Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 12/20/2017 3:44:09 PM
To: Todd F. Gaziano [TGaziano@pacificlegal.org]
CC: Jonathan Wood [JWood@pacificlegal.org]; Bakst, Daren [Daren.Bakst@heritage.org]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]
Subject: RE: Tate: phone Mtg. request re: Sec. 431 on WOTUS rule in Minibus/cromnibus

Hi Todd-

We are not in a position to speak on behalf of the hill, but I can certainly connect you with Lee Forsgren in the Office of Water (cc'd). He's very familiar with the issue and different perspectives surrounding it.

You are always welcome to email me! Sorry for the delay.

Tate

Elizabeth Tate Bennett
Associate Administrator for Public Engagement & Environmental Education
Office of the Administrator
U.S. Environmental Protection Agency
(202) 564-1460
Bennett.Tate@epa.gov

From: Todd F. Gaziano [mailto:TGaziano@pacificlegal.org]
Sent: Wednesday, December 20, 2017 10:12 AM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Cc: Jonathan Wood <JWood@pacificlegal.org>; Bakst, Daren <Daren.Bakst@heritage.org>
Subject: Tate: phone Mtg. request re: Sec. 431 on WOTUS rule in Minibus/cromnibus

Tate,

I don't know if you saw my meeting request below, but at this point, a phone connection is probably best—unless you or someone else at EPA can confirm that subsection (b) it out of the bill.

I don't mean to bug you unreasonably, but this is a fair warning I will continue to try to reach you "reasonably" (and more frequently) until you tell me the provision is out, you connect me to someone who is working the issue, or you affirmatively tell me to go away.

Todd

Todd F. Gaziano | Senior Fellow in Constitutional Law
Executive Director of the DC Center
Pacific Legal Foundation
Ex. 6 (o)
(c)

From: Todd F. Gaziano
Sent: Friday, December 15, 2017 10:55 AM
To: 'Bennett, Tate' <Bennett.Tate@epa.gov>
Cc: Bakst, Daren <Daren.Bakst@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: Mtg. request re: Sec. 431 on WOTUS rule in Minibus

Tate:

Thanks for your action to date (and I've been confused with my brother Tom before, so I'm only amused by that).

We've discussed the provision more amongst ourselves, and with some other CWA experts. I am even more concerned about it the longer I study it, and I'm more convinced that subsection (b) can serve no good purpose anyway. As for its unintended harm, it would not just codify *one* bad guidance from one year. The provision, on its face, would codify all regulations (plural) and guidance (that would be interpreted as plural in that phrase) in existence in 2015. Thus, it would codify or insulate (at least temporarily) scores of bad and otherwise illegal guidance documents from decades of horrible administration, many of which we have been litigating against. EPA would likely need a "reasoned justification" to depart from any and all of them in the new rule. I think Daren agrees with me about the harm, even if he is a little less apocalyptic than I am.

Given our deep concern, we'd like to be introduced to and meet (or at least talk) with the appropriate folks in the Water Office who might be responsible for pushing back on the subsection or who might be saddled with it if it is not killed. Can you connect us and help arrange such a meeting?

Todd

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From: Bennett, Tate [mailto:Bennett.Tate@epa.gov]
Sent: Friday, December 15, 2017 10:21 AM
To: Todd F. Gaziano <TGaziano@pacificlegal.org>
Cc: Bakst, Daren <Daren.Bakst@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Sec. 431 on WOTUS rule in Minibus

Hi Tom-

Apologies for the delay. We understand your position on this section/1986 guidance and have passed this along to the Office of Water. We will let you know if we have any questions. It's

Don't be a stranger.

Tate

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From: Todd F. Gaziano [mailto:TGaziano@pacificlegal.org]
Sent: Thursday, December 7, 2017 8:54 AM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Cc: Bakst, Daren <Daren.Bakst@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: Sec. 431 on WOTUS rule in Minibus

Tate,

It was great to meet you yesterday at the Heritage roundtable event. My colleagues and I at PLF may have many occasions to work with you and others at EPA.

As the below correspondence with Daren indicates, subsection 431(b) in the House minibus bill may not be quite as "disastrous" as I first thought in locking in 2015 regs and guidance, but it would tie EPA's hands in some clear and harmful ways until a final rule is issued, and it may still complicate the eventual replacement of the WOTUS rule under the APA. It needs to be modified or dropped to have the effect that I think was intended, but I at least see some method to the legislative madness.

Please let us know if we can provide any further help or advice on this matter.

