THE
NATIONAL LAW REVIEW

EPA and Corps Amend Effective Date of WOTUS Rule, Open Door to Legal Challenges

Monday, February 12, 2018

On January 31, 2018, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively, "Agencies") released a final rule on the "Definition of 'Waters of the United States'—Addition of an Applicability Date to 2015 Clean Water Rule" ("WOTUS Applicability Rule"). This final rule implements a two-year delay for the effective date of the 2015 rule that re-defined jurisdictional "waters of the United States" under the Clean Water Act ("2015 WOTUS Rule").

As explained in previous alert, the 2015 WOTUS Rule has far-reaching implications for project development across energy, water, agricultural, construction, and transportation sectors. The WOTUS Applicability Rule may provide predictability to the regulated public while the Agencies are conducting a two-step rulemaking process intended to review and revise the definition of "waters of the United States," and while the 2015 WOTUS Rule is judicially stayed in some jurisdictions but not others.

Van Ness Feldman LLP

Article By Brent Carson
Jenna R. Mandell-Rice Duncan M. Greene
Joseph B. Nelson Van Ness Feldman LLP

Environmental, Energy & Resources
All Federal
6th Circuit (incl. bankruptcy)

Background

On January 22, 2018, the U.S. Supreme Court ruled that the U.S. District Courts retain jurisdiction over challenges to the 2015 WOTUS Rule, a decision that will result in the lifting of a U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") stay of the 2015 WOTUS Rule across the United States, except in 13 states (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming) in which the 2015 WOTUS Rule is stayed pursuant to an order of the U.S. District Court for the District of North Dakota ("North Dakota District Court"). As discussed in a previous alert on the Supreme Court's ruling, at the time of the Supreme Court's decision, the Agencies had proposed, but had not yet finalized, a rule to amend the effective date of the 2015 WOTUS Rule. On January 31, 2018, the Agencies announced the final WOTUS Applicability Rule, amending the effective date of the 2015 WOTUS Rule to February 6, 2020. The Agencies state that the purpose of the WOTUS Applicability Rule is to reduce the inconsistencies, uncertainty, and confusion that would result from implementation of the 2015 WOTUS Rule in some states, but not others, when the Sixth Circuit's stay is lifted, and while the Agencies are simultaneously engaged in the process of reconsidering the 2015 WOTUS Rule under a two-step rulemaking process.

Practical Implications

The intent of the WOTUS Applicability Rule is to maintain the "status quo" that has been in place as a result of the Sixth Circuit's stay. Under that "status quo" approach, the Agencies will continue to evaluate jurisdictional "waters of the United States" under prior Supreme Court decisions and the prior 2008 guidance issued by the Agencies. Pursuant to the WOTUS Applicability Rule, until February 6, 2020, the Agencies will "interpret" the term "waters of the United States" to mean: (A) waters covered by the regulations, as they are currently being implemented; (B) within the context of the Supreme Court decisions and practice; (C) informed by applicable agency guidance documents; and (D) as the Agencies have been operating pursuant to the stay(s).

The WOTUS Applicability Rule does not speak to the weight of these sources of interpretation. Therefore, it appears that the governing standard is the regulatory text as applied through the prism of the Supreme Court

decisions. Although guidance can inform by example on case-by-case judgments, the ultimate application of the scope of "waters of the United States" is a matter of law and regulation, not "guidance" or "practice." Indeed, in November 2017, Attorney General Jeff Sessions issued a new policy that prohibits the U.S. Department of Justice from using non-compliance with a guidance document as a basis for enforcement actions.

The WOTUS Applicability Rule does not affect the Agencies' current two-step proposed rulemaking on the 2015 WOTUS Rule, which is intended to review and revise the definition of "waters of the United States." The Agencies have already proposed a first step (or "step-one") rule, which would rescind the definition of the term "waters of the United States" under the 2015 WOTUS Rule. The comment period for the proposed step-one rule closed in September 2017, and a final rule could be released at any time. A proposed second step (or "step-two") rule to revise the definition of "waters of the United States" has yet to be published.

The WOTUS Applicability Rule also does not directly affect existing judicial challenges to the 2015 WOTUS Rule, which are more fully discussed in January 29, 2018 alert. Therefore, the Sixth Circuit will still need to lift its stay of the 2015 WOTUS Rule. However, pursuant to the WOTUS Applicability Rule, the 2015 WOTUS Rule will not go into effect across the United States for another two years. After February 6, 2020, the 2015 WOTUS Rule would go into effect, assuming that (1) the two-step rulemaking on the definition of "waters of the United States" has not been finalized; and (2) there is no outstanding judicial stay of the 2015 WOTUS Rule that is in effect at that time. As noted above, a stay of the 2015 WOTUS Rule is in place for 13 states pursuant to a decision by the North Dakota District Court and it is possible that this stay may be in place on February 6, 2020. In addition, various parties may continue to pursue legal challenges in the U.S. District Courts over the 2015 WOTUS Rule until the Agencies issue a final rule rescinding the 2015 WOTUS Rule. Consequently, it is possible that the 2015 WOTUS Rule may be stayed by other court proceedings when February 6, 2020 arrives.

Potential Legal Challenges

The WOTUS Applicability Rule is already subject to legal challenges and may be subject to additional legal challenges in the future. On February 6, 2018, California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. filed a complaint in the U.S. District Court for the Southern District of New York against the Agencies. The states claim that the Agencies violated the Administrative Procedure Act when promulgating the WOTUS Applicability Rule because (1) the Agencies lack authority under the Clean Water Act to suspend the 2015 WOTUS Rule, (2) the Agencies failed to provide a meaningful comment period on the WOTUS Applicability Rule, and (3) the Agencies' decision was arbitrary and capricious because they did not consider whether or how the WOTUS Applicability Rule would meet the Clean Water Act's objective of restoring and maintaining the integrity of the Nation's waters.[1] In addition, various environmental organizations also filed suit against the Agencies in the U.S. District Court for the District of South Carolina, claiming that the Agencies violated the Administrative Procedure Act when promulgating the WOTUS Applicability Rule because (1) the Agencies failed to provide a meaningful comment period on the WOTUS Applicability Rule; (2) the Agencies' decision was arbitrary and unlawful because they failed to consider the implications of suspending the 2015 WOTUS Rule; and (3) the Agencies' decision was arbitrary and unlawful because they failed to restore the pre-2015 regulations to the Code of Federal Regulations.[2]

Out of concern that these lawsuits may result in a preliminary injunction that blocks the WOTUS Applicability Rule, other states (Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, South Carolina, Utah, West Virginia and Wisconsin) that oppose the implementation of the 2015 WOTUS Rule asked the U.S. Court of Appeals for the Eleventh Circuit to immediately send their challenge to the 2015 WOTUS Rule back to a district court that could issue an injunction.[3]

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[1] Compl., New York v. Pruitt, No. 1:18-cv-01030-JPO (S.D.N.Y. Feb. 7, 2018).

[2] Compl., S.C. Coastal Conservation League v. Pruitt, 2:18-cv-00330-DCN (D.S.C. Feb. 6, 2018).

[3] Reply Br. in Supp. of Time-Sensitive Mot. To Expedite Issuance of the Mandate, Georgia v. Pruitt, No. 15-14035 (11th Cir. Feb. 6, 2018).