of the United States"


SEPTEMBER 20, 2019

CONTACT

**LISA M. BRUDERLY**
*lbruderly@babstcalland.com*
412.394.6495

**GARY E. STEINBAUER**
*gsteinbauer@babstcalland.com*
412.394.6590

**Pittsburgh, PA**
Two Gateway Center
603 Stanwix Street
Sixth Floor
Pittsburgh, PA 15222
412.394.5400

BABSTCALLAND.COM


On September 12, 2019, the U.S. Environmental Protection Agency (USEPA) and the Army Corps of Engineers (Corps) (collectively, the Agencies) released a pre-publication version of a final rule repealing the Obama administration's 2015 rule re-defining "waters of the United States" (WOTUS) under the Clean Water Act (CWA), typically referred to as the "Clean Water Rule" (CWR). The repeal is intended to end the existing regulatory patchwork, where (1) the CWR's WOTUS definition currently is in effect in 22 states (Pennsylvania and Ohio among them), (2) the pre-2015 definition of WOTUS is in effect in 27 states (including West Virginia), and (3) the applicable WOTUS definition is "under federal court consideration" in New Mexico. The repeal rule becomes effective sixty (60) days after publication in the *Federal Register*, which has not yet occurred as of September 20, 2019. Major national environmental groups have already vowed to challenge the repeal rule in court.

The Trump administration directed the Agencies to review the 2015 WOTUS definition in an Executive Order issued on February 28, 2017. The repeal rule completes step one of a two-step process designed by USEPA and the Corps to implement the Executive Order. Step two of the process is underway and involves replacing the CWR's definition of WOTUS with a revised definition of the term. On February 14, 2019, USEPA and the Corps published a proposed rule to revise the definition of WOTUS. The comment period on the proposed revised definition ended on April 15, 2019. We have discussed the substance of the proposed revised definition of WOTUS in a previous *Environmental Alert*. According to the online docket, USEPA and the Corps received more than 621,000 comments on this proposed WOTUS definition. USEPA and the Corps state that they are reviewing these comments, and on September 18, 2019, USEPA indicated that the Agencies plan to take final action on the proposed revised definition of WOTUS by this winter.

The effect of the repeal rule will be to recodify the pre-2015 definition of WOTUS consistently across the United States. The current patchwork of states where the different WOTUS definitions apply has created a sense of urgency for the Agencies to complete the repeal rule. According to the Agencies, restoring the pre-2015 CWA jurisdictional regime is appropriate to remedy the identified deficiencies in the CWR's WOTUS definition. The Agencies note that regulated parties have a long track record of implementing the pre-2015 definition, as informed by applicable guidance documents and consistent with Supreme Court precedent. Nevertheless, the pre-2015 definition of WOTUS has also been criticized as leading to inconsistent determinations based on its case-by-case approach to determining whether a water is subject to federal jurisdiction under the CWA. Furthermore, the pre-2015 definition of WOTUS is the subject of a fractured U.S. Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006), which has been inconsistently applied by federal appellate courts.

The Agencies marshal four primary reasons for repealing the CWR. First, the Agencies state that the CWR's definition of WOTUS exceeded the scope of the Agencies' authority under the CWA, as intended by Congress and interpreted by the United States Supreme Court.

More specifically, the Agencies state that the CWR's definition of WOTUS improperly supported federal jurisdiction over nearly all waters within large watersheds, including non-navigable, isolated, and purely intrastate waters. Second, the Agencies state that the CWR's definition of WOTUS failed to consider Congress' recognition in the CWA that states have the primary responsibility to regulate land and water resources within their borders. Third, the Agencies indicate that the CWR's definition of WOTUS "pushes the envelope" with respect to the constitutional limitations over the exercise of jurisdiction under the CWA. Fourth and finally, the Agencies note that the CWR violated the federal notice-and-comment requirements because it included specific distance-based limitations in its definition of "adjacent" waters and a critical technical report in the final version of the rule without providing the public with an opportunity to comment.

Litigation involving the repeal of the CWR is a near certainty. Legal challenges likely will be filed in multiple federal district courts across the country. The regulatory patchwork of different WOTUS definitions may continue if any of these lawsuits is successful in obtaining a stay of the repeal rule. In addition to legal challenges to the repeal rule itself, additional skirmishes could occur if EPA, the Corps, or another party moves to dismiss the pending lawsuits challenging the CWR's definition of WOTUS as moot. Parties who have joined those lawsuits to defend the CWR's WOTUS definition are likely to oppose dismissal. In short, whether the Trump administration's repeal rule provides the desired national uniformity remains to be seen.

Babst Calland continues to actively monitor the dynamic regulatory landscape involving the definition of WOTUS and analyze how the legal landscape is affecting parties from across sectors and industries. If you have questions about the repeal rule, please contact Lisa M. Bruderly at (412) 394-6495 or lbruderly@babstcalland.com or Gary E. Steinbauer at (412) 394-6590 or gsteinbauer@babstcalland.com.