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Suspension of the New "Federal Waters" Rule Perpetuates Uncertainty for Property Owners and Developers

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Client Advisory

On October 9, 2015, a U.S. Court of Appeals suspended – nationwide – the rule that governs federal agencies' reach over dredging and filling activities in waters and wetlands (as well as affecting the reach of other Clean Water Act programs).[1] This new and more detailed rule had been released earlier this year in an attempt to clarify the scope of federal jurisdiction, after the admonishments of the U.S. Supreme Court in decisions in 2001 and 2006 criticizing the previous rule for leaving too much discretion to case-by-case determinations by agency staff.[2]

The immediate impact is that the previous version of the rule is back in force, and any clarifications in the new rule cannot be relied upon for the time being. Proposed development and redevelopment of properties where the jurisdictional reach of the Clean Water Act remains unclear require careful planning to ensure the viability of project investments regardless of whether the rulemaking is ultimately upheld.

Significance of the "Waters of the US" Rule

The federal regulation at issue governs not only actual water bodies, but also wetlands which, based on their surface or subsurface connections, potentially impact those waters. These are collectively defined as "waters of the United States."[3] The Clean Water Act requires a permit for the discharge of dredged and fill material into "navigable waters," which include "waters of the United States."

As a result, a federal permit is generally required to dredge and fill wetlands that are within the scope of the "waters of the United States" regulatory definition. The wetlands can be quite some distance from a traditional navigable waterway (the one at issue in the 2006 Supreme Court case was over 20 miles away), and determining with certainty whether or not federal jurisdiction applies often depends on highly technical engineering studies of the property at issue. The previous rule could be read quite broadly, and was tartly criticized by Justice Scalia for its breadth in 2006. Later, in a failed 2014 attempt to amend the Clean Water Act, the regulation was characterized by some members of Congress as extending to birdbaths and to puddles in the driveway.[4]

Status of the Rule

Because the federal regulation of dredging and filling of wetlands has broad implications for property owners nationwide, even a rule that maintained the status quo would provoke strong responses. The new rule was quickly challenged in several lawsuits, and, before it even went into effect on August 28, it had been suspended, temporarily, in thirteen states.[5]

Now, in its October 9 decision, the U.S. Court of Appeals for the Sixth Circuit extended the suspension nationwide, even though the court has not yet determined whether it has jurisdiction to rule on the merits.[6] There is a pending dispute in several courts as to whether the district courts or courts of appeal may hear these challenges. The Sixth Circuit's interim ruling held that opponents of the rule "have demonstrated a substantial possibility of success on the merits" and that the overall equities favor holding off on the new rule – probably not a promising sign on the ultimate result in that court. If the Sixth Circuit does decide the case, the results will be far-reaching – there are eighteen states among

the petitioners seeking to repeal the rule, and several respondent states (including New York, Massachusetts, and Connecticut) that have intervened in the case in support of it. If it does not, there are also district court-level challenges pending.

In the meantime, the Environmental Protection Agency has issued a statement that it is reverting to the previous rule.

Finally, a related issue – when and how landowners can challenge the Corps of Engineers "jurisdictional determinations" regarding the boundary of federal jurisdiction for a particular property – is potentially before the U.S. Supreme Court this term, which may provide insight into the Supreme Court's views on the new rule.

Significance of Reversion to Previous Rule

The principal impact – for the time being – is that the clarifications that were built into the new rule cannot necessarily be relied upon.

Some view the new rule as a substantial expansion of wetlands under federal jurisdiction, but it also contained some bright-line distinctions, some of which codified previous practice and guidance on certain waters and wetlands. For example, the new rule included a regulatory definition and exclusion for certain ditches, provided a regulatory definition for the "significant nexus" to navigable waters that would be a prerequisite for federal jurisdiction in some circumstances, identified a list of factors it would consider, such as nutrient recycling and runoff storage, and established distances between navigable waters and wetlands where a jurisdictional nexus to the "waters of the United States" is presumed.

With the rule in limbo, some property owners and developers lacking the security of a regulatory clarification may find it desirable to have the comfort of a jurisdictional determination by the U.S. Army Corps of Engineers as to whether a particular property is regulated federal waters or wetlands. Others will welcome the eleventh-hour opportunity to work under the old rule. In the meantime, the narrative explanation accompanying the publication of the now-suspended final rule, which consolidated and set forth an extensive discussion of the history and basis of the revisions in that rule, will at least provide a roadmap for those applying for – or resisting – permitting decisions ostensibly based on the previous (and now revived) definition of "waters of the United States."[7] But the decision on what road to take where wetlands and other connected waters may be implicated (*e.g.* whether to apply for a permit, seek a jurisdictional determination, or phase the project) still requires an in-depth understanding of the legal alternatives with a clear vision of project and business objectives.

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Endnotes

[1] *State of Ohio et al., v. U.S. Army Corps of Engineers*, No. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015).

[2] See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

[3] 40 CFR § 230.3. Conforming changes were also made to other sections.

[4] See H.R. 5078 (Waters of the United States Regulatory Overreach Protection Act of 2014)..

[5] See *North Dakota v. U.S. E.P.A.*, No. 3:15-CV-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015).

[6] *State of Ohio et al., v. U.S. Army Corps of Engineers, supra*.

[7] 80 Fed. Reg. 37054 (June 29, 2015).

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