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Practice Update

EPA's Clean Water Rule: Congressional Attempt to Stop is Vetoed, but Pending U.S. Court of Appeals' Stay Remains in Effect

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On January 19, 2016, President Obama issued the ninth veto of his presidency, rejecting Joint Resolution 22, a congressional resolution that would have overturned EPA's recently enacted regulations defining the "waters of the United States" (WOTUS) under the Clean Water Act. Attempted congressional intervention highlights the contentious nature of the new Clean Water Rule, which defines the scope of federal permitting jurisdiction over development and other activities in wetlands.

Background

The new rule is an attempt by EPA to clarify the extent to which activities in and adjacent to waterways require permitting under Section 404 of the Clean Water Act, 33 U.S.C. §§1251-1387 (1972). The text of the statute requires permits for dredging and discharge of materials into "navigable waters," which were initially defined as waters that are or are readily "navigable in fact" or "readily susceptible" to navigation. In 1977, the Army Corps of Engineers expanded the definition to include the "waters of the United States," which were in turn defined broadly to include, among other things, interstate and intrastate

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waters (e.g. lakes, rivers, streams, intermittent streams) and “adjacent” wetlands. The term adjacent was defined to include wetlands that are separated from the streams, etc. by dikes and in some instances dry land.

In Rapanos v. United States, 547 U.S. 715 (2006), the Supreme Court struck this definition. In a plurality opinion, four Justices held that “waters of the United States” could include only relatively permanent or continuously flowing water. Justice Kennedy, in a concurring opinion proposed a test calling for a “substantial nexus” between the area deemed a wetland and a body of water. This led to the need for further regulatory action by the agency.

The Regulations

WOTUS is predicated on more than 1,2000 peer-reviewed scientific studies, conducted by the EPA’s Office of Research and Development, which overwhelmingly concluded that small tributaries and wetlands play a significant role in determining the ecological health and purity of downstream water sources. The EPA’s expressed view is that these findings satisfy the “significant nexus” test, articulated by Justice Kennedy in Rapanos, which holds that a body of water or wetland in within the bounds of federal authority, when it by itself or in combination with similar waters, fundamentally impacts the biological, chemical or physical makeup of a downstream body of water.

SCOPE

WOTUS provides a three category water classification system, which decrees that there are bodies of water which are: 1) are inherently jurisdictional or “jurisdictional by rule” 2) are jurisdictional by virtue of their the influential nexus with waters that are jurisdictional by rule, and 3) waters that lack a sufficient nexus with jurisdictional waters to merit inclusion under WOTUS. Strictly excluded from this categorical analysis are waste

treatment systems, prior converted cropland, upland ditches, groundwater, gullies, non-wetland swales, storm sewer systems, and water delivery and reuse features. Furthermore, WOTUS has no effect on the exclusion of agricultural stormwater discharges from the definition of "point source" in CWA §502(11) and the exemptions to fill discharge permit requirements provided for under CWA § 404(f).

The first, innately jurisdictional category mandates that traditionally navigable waters, such as interstate waters, territorial seas, and impoundments of these waters are jurisdictional by rule. WOTUS does not differ from prior interpretations of the Clean Water act in this regard; however, WOTUS provides a new definition of "tributaries," which now includes those waters having a bed, bank, high water mark that contribute directly or indirectly to traditionally navigable waters. Additionally, WOTUS offers and encompasses a new definition of "adjacent" waters, which include "bordering, contiguous [with] or neighboring" traditionally navigable waters. This recent expansion of the Clean Water Act's purview to more clearly include tributaries and adjacent waters has prompted enforcement and regulatory concerns, as well as state sovereignty objections.

Those waters which garner federal oversight as a result of their "influential nexus," acquire this classification on a case-by-case basis. Such isolated or non-adjacent waters, include prairie potholes, Caroline and Delmarva bays, pocosins, western vernal pools in California, and Texas costal prairie watersheds that possess a significant nexus to traditionally navigable waters, interstate waters or the territorial seas.

The final category of waters is comprised of those that cannot be deemed innately jurisdictional or lack a substantial nexus to traditionally navigable waters, which naturally prompt federal oversight. These waters are categorically excluded from "waters of

the United States," and include: a) waste treatment systems; b) prior converted cropland; c) hydraulically isolated upland ditches; d) groundwater; e) gullies, swales, storm sewer system components, water delivery, reuse and erosional features; f) agricultural stormwater discharges previously excluded under CWA §502(11); and g) the exemptions to fill discharge permit requirements provided for under CWA § 404(f).

This triad approach to water classification is indicative of an increasingly clear and active federal interest in the use and contamination of even relatively insignificant bodies of water and wetlands. The absence of a minimum area requirement or other quantitative guidelines for the federal assertion of jurisdiction leaves WOTUS open to a myriad constitutional and enforcement challenges. Nevertheless, the ultimate intention of WOTUS is to effectively limit the regulatory ambiguity which has previously hindered determinations regarding which waters and wetlands are subject to federal jurisdiction. While the successful implementation of WOTUS may naturally circumscribe business and development opportunities and profitability on a national scale, by reducing the zone for legal interpretation and offering clear parameters for federal intervention, WOTUS may reduce the federal litigation burden, which has heretofore hindered EPA enforcement of the Clean Water Act and left economic actors uncertain of their corresponding rights and obligations.

Detractors have expressed concern regarding the rule's impact on private water rights, as well as a wide range of key industries, including the agriculture, energy and manufacturing sectors. Criticism voiced by industry and elected representatives, has focused on the economic and states' rights interests, which they perceive as fundamentally threatened by the controversial regulation. Proponents of the measure have suggested that the EPA's Rule making is the exercise of constitutionally sanctioned executive authority,

the assertion of which was intended to promote clean water initiatives and greater federal oversight under the auspices of EPA.

The Current Legal Status

On October 9, 2015, the U.S. Court of Appeals for the 6th Circuit issued a nationwide stay on the implementation of WOTUS, pending a determination of its jurisdiction over challenges to the rule filed by the attorneys general of eighteen states. Thus, despite President Obama's veto of congressional action aimed at eliminating the rule, WOTUS remains in a legal limbo and will most likely remains so – we won't know what will happen with WOTUS until we hear from SCOTUS, or there is a different determination by the next POTUS.

Akerman has assembled a team of lawyers and public policy professionals, experienced in regulatory and environmental matters, to meet the increasing water resource challenges facing our clients.