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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Unsettled Waters: Clean Water Rule Challenges Remain

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Olivia D. Lucas

The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' final rule defining "waters of the United States," also called the Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), has not disappointed in terms of controversy. From proposal to issuance to the slew of court cases contesting it, the Clean Water Rule has gathered unprecedented interest. One of the district court judges presiding over a challenge to the rule has differed from his peers and determined that the rule should be stayed in the 13 states that are plaintiffs in the case before him. And so the substantively controversial rule becomes procedurally controversial as well, at least for the time being. Although the stay may not survive on appeal, the legal wrangling so far already presents some interesting lessons.

Clean Water Rule: Key Provisions

Originally proposed on April 21, 2014, the rule is concerning to many industry and agricultural sectors, as well as many states, who interpret it as a significant expansion of Clean Water Act jurisdiction. In particular, the rule would extend jurisdiction to broad definitions of tributaries and adjacent waters, and would also codify the agencies' ability to make subjective determinations of what constitutes WOTUS under a "significant nexus" determination. While the agencies bill these changes as a simplification of the jurisdictional determination process that would not expand jurisdiction, opponents believe that by defining terms previously left to agency discretion, the agencies are asserting jurisdiction over waters that would previously have been out of reach.

The agencies made a number of changes to the final rule language compared to what was originally proposed in April 2014. The proposed rule had defined tributaries as any water with a bed, banks and ordinary high water mark which contributes flow directly or through other water bodies to a traditional WOTUS. This interpretation would have made many ditches jurisdictional under all CWA programs. While the final rule maintains the same general definition of tributary, the agencies expanded the types of ditches excluded from the definition, including ditches that are not excavated in or relocate a tributary and ditches that do not drain a wetland. Though the rule language does not explicitly exclude roadside ditches, the agencies assert that in implementation the final rule will exclude the vast majority of roadside and other transportation ditches.

Adjacent waters to be considered jurisdictional were defined in the proposed rule as bordering, contiguous or neighboring waters, and the term "neighboring" was defined vaguely. The final rule

establishes a more detailed definition of "neighboring," and further lays out three circumstances under which waters would be classified as such. Again, opponents are concerned that this definition would cover more waters than might otherwise have been included when the determination was left to the agencies' discretion.

The final rule also limits waters that can be assessed under a case-specific evaluation to determine whether a significant nexus exists. The rule allows the agencies to evaluate whether these waters, either alone or in combination with other similarly situated waters in the region, significantly affect more traditional WOTUS. Under the final rule, waters are similarly situated when they perform similar functions and are located sufficiently close together. Opponents of the rule contend that by more precisely defining various terms, fewer waters are left to this case-specific evaluation, which they fear will result in more previously "close cases" from a significant nexus standpoint being immediately swept in under over-broad definitions.

Reaction and Response

Lawmakers, industry and environmental groups reacted quickly to the Clean Water Rule's promulgation. The chairmen of the House and Senate Agriculture Committees, Rep. Mike Conaway, R-Texas, and Sen. Pat Roberts, R-Kan., were critical of the final rule, as were Senate Majority Leader Mitch McConnell, R-Ky., and House Speaker John Boehner, R-Ohio. Agriculture industry groups such as the American Farm Bureau Federation and National Cattlemen's Beef Association, which have been leading opponents, were critical of the final rule and joined lawsuits against it, while environmental groups such as the Natural Resources Defense Council were supportive.

A score of lawsuits contesting the final rule were filed almost immediately in different jurisdictions across the country. Plaintiffs range from industry groups, to agricultural and other interest groups, to individual corporations, to more than half of the states in the union. The 14 cases filed directly in the various courts of appeals have been consolidated in the Sixth Circuit by the Judicial Panel on Multidistrict Litigation. The EPA has also requested that nine cases pending in seven different district courts be consolidated into the district of D.C. At this stage, the threshold question is: Which court has jurisdiction to hear the substantive issues?

