

To: Dravis, Samantha[dravis.samantha@epa.gov]
From: Anthony L. Francois
Sent: Wed 4/19/2017 12:59:49 AM
Subject: Following up on 2008 Rapanos Guidance and President's 2/28/17 EO on WOTUS

Good evening Ms. Dravis,

I am writing to follow up a note that I sent last Friday afternoon, regarding the EPA's efforts under President Trump's February 28, 2017 Executive Order to repeal the 2015 WOTUS Rule and replace it with a revised definition of Waters of the United States that is based on Justice Scalia's opinion in *Rapanos v. U.S.*, rather than Justice Kennedy's opinion in that case, on which the agency's 2008 Post-*Rapanos* Guidance and the 2015 WOTUS Rule are based.

We have a specific concern relating to a report that was circulated last Wednesday by E&E News, that EPA's Acting Director of the Wetlands Division in the Office of Wetlands, Oceans and Watersheds, Mindy Eisenberg, had reported to the annual meeting of the Association of State Wetlands Managers that once the 2015 WOTUS Rule was repealed, the agency would rely on its 2008 Post-*Rapanos* Guidance while it developed a new WOTUS definition to replace the 2015 Rule. The article is here:

<https://www.eenews.net/greenwire/2017/04/12/stories/1060053007>

We have two significant concerns, if EPA is in fact considering this approach, both related to the 2008 Post-*Rapanos* Guidance. First, as a policy matter, the 2008 Guidance shares many of the flaws of the 2015 WOTUS Rule, especially its use of Justice Kennedy's *Rapanos* opinion as the basis for determining EPA jurisdiction over wetlands under the Clean Water Act. Since President Trump's WOTUS Executive Order calls for the new WOTUS definition to be based on Justice Scalia's *Rapanos* opinion instead of Justice Kennedy's, it does not seem to advance the implementation of the EO to use the Kennedy-based 2008 Guidance while developing a new rule, the development of which agency career staff may be inclined to drag out over several years. A better course would be to develop new interim guidance that implements the Scalia *Rapanos* opinion.

The second concern is legal. The 2008 Guidance was never submitted to Congress for review under the Congressional Review Act, 5 U.S.C. § 801 et seq., which means that under that Act, it cannot take legal effect. My PLF colleague Jonathan Wood wrote an excellent piece for the Daily Caller which spells this out in detail, at <http://dailycaller.com/2017/03/09/trumps-progress-on-the-epa-is-a-good-start-but-more-reform-is-needed/>. The 2008 Guidance is one of the rules which we feature on our RedTapeRollback.com project website, as never having been submitted

to Congress, in violation of the Review Act (see <https://www.redtaperollback.com/unreported-regulations>). The bottom line, we think, is that if EPA does intend to rely on the 2008 Post-*Rapanos* Guidance while developing a new permanent regulation to define Waters of the United States, the agency is required by the Review Act to submit it to Congress in order for it to have legal effect.

For the long term project of a new WOTUS definition, built on Justice Scalia's opinion in *Rapanos* per the President's WOTUS EO, submitting the 2008 Post-*Rapanos* Guidance to Congress for review under the Congressional Review Act would advance the effort significantly. Under the Review Act, if Congress disapproves of a rule, the agency cannot later adopt a substantially similar one. That may be the only way to tie the hands of a future administration, which may want to revert to a Kennedy based rule in order to more broadly impose Clean Water Act requirements, as the last administration did. And, disapproval of the 2008 Guidance (which is based on the Kennedy test) under the Review Act would substantially strengthen Administrator Pruitt's legal case that the new WOTUS definition must be based on the Scalia test.

We would be happy to discuss these issues at greater length; you are probably aware that Pacific Legal Foundation probably has the best team of attorneys in the nation on the issues of both the *Rapanos* decision and the Waters of the U.S. Rule, and the Congressional Review Act.

Best,

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