Latest Development on Rescinding the WOTUS Rule

Steven Miano
Hangley Aronchick Segal Pudlin & Schiller

Trump Orders Rule Withdrawal

On February 28th, 2017, the President signed an executive order directing the US Army Corps of Engineers and the Environmental Protection Agency to move swiftly to rescind the Waters of the US (WOTUS) rule, promulgated in August 2015 by the US EPA during the Obama Administration. (Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule: https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic) Specifically, the executive order directs the agencies to consider defining the term “navigable waters” in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States. https://supreme.justia.com/cases/federal/us/547/715/opinion.html

In addition, on the same day, EPA Administrator Scott Pruitt signed a notice of intent to review and rescind or revise the Clean Water Rule. https://www.epa.gov/sites/production/files/2017-02/documents/cwr_fr_notice_prepublication_version.pdf

Finally, the Trump Administration will seek stays on current litigation challenging the rule, pending before the U.S. Supreme Court, and numerous other federal courts.
Next Steps

The Administration’s action begins a slow administrative process that may well take more than
18 months. Any rescission of the rule must go through the formal rulemaking process, including
public notice and comment. Given that the rule was based on a substantial body of scientific
work, the Administration will have to develop an alternative scientific basis for withdrawal in
order to prevail on likely challenges. Stay tuned. Expect voluminous comments and numerous
challenges to any withdrawal.