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Water Pollution

Practitioner Insights: Courts Weigh Scope of Clean Water Act

I. Introduction

There is a tug of war underway over the scope of the Clean Water Act: While the Trump administration attempts to narrow the reach of the act through regulatory action, some states and citizen suit actions continue to take an expansive view of the act.

One of the Trump administration's first moves on environmental issues was to require reconsideration of the 2015 ''waters of the United States'' (WOTUS) rule. Defining WOTUS more narrowly would reduce the projects for which Clean Water Act permits are required. This action is one of many this administration has taken to reduce permitting burdens, particularly for infrastructure projects.

While the redefinition of WOTUS could be significant, there is a limit to how far the current administration can ''roll back'' the definition given the numerous judicial decisions, including Supreme Court decisions, interpreting the term.

In addition, the Clean Water Act has built-in ''checks'' that limit the federal government's power under the act, including a significant role for states with Section 401 state water quality certifications. The interaction between state and federal permitting processes under the Clean Water Act has led to a several recent state denials of approvals for interstate projects, especially with regard to pipelines. The statute also includes a citizen suit provision, which provides parties an opportunity to bring enforcement actions that attempt to push the boundaries of the act's scope. Thus, the existing statutory framework and current and future case law could limit this administration's ability to narrow the reach of the act.

II. Trump Plans to Limit the Water Act's Scope by Revising WOTUS In 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) issued a final rule clarifying the definition of ''waters of the United States'' (80 Fed. Reg. 37054). By clarifying the definition, the rule defined which projects required Clean Water Act permits, including Section 404 dredge-and-fill permits for wetlands impacts. EPA contended that the 2015 rule attempted to ameliorate ''confusion and uncertainty'' that had resulted from interpreting Supreme Court Justice Anthony Kennedy's 2006 concurring opinion in *Rapanos v. United States* that called for a case-by-case approach to identifying jurisdictional waters.

While the Obama EPA downplayed the breadth of the rule, arguing the 2015 rule brought fewer waters under federal protection, many saw it as a significant expansion of federal jurisdiction. Thus, the 2015 WOTUS rule became a target for dozens of lawsuits across the country. A number of these lawsuits were consolidated in the Sixth Circuit Court of Appeals, which stayed the rule's implementation in 2015 in *Ohio v. U.S. Army Corps of Eng'rs. (In re EPA and Dep't of Def. Final Rule)*. On Feb. 22, 2016, the Sixth Circuit held that U.S. Courts of Appeals had jurisdiction over review of the WOTUS Rule, rather than district courts. This jurisdictional issue was appealed to the U.S. Supreme Court, which earlier this year agreed to resolve the question in *Nat'l Ass'n of Mfrs. v. Dept. of Defense*. The Supreme Court heard oral argument on Oct. 11, 2017, on whether district or circuit courts have jurisdiction to hear such challenges.

While the Supreme Court sorts out the jurisdictional issue, the Trump administration has proposed to revoke the 2015 rule while it considers a new WOTUS definition. On Feb. 28, 2017, President Donald Trump signed an Executive Order (E.O. No. 13,788) that directs EPA and the corps to publish a rule rescinding or revising the 2015 rule. Notably, Trump also directed the agencies to consider interpreting the term ''navigable waters'' in a manner consistent with Justice Antonin Scalia's opinion in *Rapanos*. Scalia said waters of the U.S. include 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 agencies released a proposal on July 27, 2017, to rescind the 2015 Rule and re-codify the regulations that existed before the 2015 Rule (82 Fed. Reg. 34899). The

agencies, however, are already implementing the pre-2015 regulations pursuant to the Sixth Circuit's nationwide stay of the 2015 rule, so the action will have little immediate practical effect.

