Lawyer Insights

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New WOTUS Rule Could Have Widespread Impact

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Since the Supreme Court's 2006 split-decision in *United States v. Rapanos*, successive administrations have struggled to define the extent of federal jurisdiction under the Clean Water Act (CWA). That struggle continued through the Obama administration and now, into the Trump administration. The stakes are high because of the substantial federal oversight triggered if a property is subject to CWA jurisdiction.

Now-retired U.S. Supreme Court Justice Anthony Kennedy remarked that the scope of jurisdiction under the federal Clean Water Act (CWA) is "notoriously unclear." He went on to note that "the reach and systemic consequences of the [CWA] remain a cause for concern … and the consequences to landowners even for inadvertent violations can be crushing." For owners of property that contain jurisdictional "waters of the United States," the time and cost associated with the CWA permitting process is daunting. Conversely, failure to get a permit when otherwise required can expose a landowner to criminal enforcement or civil penalties accruing at the rate of $53,484 per day. Against this risk is the additional difficulty that often it is unclear to what extent property is subject to CWA jurisdiction. The task of determining whether the CWA applies has become even more difficult due to a recent district court opinion that effectively creates different standards depending your state.

The Obama administration finalized a rule in 2015 that it stated sought to bring clarity to the scope of CWA jurisdiction. Critics, however, alleged that the rule illegally expanded CWA jurisdiction and failed to provide needed clarity. As a result, the rule faced an onslaught of litigation in district and appellate courts. Ultimately, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 rule pending adjudication of the substantive challenges to the rulemaking. As a result, the Obama administration rule was never implemented and stakeholders, including property owners, have never internalized the rule's requirements into their operations and long-term planning.

Enter the Trump administration, which established a multi-pronged framework to address the wide-ranging concerns with the 2015 rule. First, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) finalized a rule to delay the applicability of the 2015 rule by two years. This delay was intended to provide the EPA time to thoughtfully evaluate the substantial concerns that were raised regarding the 2015 rule and, as determined appropriate after that evaluation, to replace it with a new rule with a narrowed scope of federal jurisdiction under the CWA while protecting against the possibility that the Sixth Circuit's stay of the 2015 rule would be lifted.

The EPA argued that the applicability rule was necessary to establish national uniform standards for application of the CWA. However, the water was muddied in mid-August 2018 when a district court, in *South Carolina Coastal Conservation League v. Wheeler*, issued an injunction against implementation of the applicability rule. In issuing its order, the district court found the EPA violated basic principles of administrative law and while "[c]ertainly, different administrations may implement different regulatory priorities … the [Administrative Procedure Act] 'requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process.' The agencies failed to promulgate the [rule delaying the effective date of the 2015 rule] with that required fidelity here. The court cannot countenance such a state of affairs."

As a result of the South Carolina Coastal Conservation League decision, the 2015 rule is suddenly reinstated in over 20 states. However, in 21 states—subject to prior or subsequent orders by three separate district courts blocking the 2015 rule—a different legal jurisdictional framework remains applicable. Determining what legal standard applies to identify if a water, wetland, or other feature is subject to the CWA now depends on where a property is situated.

The EPA, the Corps, and the industry groups that intervened in defense of the Trump administration's applicability rule, are seeking an expedited appeal in the U.S. Court of Appeals for the Fourth Circuit and a stay of the district court's order. In addition to being plainly erroneous on the law, the EPA and the Corps argue that the district court's decision will result in confusion and uncertainty by imposing varying legal standards in different states, and that the "patchwork" nature of CWA jurisdiction will burden regulators. In its motion to stay the district court's decision, the EPA and the Corps argue "the burdens associated with applying different jurisdictional analyses in different states, and the agencies' concern that the analysis applicable to some states may change if additional injunctions are granted (potentially requiring the agencies to redo an ongoing jurisdictional determination or permit review), are not insubstantial." For example, the EPA and the Corps argued that because there are over 5,000 pending requests for CWA jurisdictional determinations and over 11,000 pending applications for CWA permits, regulators will face extensive complications as a result of the differing federal legal standards.

States and industry groups are not putting all of their eggs into the Fourth Circuit basket. These stakeholders have renewed previously filed motions for an injunction against the 2015 rule in district courts. For example, in Texas, a district court subsequently blocked the 2015 rule in three additional states and there is a pending motion in Ohio which, if granted, would further shrink the number of states subject to the 2015 rule even if the South Carolina Coastal Conservation League decision survives appeal. Additional orders from district courts would apply to the states engaged in those cases, which could stay the 2015 rule in additional states or, potentially, nationwide.

If this balkanized approach to CWA jurisdiction is not resolved in the short-term by the courts, the EPA and the Corps may try various administrative steps to provide clarity. For example, the comment period has closed on the proposed repeal of the 2015 rule, and the agencies could expedite steps to finalize that rule, thereby adopting a nation-wide standard based on the pre-2015 legal framework for CWA jurisdiction and mooting the need for the "time-out" provided by the applicability rule. We can anticipate that a finalized repeal rule, however, will be immediately challenged by professional environmental advocacy groups and, as a result, we may see a return to a patchwork of federal jurisdiction under the CWA as various district courts adopt, or reject, requests to stay the rule. As a result, the outlook for clarity

in the short-term is relatively bleak and that the reach of the CWA is likely to remain murky and turbulent for the foreseeable future.

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