The Jurisdictional Question Facing Courts

The Clean Water Act vests jurisdiction in the federal courts of appeals for review of agency action "approving or promulgating any effluent limitation or other limitation under Section 1311, 1312, or 1316 or 1345 of this title ... and ... in issuing or denying any permit under Section 1342 of this title …" 33 U.S.C. § 1369(b)(1). In each of the district court cases, plaintiffs have argued the Clean Water Rule does not concern issuing or denying permits and does not approve or promulgate any "other limitation." Therefore, they argue, jurisdiction is not proper in the courts of appeals, but rather in the district courts under 28 U.S.C. § 1331. The EPA and the Army Corps of Engineers have disagreed, contending that the Clean Water Rule acts as an "other limitation" under the statute and under judicial precedent interpreting "other limitations" as used in § 1369(b).

In most of the district court cases that have acted so far, the courts either determined they do not have jurisdiction over the issue under the CWA and have dismissed the action, or have stayed the action pending the JPML determination. However, with nine cases pending in seven different judicial districts, and for a rule as controversial as this, it is not surprising that one court bucked this trend. On Aug. 27, 2015, a day before the rule was to take effect, U.S. District Judge Ralph Erickson of North Dakota

blocked implementation of the Clean Water Rule.

The North Dakota court held that the district court did have jurisdiction over the challenge to the rule. Contrary to its sister districts, the North Dakota court found that the rule was not an "other limitation" and, accordingly, the Clean Water Act did not require direct appellate jurisdiction. Then, in considering the merits of the motion for stay of the rule, the North Dakota court ruled that "it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue." Therefore, the court found, the plaintiffs had met their burden for grant of an injunction of what the court called an "exceptionally expansive" rule.

Given directly contradictory opinions in North Dakota, West Virginia and Georgia, confusion was immediate. The EPA took the position that it would respect the injunction in the plaintiff states in the North Dakota decision, but would implement the rule in other states not plaintiff to that case. On Sept. 4, the North Dakota court declined to extend its injunction past the 13 plaintiff states: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming. Judge Erickson took this position out of deference for the other district courts' rulings of lack of jurisdiction or stay of the cases pending consolidation.

On Sept. 8, 2015, Texas, Mississippi and Louisiana filed a motion to lift the stay that the Southern District of Texas had imposed based on the pending JPML determination. Citing the North Dakota decision, the southern states requested a similar preliminary injunction enjoining application of the rule arguing that these three states will succeed on the merits, the rule causes immediate and irreparable harm, and an injunction will not harm the agencies and would serve the public interest.

Lessons Learned

From the plaintiff's perspective, the scattershot approach of many lawsuits in different district courts has been partially successful to stall the rule's implementation, at least for the time being. And, success in one district court has encouraged further action in other district courts where the jurisdictional question had not been reached. Given the split among federal courts regarding who has original jurisdiction and the likelihood of success on the merits, the status of WOTUS is far from settled.

With Judge Erickson's order in North Dakota, the likelihood of a circuit split is increased. For example, the Eighth Circuit could uphold the North Dakota district court's jurisdictional determination, while the Sixth Circuit consolidated direct challenge proceeds. Given the unprecedented amount and nature of the response to this rule, such a circuit split would surely catch the U.S. Supreme Court's attention.

Furthermore, although it may not have a lasting precedential effect, the North Dakota decision provides congressional opponents of the regulation ammunition in their opposition and will energize the proponents as Congress returns in September and considers legislation to overturn the regulation.

—By Christopher H. Dolan and Olivia D. Lucas, Faegre Baker Daniels LLP

Christopher Dolan is a partner in Faegre Baker Daniels' Minneapolis office. Prior to joining the firm, Dolan was a McCleary law fellow at the Human Rights Campaign.

Olivia Lucas is counsel in Faegre Baker Daniels' Denver office, where she co-leads the water segment of the firm's energy and natural resources industry team.