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Untangling 'Waters Of The US' Web In 6th Circ.


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Law360, New York (October 15, 2015, 2:38 PM ET) -- With its most recent regulation under the Clean Water Act, the "waters of the United States" rule, the federal government has asserted authority over nearly every drop of water on land in the United States. Previously under the Clean Water Act, only water with a significant nexus to traditional navigable waterways could be regulated. The U.S. Supreme Court in Rapanos v. United States specifically stated that isolated tributaries did not fall within the meaning of "waters of the United States" under the Clean Water Act.

The U.S. Environmental Protection Agency now says these waters, and many more, do. In fact, given the complex and wide net cast by the EPA in the new regulations, isolated depressions in the ground over long distances from each other could be combined as similar water features and if one of those depressions has water in it at any time (even only for a moment) that tangentially or through intermediary features connects to navigable water, then the EPA will claim it has jurisdiction to regulate any activity on that land. Not surprisingly, this rule has been challenged. The rule is now stayed in all 52 states by a decision by the Sixth Circuit on Oct. 9, 2015.

The Sixth Circuit stayed the rule's implementation nationwide based on 12 petitions challenging WOTUS in eight different appellate courts, including the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits. These petitions were consolidated by the Judicial Panel on Multidistrict Litigation. JPML randomly selected the Sixth Circuit to hear the consolidated cases. Several dozen additional district court cases have been filed across the United States challenging WOTUS, creating a complex web of litigation and jurisdictional issues.

A preliminary injunction against enforcement of WOTUS is in place in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico, in a multiparty suit filed in federal district court in North Dakota. The Sixth Circuit noted that because of the injunction in the U.S. District Court for the District of North Dakota it makes sense now to implement a nationwide stay to maintain the status quo everywhere while the various cases proceed.

The stay will be in effect until the Sixth Circuit rules on the jurisdiction issue before it, and then rules on the merits. Motions to dismiss have been filed on jurisdictional grounds, namely whether WOTUS is an administrative action subject to direct review by a court of appeals under Section 509(b) of the Clean Water Act. If the Sixth Circuit determines that it has jurisdiction under Section 509(b), then it will move to the merits and the stay would remain in place. However, if the court decides jurisdiction lies with the district courts, then nationwide stay may be lifted and the parties

would likely reshuffle to file in district court (some parties have indicated the appellate court filing was a "protective filing"; they have moved to dismiss the Sixth Circuit consolidated case because they would prefer the district court). North Dakota's preliminary injunction of WOTUS would likely remain effective in the 13 states before that court. The Sixth Circuit indicated it will hear the Section 509(b) jurisdiction question in a matter of weeks.

Assuming the Sixth Circuit accepts jurisdiction and hears the case on the merits, there are several possible outcomes:

- The court may find that: (a) the EPA and the U.S. Army Corps of Engineers complied with the Administrative Procedures Act and the U.S. Constitution; (b) the rule is consistent with Rapanos and the statutory mandate; and (c) WOTUS is valid and lawful. If this option prevails, there will be procedural and jurisdictional chaos as district courts rule on similar challenges, which then wind their way through the appellate process. And it is likely that a petition for writ of certiorari would be filed with the Supreme Court to review the decision. It is possible the current stay would remain effective throughout the pending litigation and appellate process for the same reason the Sixth Circuit granted the stay this past week — for uniformity (status quo) nationwide. If the court lifts the stay, the remaining district courts hearing challenges to WOTUS could issue injunctions in their own jurisdictions.

- The court may uphold the challenge and strike down WOTUS, sending the EPA back to the drawing board to work its way back through the rulemaking process. If this option prevails, the U.S. Department of Justice may file a petition for writ of certiorari with the Supreme Court on behalf of the federal agencies. The pre-WOTUS regulations would be effective nationwide during the pending writ process. Once the EPA rewrites the regulations, this entire roller-coaster ride will begin again with the rulemaking process and legal challenges thereafter.

In fact, we can speculate with some certainty what likely will occur. The Sixth Circuit already telegraphed the end of this story when it stated, "We conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims." With this statement, it seems highly likely that the court will grant a summary judgment motion in favor of the petitioner, sending the rule back to the EPA to rewrite.

If the EPA does get another bite at the apple to rewrite the regulations, it would be wise for the agency to review the Sixth Circuit's advice in its recent ruling noting that the distance limitations established by the EPA in the rule are inconsistent with Rapanos v. United States, which said isolated waterways and tributaries are beyond the reach of the Clean Water Act. The court noted that the EPA failed to include the distance limitations in the definition of "adjacent waters" or "significant nexus" in the proposed rule, but it does appear in the final rule, making it "facially suspect." In the final rule, distance limits are used to determine if waters are defined as "neighboring," which is an aspect of "adjacent." With the distance limitations, the EPA substantially increased the reach of the Clean Water Act beyond what was supported in the rulemaking process. When and if the EPA rewrites this regulation, it will need to be more careful to comply with the rulemaking procedures and survive court review. No doubt, the EPA will follow procedures the next time. The real question is, given the second chance, will the EPA revise its rule so that it is clear, but not overreaching?

