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Up the Creek Without a Paddle: Navigating New Clean Water Rule

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The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers promulgated a new rule under the Clean Water Act (CWA) this past June with the intent of finally clarifying the agencies' jurisdiction over "waters of the United States." Unfortunately, the controversial new Clean Water Rule has only muddied the waters, as its future is uncertain. Conflict over the rule centers around industry and property owners' need for predictable permitting guidelines within the authority of the CWA and the agencies' goal of ensuring vital wetlands and waterbodies are adequately protected. Challenges to the rule were filed in federal district courts and courts of appeals all over the country by individual states, the regulated community and environmental organizations. As discussed below, all eyes are now on the U.S. Court of Appeals for the Sixth Circuit, which stayed the implementation of the rule across the country and now must decide whether it even has jurisdiction to decide the substantive issues of the case.

What Is the Significance of the New Rule?

The Clean Water Act was passed over 40 years ago but its scope and reach over various waterbodies across the country is still being debated. Congress created uncertainty in the act



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by limiting the agencies' jurisdiction to "navigable waters," which is defined only as "waters of the United States, including the territorial seas." Faced with this overly broad and vague definition, the agencies have wrestled with how to determine which waterbodies and wetlands constitute "waters of the United States" and therefore fall under their jurisdiction. Whether waterbodies are subject to federal jurisdiction is significant because of the myriad federal regulations that are triggered once jurisdiction is established. Such regulations include the comprehensive permitting scheme known

as the National Pollutant Discharge Elimination System (NPDES), dredge and fill permits, water quality certifications, and oil spill prevention programs.

In 2006, the U.S. Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006), clarified—to some extent—the limit of the agencies' jurisdiction. In a plurality decision, Justice Anthony Kennedy concurred with the four conservative justices that the Corps had overstepped its jurisdiction, and articulated a "significant nexus" test to determine which waterbodies constitute "waters of the United States." Jurisdiction over a waterbody or wetland exists, Kennedy explained, where it has a "significant nexus" to other jurisdictional waters. To establish a "significant nexus" the waterbody must significantly affect the physical, biological and chemical integrity of a downstream navigable waterway. This ruling only led to further uncertainty as the Corps struggled to apply the subjective "significant nexus" test on a site-by-site basis to establish which waters met these criteria.

Implications of the New Rule

In response to the continued uncertainty after *Rapanos*, the EPA and the Corps promulgated the new Clean Water Rule on June 29. In the summary of the final rule, the agencies proclaimed that the new rule will "ensure protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected

under the act.” The rule clarifies the definition of tributaries and adjacent waters, and also codifies the agencies’ authority to make determinations of what constitutes a jurisdictional waterbody under the “significant nexus” test.

Perhaps the most controversial aspect of the new rule is the addition of bright-line geographical limits to establish jurisdiction over waterbodies. Under the rule, all waters located within a 100-year floodplain of traditional navigable waters (i.e., waters used in commerce, interstate waters and territorial seas) and all waters within 4,000 feet of a high tide line or ordinary high water mark of jurisdictional waters that also have a significant nexus to the jurisdictional water are considered “waters of the United States.” In keeping with the *Rapanos* decision, these case-specific “significant nexus” analyses require a determination if “any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity” of the nearest traditional navigable water.

Finally, in response to public comments and consistent with past practice, the agencies categorically excluded certain waters from jurisdiction even though they would otherwise be jurisdictional. Such exemptions include groundwater, wastewater treatment systems, prior converted cropland, and stormwater control features constructed in dry land.

Procedural and Substantive Challenges

As soon as the new rule was promulgated, procedural and substantive challenges were filed across the country in federal district courts as well as courts of appeals. The major procedural challenge alleges that the rule violates the Administrative Procedure Act because the agencies made significant changes from the proposed rule to the final rule, thereby failing to provide commenters with adequate notice of the framework for the final rule. The major substantive

challenge alleges the rule exceeds the Supreme Court’s jurisdictional limits of the CWA as set forth in *Rapanos*. But before these issues can even be reached, the courts will have to first decide whether jurisdiction lies with the district courts or courts of appeals, an issue that requires interpretation of the CWA’s grant of jurisdiction.

Although multidistrict and multicircuit litigation is ongoing, the latest legal development comes from the Sixth Circuit where four courts of appeals cases were consolidated. On Oct. 9, a divided Sixth Circuit issued a nationwide stay of the Clean Water Rule, finding that the 18 petitioning states opposing the rule demonstrated a “substantial possibility of success” on both substantive and procedural grounds, in *Ohio v. U.S. Army Corps of Engineers (In re EPA and DOD Final Rule)*, Nos. 15-3799, 3822, 3853, 3887 (6th Cir. Oct. 09, 2015). Substantively, the court found that it was “far from clear” that the rule’s new distance limitations were harmonious with the *Rapanos* decision regarding the “permissible parameters of the ‘waters of the United States’ as used in the Clean Water Act.” Procedurally, the court noted the rulemaking process by which the distance limitations were adopted was “fairly suspect” because the proposed rule did not include any proposed distance limitations in its use of terms like “adjacent waters” and “significant nexus” that are included in the final rule.

The dissenting judge argued that the court should have determined whether the court has subject-matter jurisdiction before issuing the stay, an issue that is currently being briefed by the parties. In response, the majority noted that it would be better to issue the stay prior to deciding the jurisdictional question given the “sheer breadth of the ripple effects caused by the rule’s definitional changes.” The court must now determine its own jurisdictional authority before proceeding to the merits of the case.

The Sixth Circuit’s ruling came about one month after the U.S. District Court

for the District of North Dakota granted a motion for a preliminary injunction of the rule filed by 13 states in *North Dakota v. EPA*, Civ. No. 3:15-cv-59 (D.N.D. Aug. 27, 2015). The district court first found it had jurisdiction to hear the case before finding the injunctive relief was appropriate. Similar to the Sixth Circuit’s decision, the court said it “appears likely” that the agencies violated their grant of authority in promulgating the rule and that the agencies also failed to comply with the Administrative Procedures Act.

What’s Next for the Clean Water Rule?

The decisions by the Sixth Circuit and North Dakota district court are far from the end of this story, but their harsh critiques suggests that the rule could end up before the U.S. Supreme Court for further review or sent back to the EPA and Corps for further action.

And, in a final twist, Congress has also weighed in on the matter. On Nov. 4, the U.S. Senate voted for a resolution that would void the rule if also passed by the House and signed by the president. However, the White House has already indicated that it would veto the resolution, and Congress would need a supermajority for the resolution to pass. •

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