

"Waters of the United States"/Clean Water Act: February 28th Presidential Executive Order



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On February 28th the White House issued an Executive Order titled:

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule ("EO")

The *EO* addresses the rule issued during the Obama Administration by the United States Environmental Protection Agency ("EPA") and the Corps of Engineers (collective "EPA") that revised/clarified the scope of waters encompassed by the Clean Water Act. See 80 Fed. Reg. 37054.

The 2015 rule addressed the Clean Water Act definition of Waters of the United States ("WOTUS"). This definition is arguably one of the three critical jurisdictional terms in the Clean Water Act. The importance of the jurisdictional definition of WOTUS is magnified by the fact that it is also relevant to Non-National Pollution Discharge Elimination System federal programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, it is easy to understand why the scope of the definition of WOTUS has been a subject of litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

The February 28th *EO* directs EPA to review the 2015 final rule and determine whether it:

- Promotes economic growth
- Minimizes regulatory uncertainty
- Shows due regard for the roles of the Congress and the States under the Constitution

EPA is further directed to "publish for notice and comment" a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

EPA and the heads of all executive departments and agencies are also required to review all orders, rules, regulations, guidelines or policies implementing or enforcing the final rule for consistency with the policies previously referenced and rescind or revise, or publish for notice and comment proposed rules rescinding or revising, those issuances as appropriate and consistent with law and any changes made as a result of a rulemaking procedure pursuant to the *EO*.

EPA is also required in undertaking subsequent reviews of the definition of WOTUS to take into account Justice Scalia's opinion in the United States Supreme Court Rapanos decision. Further, EPA is required to notify the United States Attorney General about the pending review of the rule. The Attorney General is directed to notify the courts about this revised view of the rule.

Regardless of one's views of the merits of the rule, efforts to repeal it will raise a number of procedural and substantive issues. In other words, a complex promulgated rule based on prior agency scientific determinations may not be simple to unwind.

Regardless of the outcome of the struggle for the appropriate scope of WOTUS, it is important to remember that delegated states (including Arkansas) have their own statutes to authorize their environmental regulatory activities. Further, many of these states have key jurisdictional definitions that may in fact be broader than the corresponding federal terms. An example is found in Arkansas.

The arguably corresponding Arkansas statutory term ("waters of the State") is broader than WOTUS. The Arkansas Air and Water Pollution Control Act provides that "[i]t shall be unlawful to place any . . . waste in a location where it is likely to cause pollution of any waters of the State." Waters of the State are defined as:

"all streams, lake, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are confined within, flow through, or border upon the State or any portion of the State."

As a result, non-Clean Water Act NPDES programs undertaken by Arkansas will not be affected by a change in the definition of WOTUS because they are driven by the state definition "Waters of the United States."

[A copy of the EO can be downloaded here.](#)