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Clean Water Act Update

Insight — 3/21/2017

On February 28, 2017, Donald Trump issued an Executive Order aimed at undoing the Obama Administration's Rule, which had defined “Waters of the United States” (“WOTUS”) for purposes of jurisdiction under the Clean Water Act (“CWA”). The Executive Order directs the U.S. Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) to undertake a review of the Rule and to interpret any necessary revisions in light of the late Justice Antonin Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Following the issuance of the Executive Order, EPA and the Corps issued a notice of intent to rescind or revise the Rule, which was published in the Federal Register on March 6, 2017.

Under Justice Scalia's opinion in *Rapanos*, wetlands and other waters would need to be “relatively permanent, standing or continuously flowing bodies of water” in order to be jurisdictional waters under the CWA, a definition which would exclude waterways “through which water flows intermittently or ephemerally[.]” *Rapanos*, 547 U.S. at 739. Under the existing Rule, many intermittent or ephemeral tributaries and wetlands fell within the definition of WOTUS. In addition, other waters that have been regulated historically by the EPA and Corps even prior to issuance of the Rule would not be jurisdictional under the terms of the Executive Order.

On March 6, 2017, the Trump Administration filed a motion with the U.S. Supreme Court asking it to stay the pending litigation regarding the Rule in light of the Executive Order and the prospect that the Rule may be revised or rescinded.

The WOTUS Rule was the subject of more than one million comments during the rulemaking process, was appealed in 17 District Court complaints and in 23 petitions to various Circuit Courts of Appeal, and it was expected to ultimately be decided by the U.S. Supreme Court. Any rescission or revision of the Rule by the Trump Administration will almost certainly meet the same fate. Notably, the Rule was based on a significant body of scientific evidence, which will need to be countered with new scientific bases to support any new rulemaking by the Trump Administration. A new rulemaking is therefore likely to take years, and in the short term, jurisdictional determinations will likely continue to be made by the Corps and EPA based on prior guidance applying the “significant nexus” test outlined by Justice Anthony Kennedy in *Rapanos*.

Fourth Circuit Upholds Narrow Interpretation of CWA Permit Shield

In *Ohio Valley Environmental Coalition v. Fola Coal Company, LLC*, 845 F.3d 133 (4th Cir. 2017), the Fourth Circuit Court of Appeals affirmed a trial court decision holding that Fola Coal Company's (“Fola”) NPDES permit issued by the State of West Virginia did not shield it from liability for violating broad narrative water quality standards in its permit, despite the

company having disclosed the nature of its discharges in its permit application.

Environmental groups filed the underlying action under the CWA citizen suit provision, alleging that Fola had violated the following broad provision of its NPDES permit:

The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the Department of Environmental Protection.

845 F.3d at 136. The plaintiffs alleged specifically that Fola violated narrative water quality standards by increasing conductivity through the discharge of ions and sulfates, which resulted in biological impairment in the receiving streams. *Id.* Fola had disclosed the nature its discharges when it applied for its permit, but the West Virginia Department of Environmental Protection did not include a specific limit for conductivity in the permit. *Id.* Fola argued that, because it complied with the effluent limits set out in its permit, the permit shielded Fola from liability under the CWA.

Fola attempted to rely on an earlier opinion from the Fourth Circuit's in *Piney Run Preservation Ass'n v. County Comm'r of Carrol County, Maryland*, 268 F.3d 255 (4th Cir. 2001), in which the Circuit Court stated that permit holders “who disclose their pollutants to the permitting agency and thereafter comply with the effluent limits in their NPDES permits are shielded from liability” under the CWA. 268 F.3d at 142. The Fourth Circuit rejected this argument, holding that a permit shields “its holder from liability . . . [only] as long as . . . the permit holder complies with the express terms of the permit and with the CWA's disclosure requirements.” *Id.* The Court concluded that the express terms of Fola's permit required it to comply with narrative water quality standards, and that because “Fola did not do so, it may not invoke the permit shield.” *Id.*
