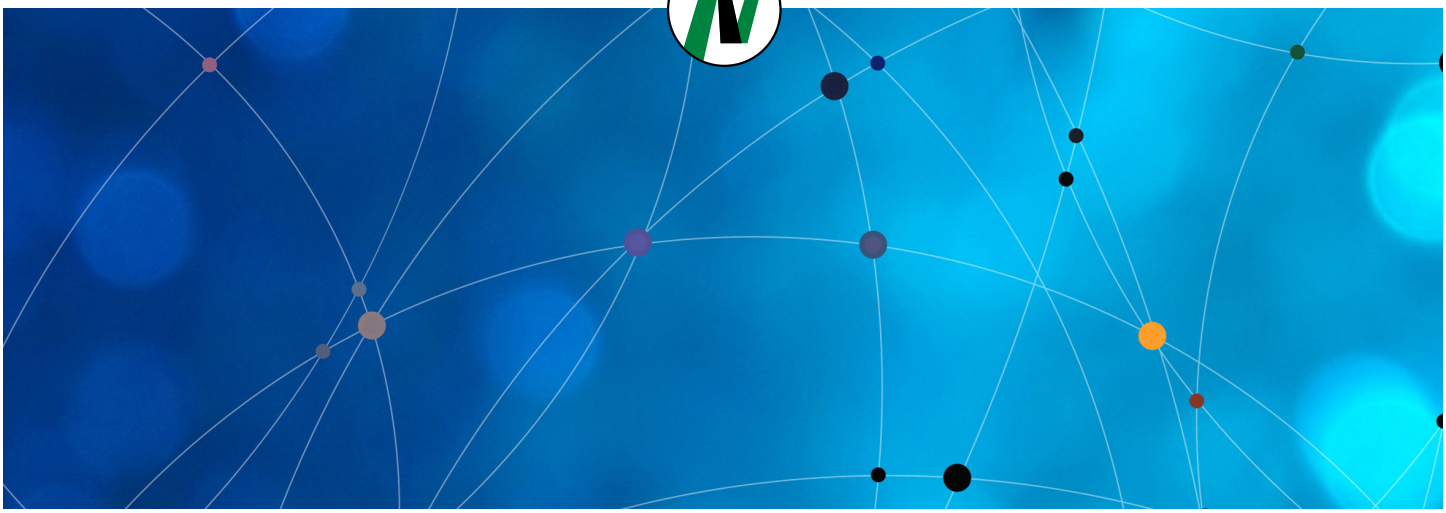

Executive Order That Seeks to Undo Obama Administration's "Waters of the United States" Rule Has More Limited Immediate Impacts

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Debate and uncertainty regarding the extent of federal jurisdiction under the Clean Water Act will continue under the Executive Order.

On February 28, 2017, President Trump issued an Executive Order entitled Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule (Order). The Order requires the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to review a 2015 regulation referred to by the Obama Administration as the Clean Water Rule. On March 6, 2017, EPA and the Corps published formal notice of the agencies' intent to review the Clean Water Rule and engage in further rulemaking (Notice of Review).

The 2015 Clean Water Rule issued by the Obama Administration (2015 Rule) was intended to clarify regulatory confusion over which waters and aquatic features constitute waters of the United States, (WOTUS) and are therefore subject to Clean Water Act (CWA) protection and permitting jurisdiction under the CWA. (For additional background information, see our February 22 e-alert.) Such jurisdictional determinations are critical to determine whether the discharge of a pollutant requires an NPDES permit issued under CWA section 402, or discharges of dredge and fill material require a permit under CWA section 404.

Order Requirements. The Order requires EPA and the Corps to review the 2015 Rule and rescind or revise it to be consistent with the following policy statement: It is in the national interest to ensure that the Nation's

navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution. The Order also directs the agencies to consider limiting the features that constitute waters of the United States by interpreting the term navigable waters in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*. In that famously fractured Supreme Court opinion, Justice Scalia expressed the narrowest view of the reach of the CWA, writing that WOTUS include only navigable waters, that are navigable-in-fact, relatively permanent, standing or flowing bodies of waters and wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right.