The second step under the executive order will be a ''substantive re-evaluation'' of the WOTUS definition. As directed, the agencies intend to consider interpreting ''navigable waters'' in a manner consistent with Justice Scalia's opinion in *Rapanos*. However, the agencies must also work within the existing case law, which has largely adopted Justice Kennedy's concurring view in *Rapanos*, rather than Scalia's plurality. In *Rapanos*, Justice Kennedy concurred in the judgment and wrote an opinion rejecting Justice Scalia's ''unprecedented reading of the Act.'' Kennedy argued that the corps' jurisdiction over wetlands depends upon the existence of a ''significant nexus'' between the wetlands in question and navigable waters. Since the *Rapanos* decision, some courts have found Kennedy's ''significant nexus'' standard controlling, while others have found that either Justice Kennedy's standard or Justice Scalia's standard may apply. See, e.g., *N. Cal. River Watch v. City of Healdsburg*, (''[T]he controlling opinion is that of Justice Kennedy''); United States v. Johnson, (''the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality''); *United States v. Chevron Pipe Line Co.*, (citing the plurality opinion). In light of the existing case law, the Trump administration will be challenged to create a rule that is consistent with Justice Scalia's opinion and can withstand judicial review.

III. Citizen Suits Attempt to Expand Scope of the Clean Water Act At the same time the Trump administration is attempting to narrow the reach of the Clean Water Act through rulemaking, several pending citizen suit actions are seeking to expand the overall reach of the act. Under the Clean Water Act, any citizen can commence a civil action against any person who is in violation of the Act, 33 U.S.C. § 1365(a). Several citizen suits are currently on appeal that seek to expand the scope of activities regulated under the act to include discharges that indirectly impact federally protected waters through groundwater migration. If such cases are successful, the current administration's attempt to narrow the scope of the act could be undermined.

A. Hawai'i Wildlife Fund v. County of Maui

One of the key cases grappling with a citizen suit based on a groundwater migration theory of liability is *Hawai'i Wildlife Fund v. County of Maui*, pending in the Ninth Circuit. A citizen suit was brought alleging the County of Maui violated the Clean Water Act by discharging effluent at underground injection wells without a National Pollutant Discharge Elimination System (NPDES) permit. Although NPDES permits are only required for discharges from a ''point source'' (like an outfall pipe) to jurisdictional, or navigable, waters, the plaintiffs claim the injected wastewater required a permit because it migrates through groundwater and eventually ends up in the Pacific Ocean. The United States District Court for the District of Hawaii granted the plaintiffs' motion for partial summary judgment (*Hawai'i Wildlife v. County of Maui*), finding that ''the groundwater is a conduit through which pollutants are reaching navigable-in-fact water.''

The county appealed the district court's decision, arguing that ''[f]orcing NPDES permitting on the . . . wells requires [the Ninth Circuit to] ignore the plain language and structure of the CWA, disregard the states' exclusive control over groundwater, and reject controlling precedent.'' (County of Maui's Reply Brief on Appeal at 1, *Hawai'i Wildlife Fund v. County of Maui*) Interestingly, the Obama administration submitted an amicus brief in the Ninth Circuit, agreeing with the district court's result but disagreeing ''with the district court's application of the 'significant nexus' standard from Rapanos.'' (Brief for the United States as Amicus Curiae at 2, *Hawai'i Wildlife Fund v. County of Maui*) According to the United States, an NPDES permit is required in this case ''because the discharges from the [County's] wastewater treatment facility are from a point source (i.e., the injection wells) to waters of the United States (i.e., the Pacific Ocean.).'' (Id. at 1-2.) However, the United States declared that it ''views groundwater as neither a point source nor a water of the United States regulated by the CWA.'' (Id. at 11.) Given that the U.S. government's amicus brief was submitted by the Obama administration and largely supported the District Court's expansive view of the Act, some had thought the current administration would withdraw the brief to prevent the prior administration's view of Clean Water Act jurisdiction from being considered by the Ninth Circuit. However, the current administration has taken no such action, and time has effectively run out—oral argument was held on October 12, 2017.

B. Upstate Forever v. Kinder Morgan Energy Partners, L.P.

A similar battle over the scope of the Clean Water Act is playing out in the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners*. In 2016, Upstate Forever and Savannah Riverkeeper filed a citizen suit after a petroleum leak from the Plantation Pipe Line in South Carolina. Plaintiffs alleged that defendants ''violated the [CWA] through the unlawful discharge of . . . contaminants that have ultimately flowed into the waters of the United States.''

