CLEAN WATER RULE STAYED NATIONWIDE

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INTRODUCTION

On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a stay of the Obama Administration's new rule defining the scope of federal jurisdiction under the Clean Water Act.[1] The stay postpones nationwide implementation of the Clean Water Rule, which a coalition of states argue dramatically expands the regulatory jurisdiction of the Clean Water Act and upsets the balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters.

As discussed in our prior alerts on the proposed and final Clean Water Rule, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, the "agencies") developed the new rule in response to the U.S. Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715 (2006) (which also involved an appeal from the Sixth Circuit). In the Clean Water Rule, the agencies revise the definition of the "waters of the United States" by adding classes and categories of waters and creating new bright-line distance limitations at the outer-bounds of the agencies' Clean Water Act jurisdiction.[2]

Immediately after publication of the final Clean Water Rule, numerous states, industry, and environmental groups filed an array of legal challenges in courts across the country. The parties in these cases dispute whether the federal district courts or appellate courts are the proper forum for their challenges to the rule. Industry and state petitioners prefer a multi-pronged attack in multiple district courts. The federal government, meanwhile, would prefer to defend the rule in a single case before a Court of Appeals. These positions are demonstrated in the parties' motions and filings with the courts.

On July 28, 2015, the U.S. Judicial Panel on Multidistrict Litigation consolidated all Court of Appeals cases in the Sixth Circuit. Shortly thereafter, a coalition of 18 states (Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin) filed motions with the Court seeking (1) a stay of the rule during the pendency of the court's proceedings and (2) a ruling from the Sixth Circuit that it lacked jurisdiction to hear their appeals (enabling pursuit of their cases before the district courts).

Meanwhile, several of the federal district court cases marched forward, with numerous challengers filing motions to preliminarily enjoin the Clean Water Rule. On August 27, 2015, the U.S. District Court for North Dakota granted such a motion filed by Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, North Dakota, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico. In a follow-up order on September 4, 2015, the court clarified that the rule was enjoined only in the 13 plaintiff states, not nationwide. Other district courts, however, refused to grant similar injunctive relief, and most stayed proceedings while the Judicial Panel on

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Multidistrict Litigation considered EPA's request to consolidate the district court cases. On October 13, 2015, the Judicial Panel on Multidistrict Litigation denied EPA's request to consolidate the district court cases, which will allow these stayed cases to proceed.

SIXTH CIRCUIT ISSUES NATIONWIDE STAY

With this backdrop in place, the Sixth Circuit issued its order on October 9, 2015, staying the Clean Water Rule nationwide. The two judges in the majority found that the petitioners had demonstrated a "substantial possibility of success on the merits of their claims," specifically mentioning that it was "far from clear" that the new rule's distance limitations were harmonious with the Supreme Court's 2006 decision in *Rapanos*.[3] The court also indicated that the process by which the distance limitations were adopted was "facially suspect" because the proposed rule did not include distance limitations, calling into question whether the final rule was a logical outgrowth of the proposal (as required under the Administrative Procedure Act).[4] Finally, the court found that the government had not "persuasively rebutted" the petitioners' argument that the rule's bright-line distance limitations were devoid of specific scientific support.[5]

In balancing the respective harms of the parties, the court focused on the burden that would potentially visit governmental bodies, private parties, and the public at large if the rule's "effective redrawing of jurisdictional lines" were allowed to take effect during the pendency of the appeal.[6] A stay, on the other hand, would "temporarily silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing[,]" "honor[] the policy of cooperative federalism that informs the Clean Water Act[,]" and "restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review."[7]

The lone dissenting judge did not reach the merits of the petitioners' motion, believing it was "not prudent for [the] court to act before it determines that it has subject-matter jurisdiction[.]"[8] The majority countered that it had "no doubt" of the court's authority to make orders preserving the status quo pending consideration of the outstanding jurisdictional question.[9]

RAMIFICATIONS

Until further notice, the Clean Water Rule is no longer in effect across the nation. The nationwide stay, however, could be short-lived, depending on how the Sixth Circuit answers the key question regarding its own jurisdiction. Briefing on the jurisdictional issue is scheduled for completion on November 4, and the court indicated that its decision could be issued "in a matter of weeks."[10]

NOTES:

[1] *In re* Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015).

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[2] The distance limits in the final Clean Water Rule serve to categorically include or exclude certain waters from the agencies' jurisdiction based solely on their distance from other jurisdictional waters. For instance, the final rule categorically includes as jurisdictional any water that is within *either* (a) 100 feet of *or* (b) the 100-year floodplain of any traditional navigable water, interstate water, territorial sea, tributary, or impoundment of these waters. On the other hand, the Clean Water Rule excludes any water that is *both* (a) beyond the 100-floodplain of any traditional navigable water, interstate water, or territorial sea *and* (b) farther than 4,000 feet from any traditional navigable water, interstate water, territorial sea, tributary, or impoundment of these waters.

[3] *Id.* at 4.

[4] *Id.* at 4–5.

[5] *Id.* at 5.

[6] *Id.* at 5–6.

[7] *Id.* at 6.

[8] *Id.* at 7.

[9] *Id.* at 4.

[10] *Id.*

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