Todd

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From: Todd F. Gaziano
Sent: Wednesday, December 06, 2017 6:20 PM
To: 'Bakst, Daren' <Daren.Bakst@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

Two issues:

1. At a minimum, it says that EPA MUST follow Rapanos Guidance (not Scalia) until it issues a final rule, or at least an interim final rule. How long will that take?
2. It still is ambiguous enough that it might complicate replacing the Rapanos Guidance. For example, it might allow EPA to replace the now mandated Rapanos Guicance, but as to that, it would have to give sufficient reasons under the APA, since section (a) do not apply to the new rule, only the withdraw of WOTUS.

Regardless of how bad it is, it should go.

From: Bakst, Daren [mailto:Daren.Bakst@heritage.org]
Sent: Wednesday, December 06, 2017 6:08 PM
To: Todd F. Gaziano <TGaziano@pacificlegal.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: FW: Tomorrow on WOTUS

Todd and Jonathan,

I am trying to process this language. I am trying to figure out the impact of this language: "Except as otherwise provided by any Act or rule that takes effect after the date of enactment of this Act."

This *seems* to be saying that the EPA could still issue a rule that does not implement the old guidance so long as such rule goes into effect after the date of the appropriations bill. The problem is the language in (b) still likely gives a Congressional blessing to the old rules and guidance.

I think Congress is also trying to give legal cover for the interim stuff as well.

Thoughts?

Daren

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From: Bakst, Daren
Sent: Wednesday, December 6, 2017 11:22 AM
To: 'Todd F. Gaziano' <TGaziano@pacificlegal.org>
Cc: Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

This was in a "minibus" bill that passed the House. I am not saying that this bill will pass, but I think there is a good chance that the following language would be included in any omnibus bill:

See this recent article: https://www.washingtonpost.com/news/energy-environment/wp/2017/11/30/gop-crafts-spending-bill-provisions-aimed-at-speeding-repeal-of-water-protection-rule/?utm_term=.0ec68799f1a7

H.R. 3354: https://www.congress.gov/bill/115th-congress/house-bill/3354/text

SEC. 431.

(a) AUTHORIZATION.—The Administrator of the Environmental Protection Agency and the Secretary of the Army may withdraw the Waters of the United States rule without regard to any provision of statute or regulation that establishes a requirement for such withdrawal.

(b) EFFECT OF WITHDRAWAL.—Except as otherwise provided by any Act or rule that takes effect after the date of enactment of this Act, if the Administrator of the Environmental Protection Agency and the Secretary of the Army withdraw the Waters of the United States rule under subsection (a), the Administrator and Secretary shall implement the provisions of law under which such rule was issued in accordance with the regulations and guidance in effect under such provisions immediately before the effective date of such rule.

(c) DEFINITIONS.—In this section the term "Waters of the United States rule" means the final rule issued by the Administrator of the Environmental Protection Agency and the Secretary of the Army entitled "Clean Water Rule: Definition of 'Waters of the United States'" on June 29, 2015 (80 Fed. Reg. 37053).

From: Todd F. Gaziano [mailto:TGaziano@pacificlegal.org]
Sent: Wednesday, December 6, 2017 11:16 AM
To: Bakst, Daren <Daren.Bakst@heritage.org>
Cc: Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

Sorry for my delay in responding to this, but I may try to talk to you for a couple of minutes when I arrive if you can't respond by email to my question, but I was unaware of the legislation that exempts this rulemaking change from APA requirements. I'd like to know more about that.

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From: Bakst, Daren [mailto:Daren.Bakst@heritage.org]
Sent: Tuesday, December 5, 2017 2:55 PM
To: Todd F. Gaziano <TGaziano@pacificlegal.org>
Cc: Gordon, Robert <Robert.Gordon@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

Todd,

I don't have an answer to your question about groups like AFBF, but I highly doubt that such groups will be there. I would also just assume that our audience are folks who have some knowledge of WOTUS, but not at the level of those groups.

What if I provide a 5-6 minute update that would:

- Explain the latest developments
- Lay out the principles and substance of what a definition of WOTUS should look like

I'd like to get buy-in on the need to limit waters to traditional navigable waters (TNRs), tributaries to TNRs, and wetlands of TNRs. Basically, my presentation would cover the attached comment.