The U.S. District Court for the District of South Carolina rejected the plaintiffs' arguments, noting that although they ''identified a discrete source for the pollution, [they] failed to allege a discrete conveyance of pollutants into navigable waters.'' The court also rejected the plaintiffs' ''alleg[ation] that the Defendants have violated the CWA by discharging pollutants into groundwater that is hydrologically connected to surface waters.'' (Id.) The court acknowledged that district courts are split on the issue of ''whether the CWA encompasses groundwater hydrologically connected to surface waters.'' However, the court determined ''that a narrower interpretation of 'navigable waters' is more persuasive,'' and concluded that ''the CWA does not apply to claims involving discharge of pollution to groundwater that is hydrologically connected to surface waters.'' (Id.) The case is currently pending in the Fourth Circuit, with briefing completed and oral argument scheduled for December 2017. (*Upstate Forever v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir. filed May 19, 2017).)

C. Why are the Groundwater Migration Citizen Suits Significant?

The cases currently before the Ninth and Fourth Circuits are important to watch because a decision in favor of the plaintiffs could significantly expand the reach of the Clean Water Act. Under the plaintiffs' groundwater migration theory, much of what EPA and the courts

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have long considered to be outside the CWA's scope subject only to state jurisdiction could suddenly be included in the NPDES program, including spills from pipelines or other forms of transportation such as rail or trucks, or leaks from storage tanks or septic systems. Because all that is required under the plaintiffs' theory to trigger NPDES liability is the eventual migration of a pollutant to a navigable water, hundreds of thousands of additional NPDES permits could be required nationwide. Such a decision would potentially expose facility operators to unprecedented and burdensome CWA obligations and liabilities, including a requirement to obtain NPDES permits, for activities that have never before been subject to such permitting. Such an interpretation would represent a vast expansion of the CWA.

Given the significant issues involved, several amici groups have filed briefs on both sides of the cases. For example, 12 states filed an amicus brief in the Fourth Circuit (Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, South Carolina, Utah, West Virginia and Wisconsin) arguing that ''judicially expanding the scope of the NPDES regime as Appellants urge would violate the CWA's text and erode the States' role as the principal regulators and protectors of local land and water resources.'' Moreover, the states' brief notes concern ''that the result of this federal jurisdictional creep will not be more aggressive environmental cleanup actions, but rather an unwarranted expansion of the NPDES program—with its costly and time-consuming requirements—to scores of new lands and water sources that the program was not designed to address.'' While the Obama administration filed an amicus brief in the Ninth Circuit, as noted above, the current administration has not withdrawn that amicus brief, nor made any further filings in either case. Thus, while the current administration is working to redefine WOTUS through regulation, they appear to have missed an opportunity to weigh in on the groundwater migration theory that is at issue in both circuits and which could, if successful, lead to a significant expansion of the reach of the CWA. The two pending appeals could also result in a circuit split, which could lead to Supreme Court review next year.

IV. States Flex Their Muscles Under Section 401 of the Clean Water Act The second built-in check on federal authority under the Clean Water Act is Section 401: state water quality certifications. Under Section 401, 33 U.S.C. § 1341, an applicant for a federal permit to conduct activity that may result in discharges into navigable waters must provide the federal agency with a certification from the state where the discharge will originate. The state's certification may set forth limitations or requirements, which become conditions on the federal license or permit. The criteria and processes for evaluating water quality certification applications vary by state, but a federal permit will not be granted until the state certification is obtained or waived. Thus, states effectively have the power to ''veto'' federal permits or licenses by denying Section 401 certifications. Recently, New York has denied Section 401 certifications for several interstate pipeline projects approved by the federal government, based on an expansive view of their authority under the Clean Water Act. Section 401 could continue to be a significant obstacle to the Trump administration's goal of streamlining permitting for infrastructure and energy projects.

