

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-299

NATIONAL ASSOCIATION OF MANUFACTURERS, PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOTICE OF EXECUTIVE ORDER AND RELATED AGENCY ACTION AND MOTION
OF THE FEDERAL RESPONDENTS TO HOLD THE BRIEFING SCHEDULE IN
ABEYANCE

Pursuant to Rule 21.1 of the Rules of this Court, the Acting Solicitor General, on behalf of the federal respondents, provides this notice of an Executive Order and related agency action that may affect this case, and respectfully moves that the briefing schedule be held in abeyance.

1. This case arises from a challenge to the Clean Water Rule, which the United States Environmental Protection Agency (EPA) and the Department of the Army, Army Corps of Engineers (the Army) promulgated respecting the statutory term "waters of the United States" in the Clean Water Act, 33 U.S.C. 1251 et

seq. See 80 Fed. Reg. 37,054 (June 29, 2015). On January 13, 2017, this Court granted a petition for a writ of certiorari to address the question whether the court of appeals erred when it held that it has jurisdiction under 33 U.S.C. 1369(b)(1) to decide petitions to review the Clean Water Rule.

2. On February 28, 2017, the President of the United States signed an Executive Order directing the Administrator of the EPA and Assistant Secretary of the Army for Civil Works to review the Clean Water Rule and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." A copy of the Executive Order, which has been published at 82 Fed. Reg. 12,497 (Mar. 3, 2017), is attached to this motion. An electronic copy of the Executive Order is available at <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>.

Also on February 28, 2017, the EPA and the Army signed a Federal Register notice announcing their intent to review the Clean Water Rule and to "provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order." A copy of the notice, which has been published at 82 Fed. Reg. 12,532 (Mar. 6, 2017), is attached to this motion. An electronic copy of the notice is available at

<https://www.epa.gov/cleanwaterrule/notice-intention-review-and-rescind-or-revise-clean-water-rule>.

3. Under the current briefing schedule, petitioner's brief on the merits is due on March 29, 2017, and the government's brief on the merits is due on May 31, 2017. Petitioner has filed an unopposed request for an extension of time to file its opening brief to and including April 13, 2017, to provide an opportunity to consider the effect of the Executive Order and related agency action on this litigation.

Given the circumstances described above, the government respectfully requests that the Court hold the briefing schedule in abeyance. In light of the Executive Order and the notice issued by EPA and the Army, and the attendant prospect that the 2015 Clean Water Rule may be rescinded or revised, the determination whether the court of appeals erred in asserting jurisdiction to review that Rule may ultimately have little significance for the Rule that is currently under review by the court of appeals. Given that possibility, it would be wasteful for the parties and potential amici to brief the jurisdictional issue at this time. Because the court of appeals has issued a nationwide stay of the Clean Water Rule, the Rule will not place any burden on regulated entities while the briefing schedule is held in abeyance.

We have consulted with counsel for petitioner, who has informed us that petitioner has not determined its position on this motion at this time.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record

MARCH 2017

Presidential Documents

Title 3—

Executive Order 13778 of February 28, 2017

The President

Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. 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.

Sec. 2. Review of the Waters of the United States Rule. (a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army for Civil Works (Assistant Secretary) shall review the final rule entitled “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 *Fed. Reg.* 37054 (June 29, 2015), for consistency with the policy set forth in section 1 of this order and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

(b) The Administrator, the Assistant Secretary, and the heads of all executive departments and agencies shall review all orders, rules, regulations, guidelines, or policies implementing or enforcing the final rule listed in subsection (a) of this section for consistency with the policy set forth in section 1 of this order and shall rescind or revise, or publish for notice and comment proposed rules rescinding or revising, those issuances, as appropriate and consistent with law and with any changes made as a result of a rulemaking proceeding undertaken pursuant to subsection (a) of this section.

(c) With respect to any litigation before the Federal courts related to the final rule listed in subsection (a) of this section, the Administrator and the Assistant Secretary shall promptly notify the Attorney General of the pending review under subsection (b) of this section so that the Attorney General may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.

Sec. 3. Definition of “Navigable Waters” in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

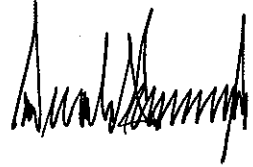
Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be Donald Trump, located in the upper right quadrant of the page.

THE WHITE HOUSE,
February 28, 2017.

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[FRL-9959-93-OW]

Intention To Review and Rescind or Revise the Clean Water Rule

AGENCY: U.S. Army Corps of Engineers (Corps), Department of the Army, Department of Defense; Environmental Protection Agency (EPA).

ACTION: Notice of intent.

SUMMARY: In accordance with a Presidential directive, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) announces its intention to review and rescind or revise the Clean Water Rule.

DATES: March 6, 2017.

FOR FURTHER INFORMATION, CONTACT: Ms. Donna Downing, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202-566-2428; email CWAwaters@epa.gov, and Mr. Gib Owen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 104 Army Pentagon, Washington, DC 20310-0104; telephone number 703-695-4641; email gib.a.owen.civ@mail.mil.

SUPPLEMENTARY INFORMATION: The Federal Water Pollution Control Act, originally enacted in 1948, most comprehensively amended in 1972, and known as the Clean Water Act (CWA), seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251 *et seq.* Among other provisions, the CWA regulates the discharge of pollutants into "navigable waters," defined in the CWA as "the waters of the United States." The question of what is a "water of the

United States" is one that has generated substantial interest and uncertainty, especially among states, small businesses, the agricultural communities, and environmental organizations, because it relates to the extent of jurisdiction for federal and relevant state regulations.

The EPA and the Department of the Army (collectively, the agencies) have promulgated a series of regulations defining "waters of the United States." The scope of "waters of the United States" as defined by the prior regulations has been subject to litigation in several U.S. Supreme Court cases, most recently in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). In response to that decision, the agencies issued guidance regarding CWA jurisdiction in 2007, and revised it in 2008.

In response to that guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation. At the conclusion of that rulemaking process, the agencies issued the "Clean Water Rule: Definition of 'Waters of the United States.'" 80 FR 37054 ("*2015 Rule*") (found at 40 CFR 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401, and 33 CFR 328).

Due to concerns about the potential for continued regulatory uncertainty, as well as the scope and legal authority of the 2015 Rule, 31 states and a number of other parties sought judicial review in multiple actions. Seven states plus the District of Columbia, and an additional number of parties, then intervened in those cases. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court.

On February 28, 2017, the President of the United States issued an Executive Order directing the EPA and the Army to review and rescind or revise the 2015 Rule. Today, the EPA and the Army announce their intention to review that rule, and provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order. In doing so, the agencies will consider

interpreting the term "navigable waters," as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*. It is important that stakeholders and the public at large have certainty as to how the CWA applies to their activities.

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *Motor Vehicle Manufacturers Ass'n of the United States, Inc., et al. v. State Farm Mutual Automobile Insurance Co., et al.* 463 U.S. 29, 42 (1983) ("*State Farm*"). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15; quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

Through new rulemaking, the EPA and the Army seek to provide greater clarity and regulatory certainty concerning the definition of "waters of the United States," consistent with the principles outlined in the Executive Order and the agencies' legal authority.

Dated: February 28, 2017.

E. Scott Pruitt,
Administrator, Environmental Protection Agency.

Dated: February 28, 2017.

Douglas W. Lamont,
Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works, Department of the Army.

[FR Doc. 2017-04312 Filed 3-3-17; 8:45 am]

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