Depending on the outcome of the reconsideration process, the Order may make a substantial difference in how jurisdictional WOTUS may be defined *in the future*, by significantly narrowing the scope of aquatic features protected by, and requiring permits under the CWA. Narrowing of WOTUS may occur if EPA and the Corps determine, as suggested by the Order, that it is appropriate to shift away from Justice Kennedy's definition of WOTUS set forth in *Rapanos*, which has been used ever since that case, to Justice Scalia's definition. As a practical matter, Justice Kennedy's definition of WOTUS has led to much broader CWA jurisdiction over aquatic features than Justice Scalia's because WOTUS as defined by Kennedy in *Raponos* includes all of the waters discussed as jurisdictional by Scalia, together with all other aquatic features with a significant nexus to such waters. Eliminating aquatic features determined to be WOTUS under the significant nexus test in a future regulation would substantially limit the scope of CWA jurisdictional waters, impacts to which require permits.

No Immediate Effects of the Order. Such changes in the scope of WOTUS will not, however, have an immediate effect on the vast majority of current permit applications for three primary reasons. First, the 2015 Rule addressed by the Order and Notice of Review is not currently in effect, and it has not been in effect since late 2015 or early 2016, depending on the State. In February 2016, the United States Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Rule, following a stay issued in November 2015 by the North Dakota District Court, which, though issued earlier, only stayed the 2015 Rule in 13 States (including Texas). The judicial stays have prohibited the operation of the 2015 Rule until after resolution of ongoing litigation challenges to it. As a result of the judicial stays, the federal guidance currently in effect, and which has been governing jurisdictional delineations since fall of 2015 or early 2016 (depending on the State), is *not* the 2015 Rule. Instead, Bush-era joint guidance from EPA and the Corps, entitled Clean Water Act Jurisdiction Following the U.S Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008) is, and has been governing jurisdictional delineations for some time.

Second, by law, the Order and the EPA/Corps Notice of Review cannot rescind or replace the 2015 Rule, and it will be quite a long time before a new jurisdictional WOTUS rule can take effect. Under the federal Administrative Procedures Act, a full rulemaking process, including public notice, public comment, responses to comment, and development of substantial technical, policy and scientific evidence in support of the newly proposed rule, must be conducted prior to rescinding or revising the 2015 Rule permanently. Upon issuance of a new WOTUS rule, an onslaught of litigation can be anticipated that is likely to further delay the effect of any new rule.

Third, States like California have laws already on the books that are asserted to define permitting jurisdiction for discharges of pollutants and dredge and fill material to aquatic features that not only include, but are broader than federal WOTUS. In California, State jurisdiction under the Porter-Cologne Water Quality Control

Act extends to all waters of the state, defined to include any surface water or groundwater, including saline waters, within the boundaries of the state. Notwithstanding the proposed changes to the 2015 Rule, the California State Water Resources Control Board (SWRCB) has taken the position that discharges of dredge and fill material and other pollutants require a California permit issued by the state or regional water boards. Pursuant to the SWRCB's position, any discharge of pollutants or dredge and fill material to aquatic features excluded from WOTUS pursuant to federal law and regulation, would instead require state law permits, which may be more difficult to obtain.

Potential Federal Congressional Intervention. At least one federal bill has been proposed to immediately narrow CWA jurisdictional WOTUS, shortcutting the complicated and time-consuming rulemaking process contemplated by the Order. HR 1261, the Federal Regulatory Certainty for Water Act, would invalidate the 2015 Rule and other inconsistent guidance, and define navigable waters by an amendment to the CWA statute. Legislation like this would be game-changing for federal law, but it remains to be seen whether such legislative fixes will gain traction on Capitol Hill.