Then, as a suggestion, you could discuss:

- Concerns regarding the process (e.g. need for the agencies to look beyond Rapanos for support (I will mention Riverside and SWANCC in my brief discussion regarding defining tributaries; issue regarding getting better support for getting rid of the rule itself; please be aware that Congress has appropriations language that would allow the agencies to withdraw the rule without having to worry about the APA. I can provide more info on this if you need it)
- Enforcement changes (my suggested ideas include the Corps and EPA identifying how they could develop an MOU to allow property owners to secure JDs within 60 days or so, directing that certain enforcement actions cease until after review by HQs, and set new priorities)

I am still thinking through what I think of the EPA and Corps proposing (and seeking comment) on extending the applicability date of the Clean Water Rule (it seems odd to seek to repeal the rule and extend its applicability date; I think it is just another way to make sure that it doesn't go into effect):

The Environmental Protection Agency and the Department of the Army ("the agencies") are proposing to add an applicability date to the "Clean Water Rule: Definition of `Waters of the United States'" (the "2015 Rule") to two years from the date of final action on this proposal. On October 9, 2015, the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court, but the Supreme Court is currently reviewing the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 Rule. On February 28, 2017, the President signed an Executive Order, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the `Waters of the United States' Rule." With this proposed rule, the agencies intend to maintain the *status quo* by proposing to add an applicability date to the 2015 Rule and thus provide continuity and regulatory certainty for regulated entities, the States and Tribes, agency staff, and the public while the agencies continue to work to consider possible revisions to the 2015 Rule. See https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0644-0001

Best,

Daren

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From: Todd F. Gaziano [mailto:TGaziano@pacificlegal.org]
Sent: Tuesday, December 5, 2017 1:56 PM
To: Bakst, Daren <Daren.Bakst@heritage.org>

Cc: Gordon, Robert <Robert.Gordon@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

I was on a series of calls, and may have another …

We can condense our discussion. My main question on who will be there is whether there will be anyone else with extensive WOTUS experience, like AFBF, the mining association, home builders?

As far as the substance of our discussion:

- I especially agree we should discuss, and try to raise with Pruitt, concerns about the rulemaking process. For example, we should suggest that he bolster his position for change if EPA cites legal concerns with the WOTUS rule.
- I don't object to most of the discussion about what should go in the new rule, but some of that may be in the weeds for folks who aren't into it and possibly Pruitt.
- We might also discuss what more can/should be done to reign in bureaucrats who are acting as if nothing has changed. I want to suggest that EPA/Corps might come up with some enforcement policy priorities that state what violations are priorities and what are not, which might help get bureaucrats to change behavior during the rulemaking process.

From: Bakst, Daren [mailto:Daren.Bakst@heritage.org]
Sent: Tuesday, December 05, 2017 11:47 AM
To: Todd F. Gaziano <TGaziano@pacificlegal.org>
Cc: Gordon, Robert <Robert.Gordon@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

Todd,

Rob and I just chatted; he is out of the office.

Even though we are allotted 30 minutes, we should expect about 15 minutes, with you and I presenting for about 10 minutes.

Our audience is going to be our friends, e.g. CEI, Capital Research Center, Heartland, etc. There will be about 30-40 people.

I thought we could discuss:

- The latest developments and process to develop a new definition (the two-step process and the recent and current comment period)
- Our ideas on what a new definition should look like, highlighting key principles such as CWA expressly envisions a significant state role, having clear and objective definitions, and then going through what waters we think should constitute "waters of the U.S." in any new rule.

It seems our goal should be to get buy-in from the group on the substance of any new definition.

Also, if we have time, we might want to propose some ideas on how the EPA and Corps could improve the enforcement of the CWA during this interim period before a new rule goes into effect. For example, could the EPA and Corps direct that certain actions, even if currently in litigation, being reviewed by the central offices?

Best,

Daren

My plan, based on what you said, is to provide an update on what is happening, the issues that exist regarding defining "waters of the U.S.", and what we have argued the definition should look like. My goal is to get buy-in on our general principles and definition.

There is one issue that I am not sure if we should address but it is important:

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From: Todd F. Gaziano [mailto:TGaziano@pacificlegal.org]
Sent: Tuesday, December 5, 2017 11:24 AM
To: Bakst, Daren <Daren.Bakst@heritage.org>
Cc: Gordon, Robert <Robert.Gordon@heritage.org>; Jonathan Wood <JWood@pacificlegal.org>
Subject: RE: Tomorrow on WOTUS

Glad to try to come up with an agenda, but it would be helpful for me to know who else will be attending, in part to know who else is an expert or up to speed on WOTUS issues. Can you or Rob send me a list of attendees?

From: Bakst, Daren [mailto:Daren.Bakst@heritage.org]
Sent: Tuesday, December 05, 2017 10:40 AM
To: Todd F. Gaziano <TGaziano@pacificlegal.org>
Subject: Tomorrow on WOTUS
Importance: High

Todd,

You and I will be discussing WOTUS tomorrow. It seems like it would be good if we could come up with a game plan on how to organize the presentation. I am around today if you can chat. It would be good if we could divide up what we would like to present.

Thanks,

Daren

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