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3 Takeaways From The New, Narrower Clean Water Act Rule

By **Juan Carlos Rodriguez**

Law360 (January 24, 2020, 9:03 PM EST) -- The Trump administration has shortened the reach of the Clean Water Act and claims to have made permitting under the law more predictable, but the new rule is likely to end up in the same place as the Obama-era one it replaced — mired in litigation and vulnerable to political winds.

It has never been completely clear which waterways in the U.S. are subject to Clean Water Act jurisdiction, despite decades of rules, rule changes, and court decisions that have attempted to answer the question. The Trump administration took a crack at setting it straight, **offering up** its Navigable Waters Protection Rule on Thursday.

The Trump U.S. Environmental Protection Agency and Army Corps of Engineers took a narrower view of the act's scope than did the Obama administration, saying they tried to make it as easy to determine as possible when a body of water is or isn't subject to a federal permitting regime. The rule has been widely praised by industry organizations and agriculture-heavy state politicos but slammed by green groups, who say it doesn't go far enough.

Although the rule's future is unclear, it does resolve some outstanding issues, at least for now, Hunton Andrews Kurth LLP partner Kerry McGrath said.

"This is still a complex issue," McGrath said. "It's not as simple as everybody wants it to be. But I think these new definitions and bright lines will go a long way to provide some clarity and consistency in jurisdictional determinations."

Here are three takeaways from the new Navigable Waters Protection Rule.

Rule Will Be Thoroughly Tested in Court

Just like its Obama-era counterpart, the new rule defining waters of the U.S. will be the target of litigation from groups across the country.

Brett Hartl, government affairs director at the Center for Biological Diversity, said opponents of the rule are sure to focus on three procedural steps the agencies took to get to Thursday's final rewrite: a rescission rule, **a failed rule** to delay implementation of the 2015 rule, and the final rewrite rule.

Hartl said at every stage of the process, the EPA and Corps told commenters that they should limit their input to the rule at hand, and that once they released the rewrite, they did not allow comments on the previous two steps.

"It artificially cabined what comments they were willing to look at and consider, which you really aren't allowed to do," Hartl said. "Had they not tried to game the system when it came to public commenting, they'd be in better shape, but they kept creating this perception that they were artificially segmenting the rule, like, 'Wink, wink, nod, nod, you don't know where we're going,' even though they kept saying where they were going."

But McGrath said the administration does have some things going for it, such as that the final rewrite

closely mirrors the proposed version and that there was ample time for comments.

Many expect the rule to come before the U.S. Supreme Court at some point, if it isn't replaced or overruled by a later presidential administration. Kevin Minoli, a partner at Alston & Bird LLP and a longtime EPA lawyer who served as acting general counsel at the beginning of the Trump administration, said the rule's fate at the high court depends on what the justices focus on.

"Is the court going to look for a robust scientific record that clearly justifies the calls that the agency made? Because I think the agencies will struggle if that's what the Supreme Court ultimately looked for," he said. "But if the Supreme Court looks for a legal interpretation that was within the bounds of what the law allows for, I think the government has a better shot at defending the rule."

Real-World Impacts Will Be Varied

The rule, once implemented, should help people who need to know whether water on their land or near a possible project is protected by the Clean Water Act, Saul Ewing Arnstein & Lehr LLP partner Nancy Burke said.

"The rule says that waters of the United States are one of four things. And if it's not one of those four things, then it's not a jurisdictional water," she said.

Under the new rule, the act covers territorial seas and traditional navigable waters; tributaries that flow into jurisdictional waters; wetlands that are directly adjacent to jurisdictional waters; and lakes, ponds and impoundments of jurisdictional waters.

Burke said the definitions of what it means for a wetland to be "adjacent" to a navigable water of the U.S., what the definition of a lake or pond is, and whether an artificial structure that divides a water body impacts jurisdiction are clearer in the new rule.

"A lot of these things are set out in black and white here in a way that's different from before," Burke said.

But while the administration tried to make it easier to identify waterways that are protected and would necessitate permitting to impact them, that's only one hurdle for project proponents to clear, she said. Many states have their own definitions for protected waterways that may be stricter than the federal rule and that could impact permitting as well, she said.

And Minoli noted that the final rule states several times that the Army Corps still may need to do site visits to make final jurisdictional determinations in some cases.

"I think the fact that there are a number of places where the rule says that that might be necessary is a sign that we're not at a place where we're going to know for certain what the impacts are going to be or where the lines are actually drawn for quite some time," he said.

Hartl said the changes aren't likely to cause a "mad rush" for new projects, but that over time it will make it easier for projects to avoid permitting, something he said will be damaging to the environment.

"It's not like an immediate catastrophe, it's more like a slow-burning catastrophe," he said.

Post-Proposal Changes Are Mostly Minor

When the proposed rewrite rule was **issued in December 2018**, it garnered close to 630,000 comments. Some felt the EPA and Army Corps could go further in narrowing the definition, while others wanted changes that were broader than even the Obama-era rule.

In the end, the agencies did make a couple of notable changes that actually expanded jurisdiction a little bit from the proposed version, but probably won't be that significant in the grand scheme of things.

For instance, McGrath said the definition of tributaries is a bit broader. The proposal required

tributaries to contribute perennial or intermittent flow to a navigable water in a typical year, but the final rule requires that the feature itself be perennial or intermittent and that it contributes surface water flow.

"So there's not a limit on what sort of the level of flow that it has to contribute," she said.

McGrath said the change means that just because water might travel through some type of ephemeral feature doesn't mean jurisdiction is severed for the upstream navigable water. Under the new rule, 12 categories of waters including ephemeral streams and pools are not covered by the CWA.

"I think it was an attempt to address concerns that they would be cutting off some relatively permanent waters upstream just by virtue of the fact that there is an ephemeral [feature] between that stream and the bigger water," she said.

The administration also consolidated the original six categories of covered waters into four for the final rule, but that doesn't change the actual implementation at all, McGrath said.

--Additional reporting by Adam Lidgett. Editing by Breda Lund and Emily Kokoll.