Landowners had hoped WOTUS' definition of "waters of the United States" would be clear and reasonable. They participated in the rulemaking process and provided comments pleading for

more certainty so that they may anticipate regulatory impacts and costs. Unfortunately, the EPA did not provide more certainty with WOTUS, nor is the new rule reasonable. The new definition of "waters of the United States" is riddled with ambiguity resolved only by unfettered agency discretion. Nearly every depression in the ground in the United States that gathers or could gather water creating a high-water mark after a heavy rain could be subject to regulation under WOTUS. The definition of "waters of the United States" in the new rule includes any area that has any amount of water with bed and banks and an ordinary high-water mark (basically a line of litter or debris marking the highest point that the water reached before it receded, which could include rainwater in a depression in the land). Nearly every landowner with a business, farm, construction site, development or even the desire to move dirt from one place to the other on their private property, could be subject to the stringent regulations of the rule, as well as penalties of $37,000 per day per violation, under this definition of "waters of the United States."

The definition of "waters of the United States" in the new rule includes wetlands that are remote, intermittent and ephemeral. Even features such as western vernal pools in California that are shallow and seasonal and dry during warm months, are covered by the regulations. The EPA and the Army Corps of Engineers also assert the discretion to regulate other waters located within the 100-year floodplains or within 4,000 feet of a high-tide line, which were not previously regulated by the Clean Water Act. The Sixth Circuit noted that the EPA's definition in WOTUS is not consistent with the Supreme Court's definition of "waters of the United States" in Rapanos v. United States, which is limited to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes." The Sixth Circuit did not agree with the EPA that this definition includes areas that are dry most of the time. Such areas do not have a "significant nexus" to "navigable waters," as required by the Rapanos court.

In WOTUS, the EPA explicitly references the Rapanos phrase "significant nexus" and defines it to include any water that significantly affects (meaning more than speculative or insubstantial) the chemical, physical or biological integrity of a traditional navigable, interstate water or territorial sea. To support that definition, the EPA's Office of Research and Development prepared a science report summarizing the current scientific understanding of the connectivity of waters and the effects on the biological, chemical and physical integrity of downstream waters. Based on the science report, the EPA determined "connectivity" to be the basis for determining a "nexus" between water bodies, even if the connections are remote and ephemeral. Although the EPA asserts otherwise, this is clearly inconsistent with the significant nexus test articulated by Justice Anthony Kennedy in Rapanos.

In an isolated act of reasonableness and clarity, the EPA and the Army Corps of Engineers excluded "puddles" and "swimming pools" from the definition of "waters of the United States." The EPA also wisely excluded stormwater control features, which are required by the Clean Water Act to be present; without such features, the EPA may find a landowner in violation of the Clean Water Act.

It does not appear that farmland is exempted or excluded from the definition in WOTUS. This overreaching alone could create widespread regulation across the United States. Small ponds on farms, irrigation ditches, roadside ditches, excavations and other necessary features for agricultural development could find itself caught up in WOTUS' web. For example, the EPA recently made the widow of a rural Washington blueberry farmer pay $210,000 in penalties and agree to restore 12 acres of forested wetlands that were allegedly harmed in violation of the Clean Water Act when the widow's deceased husband constructed a gravel road, a ditch and cleared 10 acres of his property to plant blueberries. See United States v. Suellyn Rader Blymyer, individually and in her capacity as the Personal Representative of the Estate of Lyle J. Rader, and Uptrail Group, LLC, No. 2:13-cv-01555 JCC. This case is an example of the type of cases that will flood in if the

EPA has the discretion to regulate intermittent impoundments of water under WOTUS. Farmers across the country will need permits for any improvements on their land, or preparation for planting that disturbs land, because most agricultural property in the United States could fall within the definition of "waters of the United States" under WOTUS.

While the Sixth Circuit ruled to maintain the "status quo" (i.e., revert to the pre-WOTUS regulations) during the stay, unfortunately, the status quo equates to overly broad, vague, ambiguous and inconsistent regulations. Even the EPA stated that the pre-WOTUS regulations are ambiguous and result in inconsistent application due to the case-by-case discretion necessary to implement the law. Nonetheless, going forward during the stay, under the previous regulations, the EPA and the Army Corps of Engineers will continue to evaluate projects on a case-by-case basis to determine if "waters of the United States" could be impacted. The EPA previously issued a guidance document explaining its method for determining whether a significant nexus exists between a body of water and navigable waters to justify regulating it as "water of the United States." While the guidance attempts to follow the Supreme Court's concept of "significant nexus" set forth in Rapanos, the EPA still must make its determination for each project, case by case, based on its own discretion. Because of the case-by-case nature of that process, there is no certainty for the permit applicants. It is likely that pending development, existing facilities with National Pollutant Discharge Elimination System permits, agricultural endeavors and other projects by landowners will suffer delays during the stay as the EPA and the Army Corps of Engineers continue business as usual under the status quo. There is no doubt that approving permits for projects will not be a high priority for the EPA or the Army Corps of Engineers during the stay. Nonetheless, during the stay, and for the foreseeable future, the law of the land governing Clean Water Act permits will continue to be the pre-existing (i.e., pre-WOTUS) Clean Water Act regulations.

While it is likely to be a long and drawn out process beginning with the jurisdictional question of whether this challenge should be heard by the court of appeals or the district court, it is likely that the Sixth Circuit will rule that WOTUS is inconsistent with the law of the land, as defined by the Supreme Court in Rapanos v. United States because the definition includes many categories of water that do not have a significant nexus to navigable waters under the Clean Water Act. Once that decision comes down, the EPA will likely go back to the drawing board and restart the rulemaking process. Stakeholders will have another opportunity to participate in the process in the hope that the EPA drafts reasonable, science-based regulations that can be applied consistently and with some clarity nationwide.

And then we begin again.

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