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Clean Water Act Agencies Solicit Comments to Support Repeal of WOTUS Rule

On July 12, 2018, the United States Environmental Protection Agency (“USEPA”) and the United States Army Corps of Engineers (“USACE”) published a “Supplemental Notice of Proposed Rulemaking” soliciting additional comments on their proposal to repeal the “Waters of the United States” rule adopted in 2015 (the “2015 Rule”).¹ The new 30-day comment period will end on August 11.

Any rule affecting the scope of Clean Water Act jurisdiction could have significant effects on broad sectors of the economy, including land development, infrastructure projects, linear projects such as pipelines, and any other project involving discharges or wetland impacts potentially regulated under the Act.

The agencies have proposed to repeal the 2015 Rule because (1) it failed to achieve regulatory certainty; (2) “certain findings and assumptions” supporting its adoption “were not correct”; and (3) the agencies are “concerned” that it “exceeds [their] authority under the Act.”

The Supplemental Notice solicits comment on the following subjects, among others:

- Legal arguments for and against repeal;
- Whether the 2015 Rule significantly expanded federal jurisdiction under the Clean Water Act in comparison to pre-existing rules (and, if so, whether that expansion altered State, tribal, and local government relationships in implementing the Act); and
- Whether repealing the 2015 Rule would adversely affect jurisdictional determinations rendered pursuant to it (and, if so, whether this potential harm outweighs the potential benefits).

A final decision on the repeal rule is currently projected to be released in November 2018, but this date could slip. This would be the first step in a two-step plan to repeal and replace the 2015 Rule. The second step will be to propose a new, more limited rule. The Supplemental Notice clarifies,



however, that the agencies are proposing to repeal the 2015 WOTUS Rule “permanently and in its entirety” “regardless of the timing or ultimate outcome” of the effort to adopt a new rule. The effect would be to reinstate the regulatory language that existed immediately prior to 2015 Rule. A draft of the replacement rule is currently projected to be released for comment in August 2018.

Meanwhile, implementation of the 2015 Rule has already been stayed by the agencies and by several courts. On February 6, 2018, the agencies postponed the effective date of the 2015 Rule until February 6, 2020. Legal challenges to this action are currently pending, however.² Separately, two federal district courts have entered preliminary injunctions blocking implementation of the rule in 24 States,³ and similar motions are pending in two other federal district courts.⁴

Together, these developments create substantial uncertainty for the regulated community. While repealing the 2015 Rule would eliminate one source of controversy, the pre-existing rules also caused substantial confusion, controversy, and litigation. Because both the repeal and replacement rules are certain to be challenged in court, the scope of Clean Water Act jurisdiction will not be resolved for years. Until then, clients pursuing projects in jurisdictionally marginal waters should consult with experienced legal counsel to assess and mitigate risk. They should also consider participating in the rulemaking process by submitting comments in response to the Supplemental Notice.

King & Spalding has extensive experience representing clients in administrative and environmental matters, including enforcement and permitting matters involving the WOTUS rule, and has represented clients in state attorneys general investigations and litigation in all 50 states and the District of Columbia for more than three decades. We also have substantial experience developing comments for individual businesses and trade associations regarding proposed regulations, including WOTUS. If you have questions about how these developments may affect you or your business, please contact any of our lawyers noted on the first page.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

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¹ See USACE and USEPA, *Definition of Waters of the United States*— *Recodification of Preexisting Rule*, 83 Fed. Reg. 32227 (July 12, 2018).

² See USACE and USEPA, *Definition of Waters of the United States*— *Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5200 (Feb. 6, 2018) (“Suspension Rule”). Challenges to the Suspension Rule are pending in at least two federal district courts. See *New York v. Pruitt*, No. 1:18-cv-1030 (S.D.N.Y.) (challenge by 10 states and the District of Columbia); *South Carolina Coastal Conservation League et al v. Pruitt*, No. 2:18-cv-330 (D.S.C.) (challenge by environmental groups).

³ See *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *id.*, No. 3:15-cv-59, Order of Sept. 4, 2015 (Doc. 79) (preliminarily enjoining the rule in 13 states: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming); *Georgia v. Pruitt*, No. 2:15-cv-79 (S.D. Ga.), Order of June 8, 2018 (Doc. 174) (preliminarily enjoining the rule in 11 states: Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin and Kentucky). Environmental groups have intervened in the *Georgia* case and stated their intent to appeal the preliminary injunction.

⁴ See *Texas v. USEPA*, No. 3:15-cv-162 (S.D. Tex.) (challenge by Texas, Mississippi, and Louisiana); *American Farm Bureau v. USEPA*, No. 3:15-cv-165 (S.D. Tex.) (challenge by agricultural and industry associations); & *Ohio v. EPA*, No. 2:15-cv-02467 (S.D. Ohio). (action by Ohio, Michigan, and Tennessee).