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CWA Waters of the United States Remain Murky

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On September 12, 2019, the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (the “Corps”) issued a final rule (the “Repeal Rule”) repealing the Obama administration’s 2015 “waters of the United States” rule (the “2015 WOTUS Rule”). According to EPA’s press release, the Trump administration contends that the 2015 WOTUS Rule impermissibly expanded the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act, illegally curtailed states’ rights to regulate water within their boundaries, and suffered from other technical deficiencies.

The Repeal Rule restores pre-2015 Clean Water Act regulations in all jurisdictions, which are already in effect in more than half of states due to multiple legal decisions enjoining the 2015 WOTUS Rule. EPA and the Corps intend to publish a final replacement rule defining WOTUS by the end of 2019.

The Repeal Rule takes effect 60 days after its publication in the federal register. Both the Repeal Rule and the expected new WOTUS rule will likely trigger considerable litigation.

Background

The 2015 WOTUS Rule attempted to clarify federal jurisdiction under the Clean Water Act following decades of legal fights and confusion over the meaning of WOTUS in the context of the Clean Water Act. It expanded the definition of waters that could be regulated from “navigable” or continuously flowing to other potentially temporary bodies of water like ephemeral streams, creeks and ponds.

The Trump Administration issued a rule in February 2018 postponing application of the 2015 WOTUS Rule for two years (the “Suspension Rule”). The Suspension Rule extended the effective date of the 2015 WOTUS Rule while EPA and the Corps finalized a rulemaking to repeal and replace the Obama administration’s jurisdictional rule. Like the 2015 WOTUS Rule, the Suspension Rule was immediately subject to legal challenges. On August 16, 2018, the U.S. District Court for the District of South Carolina issued a nationwide injunction against the Suspension Rule, effectively reviving the 2015 WOTUS Rule in just over half of the country until the Trump Administration finalized a replacement rule. Challenges to the 2015 WOTUS Rule continued in other jurisdictions with the U.S. District Court for the Southern District of Texas holding that the 2015 WOTUS Rule violated the Administrative Procedure Act because the final regulation was too different from the proposed version circulated for

public comment.

The Repeal Rule is intended to ameliorate the regulatory patchwork created by legal challenges to the 2015 WOTUS Rule and the Suspension Rule. However, legal challenges to the Repeal Rule are expected and could potentially prevent the Repeal Rule from going into effect.

Until the Repeal Rule goes into effect, the 2015 WOTUS Rule will remain in effect in 22 states and the District of Columbia, while the pre-2015 regulations are already in effect in the remaining 28 states.

Potential Repeal Rule Impacts

- The 2015 WOTUS Rule would be removed from the regulatory code, eliminating the current regulatory patchwork.
- Any nationwide regulatory consistency resulting from the Repeal Rule may be short-lived as both the Repeal Rule and any future WOTUS rule will likely generate considerable litigation.
- The Repeal Rule would provide limited clarity as to the scope of federal jurisdiction under the Clean Water Act. It restores pre-2015 Clean Water Act regulations, which were themselves the subject of litigation and confusion.
- The Repeal Rule and forthcoming replacement rule redefining WOTUS could potentially make permitting easier for pipelines and land development projects near certain water sources like ephemeral streams and non-contiguous wetlands.

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