EPA and USACE Move to Rescind 2015 Waters of the U.S. Rule

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In a move that surprises nobody, the Environmental Protection Agency and the Department of Army, and Army Corps of Engineers ("USACE") proposed on June 27, 2017 a new rule to rescind the 2015 Waters of the US Rule and re-codify the regulatory text that existed prior to 2015 defining "waters of the United States" or "WOTUS". Rescinding the 2015 WOTUS Rule will likely moot existing litigation over the 2015 WOTUS Rule and undoubtedly spawn a new round of litigation over the replacement rule, which would be identical to the rules in place before the 2015 WOTUS Rule was approved.

The new rule reviews the U.S. Supreme Court decisions, *Riverside, SWANCC, and Rapanos*, that interpreted the existing statute and rule in effect prior to the 2015 WOTUS Rule and appears to endorse the definition in late Justice Scalia's plurality opinion in Rapanos v. United States, 547 U.S. 715 (2006). Justice Scalia interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water . . .," id. at 739, that are connected to traditional navigable waters, id. at 742, as well as wetlands with a "continuous surface connection . . ." to such water bodies, id. (Scalia, J., plurality opinion) (quoting from the new 2017 Rule).

The new rule makes it clear that this is just the first of two steps, the first step to re-establish the regulatory status quo with all of its uncertainties and a second step that would create a new definition of "waters of the United States" taking into consideration the principles that Justice Scalia outlined in the Rapanos plurality opinion.

Given that this second step would generate new challenges by environmental groups, the question that must be asked is whether the makeup of the U.S. Supreme Court has changed since 2017. Although Justice Scalia has now passed away, he has been replaced with Neil Garland, who most legal observers believe has a judicial perspective nearly identical to Justice Scalia. David Souter and John Paul Stevens, who both dissented, have since retired but they have been replaced by Obama appointees Sonia Sotomayor and Elana Kagen, respectively. Therefore, the swing vote by Justice Anthony Kennedy who developed the incredibly murky

"significant nexus" test in his concurring opinion in *Rapanos*, is the stumbling block to any judicial change. Justice Kennedy made a telling comment during oral arguments in *Army Corps of Engineers v. Hawkes*, 578 U.S. __ (2016), that the Clean Water Act was "arguably, unconstitutionally vague." Given Justice Kennedy's doubts about the Clean Water Act, and speculation that the 80 year old Justice may retire, it may be possible for a new "second step" rule to pass muster in a future challenge.

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