A. Constitution Pipeline v. New York: Second Circuit Upholds Section 401 Certification Denial

In 2013, Constitution Pipeline Company, LLC (''Constitution'') applied to New York to obtain a 401 certification needed to construct an approximately 124 mile-long natural gas pipeline from Pennsylvania to New York. The Federal Energy Regulatory Commission (FERC) issued a certificate approving the construction of the pipeline as long as Constitution obtained other required approvals, including 401 certifications. However, on April 22, 2016, New York denied Constitution's request for Section 401 certification, stating that the application ''fail[ed] in a meaningful way to address the significant water resource impacts that could occur . . . and . . . failed to provide sufficient information to demonstrate compliance with New York State water quality standards.''

Constitution challenged the state's denial in the Second Circuit, seeking a remand to require the state to either waive the Section 401 requirements or issue the certification.

On August 18, 2017, the Second Circuit upheld New York's denial of the certification, *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*. The panel found the state had authority to demand additional environmental information from Constitution and to deny the certification when the company failed to provide it. The court also rejected Constitution's argument that the state's actions were preempted by FERC's action. The court declined to address the argument that the state waived its Clean Water Act authority by waiting too long to act, noting that under the Natural Gas Act, such failure-to-act claims are exclusively within the jurisdiction of the D.C. Circuit. Constitution filed a petition for panel rehearing or rehearing en banc on Sept. 1, 2017.

The case is significant in holding that even where FERC has found an interstate pipeline project to be in the national interest under the Natural Gas Act, a state's ability to ''veto'' the project by denying certification under the Clean Water Act is not preempted. The Second Circuit's recent decision reinforces the authority of states under the Clean Water Act to conduct independent reviews of projects, including interstate pipelines previously approved by FERC or other federal agencies.

B. National Fuel Gas v. New York: Pending Appeal of Section 401 Certification Denial A similar case is currently pending before the Second Circuit regarding New York's April 2017 denial of a 401 certification for the Northern Access Gas pipeline—a 97-mile pipeline from Pennsylvania to New York. National Fuel has appealed the permit denial to the Second Circuit, and has taken FERC's determination that the state had not waived its Clean Water Act authority to the D.C. Circuit.

On April 8, 2016, National Fuel submitted an application to New York to obtain a Section 401 certification. FERC had already approved the project on the condition that National Fuel obtain other necessary approvals. However, New York denied National Fuel's Section 401 certification, noting that the project involved impacts ''in terms of water body water quality, stream bed and bank disturbances, and wetlands and wetland adjacent area disturbances.'' Due to these impacts and their cumulative effect, the state concluded that the applica-

tion ''fail[ed] to demonstrate compliance with New York State water quality standards.''

National Fuel challenged the Section 401 denial in the Second Circuit in April 2017, *Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Envtl. Conservation*. National Fuel argued that the New York Governor admitted the denial was a pretext, and that the decision did not comply with Clean Water Act requirements. National Fuel also argued that many of the issues raised by the state, including its objection to the project's route, are outside the specific grounds enumerated in Section 401: ''Nothing in Section 401 or its legislative history ''empower[s] [the Department] to deny certification on the basis of broader environmental provisions of New York law or regulation''; thus, allowing the Department ''to usurp the authority that Congress reserved for FERC . . . over issues beyond water quality standards . . . is not justified.'' National Fuel requested discovery into the state's decision-making process in order to explore whether improper considerations influenced the denial. As of this writing, the case remains pending in the Second Circuit, with oral argument scheduled for November 16, 2017.

C. *Millennium Pipeline Co.*: FERC Deems New York Section 401 Certification Authority Waived

A third gas pipeline project, Millennium Pipeline, was also denied 401 certification by New York this year, but was recently thrown a lifeline when FERC deemed New York's denial untimely and therefore waived. By way of background, Millennium applied for a certificate of public convenience and necessity from FERC in 2015 requesting authorization to construct and operate the Valley Lateral Project in New York. Millennium also applied for a section 401 certification from New York. When New York failed to issue a decision, Millennium sought relief from the D.C. Circuit. However, on June 23, 2017, the D.C. Circuit rejected Millennium's claims that New York had improperly delayed issuing a decision, holding the company should get a determination from FERC that the state had waived its Clean Water Act authority. (*Millennium Pipeline Co. v. Basil Seggos*) In the interim, New York deemed the certification denied on August 30. On September 15, FERC declared that New York failed to act within the one-year time frame required by the Clean Water Act, and therefore waived its authority to issue or deny the water quality certification. (*Millennium Pipeline Company*, 160 FERC ¶ 61,065 (2017).)

It remains to be seen whether New York will seek rehearing of the commission's waiver ruling or seek judicial review, and whether other states may join the appeal. In the meantime, Constitution Pipeline filed a petition with FERC on October 11 seeking a similar ruling that New York waived its authority to issue a 401 certification with regard to their project. It is important to note that Section 401 certifications are required for all projects that require permits from the U.S. Army Corps of Engineers under Clean Water Act Section 404, so this issue is not limited to natural gas pipelines. Thus, FERC's order may also embolden applicants before other agencies, such as the Corps, to challenge states' untimely action under Section 401. Conversely, state water quality agencies may simply opt to deny water quality certifications within one year rather than risk waiving their authority. The bottom line is that states will continue to exercise their Section 401 authority, although perhaps more quickly than in the past. So while the Trump administration is emphasizing streamlining the permitting process for infrastructure projects like pipelines, Section 401 of the Clean Water Act provides states the ability to effectively ''veto'' such projects.

V. Conclusion The Trump administration's attempt to narrow the reach of the Clean Water Act through regulatory action could be undercut by past and future judicial and state decisions that take an expansive view of the Act. In particular, several citizen suit actions are pending that attempt to push the boundaries of the Clean Water Act's scope, especially with regard to contamination that migrates through groundwater. If the Ninth or Fourth Circuit finds Clean Water Act jurisdiction based on diffuse groundwater migration in Hawai'i Wildlife Fund v. County of Maui or Upstate Forever v. Kinder Morgan Energy Partners, that could undercut this administration's ability to restrict the scope of the Act through rulemaking. It could also create a circuit split, which could be taken up by the Supreme Court. Thus, close attention to these pending cases is warranted.

In addition, Section 401 state water quality certifications provide a further check on the federal government's power under the Act, with several recent state ''vetoes'' of interstate projects that had been approved by the federal government. As seen in the New York denials, states can take a broad view of their authority under 401, and courts may be hesitant to second guess the state's findings with regard to state water quality impacts. There continues to be significant litigation on this issue around the country.

The Second Circuit's recent affirmance of states' 401 certification authority may lead project opponents to pursue further 401 denials for controversial projects, encouraging states to become a backstop against federal efforts to ''streamline'' the permitting of infrastructure and energy projects. While the recent FERC order finding New York's denial to have been waived as untimely may have thrown a lifeline to the Millennium project, the long-term effects of the order remain to be seen. States may simply opt to deny certifications within a year rather than risk waiving their authority. Given that states' certification authority arises out of the Clean Water Act itself, a legislative change would be needed to preclude such state ''vetoes'' of interstate projects. Short of such a legislative change, some developers may try to avoid siting in states that are seen as more likely to deny 401 certifications.

In sum, even with a revamp of the WOTUS rule in the works, there are substantial tools available for environmental organizations and states that may limit the federal government's ability to restrict Clean Water Act jurisdiction and ease permitting burdens. While the regulatory definition of WOTUS continues to draw significant attention, the scope of the Act will continue to be primarily driven by judicial decisions, both past and future. Therefore, as Justice Kennedy noted in his 2016 concurrence in *U.S. Army Corps of Eng'rs v. Hawkes Co.*, ''the reach and systematic consequences of the Clean Water Act remain a cause for concern.''

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ever v. Kinder Morgan Energy Partners, No. 17-1640 (4th Cir. filed May 19, 2017), *which is one of the cases discussed in the article.*