CLIENT ALERTS & INSIGHTS

Ohio EPA Taking Steps to Offset Some of the Federal Government's Reduced Regulation of Wetlands

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Authors: Kevin D. Margolis, Reed W. Sirak

In January 2020, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (USACE) finalized a regulation that narrowed the scope of their regulatory jurisdiction under the Clean Water Act.

In doing so, the federal agencies acknowledged that their action did not affect the scope of independent regulatory authority that state agencies might have under state law. The Ohio Environmental Protection Agency has now announced its intention to assert state authority over a significant portion of the regulatory jurisdiction that the federal agencies have disclaimed. The net effect is that the Ohio regulated community, particularly those involved in construction impacting wetlands, will experience far less change in regulatory requirements than analyses of the new federal rule might suggest.

Context

At the core of the Clean Water Act is its prohibition of any ''discharge of any pollutant'' to ''navigable waters'' or to the ''contiguous zone or the ocean,'' except as authorized by the statute. 33 U.S.C. § 1311(a). Authorization for regulated discharges typically comes in the form of a permit that establishes conditions regulating the conditions under which the release may occur and the permissible levels of pollutants that may be released. The statute unhelpfully defines "navigable waters" as ''the waters of the United States, including the territorial seas.'' 33 U.S.C. § 1362(7). For decades regulators, the regulated community and the federal courts have struggled to clearly delineate the jurisdictional reach of "waters of the United States," or "WOTUS," particularly at the outer margins with respect to features, like wetlands, that are clearly not "navigable," but which may nevertheless impact navigable waters.

Like many interpretive questions with significant regulatory consequences, U.S. EPA's "settled" interpretation of "waters of the United States" has actually ebbed and flowed according to the politics of the party in power. In 2015, the Obama administration formally promulgated its WOTUS interpretation, drawing praise from the left and apocalyptic predictions of economic devastation from the right. In 2018, the Trump administration suspended (and in 2019 formally repealed) the Obama-era regulation and announced its intention to promulgate its own WOTUS rule, drawing praise from the right and apocalyptic predictions of environmental devastation from the left. On April 21, 2020, U.S. EPA and USACE completed that process with publication of a new WOTUS interpretation in the Federal Register. The new rule takes effect June 22, 2020, but court challenges have already been filed in multiple federal district courts that will undoubtedly take years to resolve. If recent experience holds, the lawsuits might outlast the rule itself.

The new WOTUS rule does not attempt to alter the regulated status of categories of waters either statutorily included, such as territorial seas, or long understood to be federally regulated, such as rivers, lakes and other large waterbodies used in connection with interstate or foreign commerce. Naturally occurring tributaries to such waterbodies also remain regulated, so long as flow in such tributaries occurs at least perennially or intermittently. The new rule also retains exclusions for groundwater and a variety of artificially created bodies, such as irrigated cropland, stormwater control features and wastewater treatment ponds.

The jurisdictional scope of the new WOTUS interpretation departs most notably from its predecessor's with respect regulation of wetlands and ephemeral flows. The new rule retains Clean Water Act jurisdiction over "adjacent wetlands," those that touch or at least have some direct hydrogeologic surface connection to other jurisdictional waters, but the rule withdraws Clean Water Act jurisdiction over "neighboring" or "isolated" wetlands whose hydrogeologic connection to flowing water is less direct. The new rule also categorically withdraws jurisdiction over all ephemeral (*i.e.,* fed solely by rainwater or snow melt) flows, including natural features, like ravines and dry stream beds, that would otherwise meet the criteria of a tributary.

Ohio EPA Steps In to Maintain Regulatory Jurisdiction

Ohio EPA has long exercised jurisdiction over activities that could contribute to water pollution and wetland impacts, exercising both delegated federal authority from U.S. EPA and its own complimentary state statutory authority over "waters of the State," such as groundwater. Under authority granted by Section 401 of the Clean Water Act, 33 U.S.C. § 1341, Ohio EPA currently requires permits for construction and filling activities that could adversely impact certain ephemeral streams and wetlands. When the new WOTUS rule takes effect, Ohio EPA will no longer have delegated authority to regulate such features under the Clean Water Act.

On May 8, 2020, Ohio EPA expressed its belief that ephemeral streams and isolated wetlands should continue to be protected from degradation and, therefore, announced that the agency would do so as a matter of Ohio law. Ohio EPA asserted that state-based regulation would not impose any new legal requirements, but instead would merely ensure the continuation of regulatory requirements that would otherwise disappear when the new WOTUS rule takes effect in June 2020. The agency sought to preemptively address concerns of regulatory overreach by noting that "[c]hannel-like features on the land surface created by water erosion that are not tributaries, such as agricultural ditches, roadside ditches and grass swale waterways would not meet the definition of ephemeral streams."

Ohio EPA has released a draft general permit for discharges of fill materials or dredged sediment to Category 1 and Category 2 isolated wetlands and ephemeral streams. The agency will accept public comments on the proposed general permit until 5:00 pm on June 17, 2020.

The new WOTUS rule, dubbed the "Dirty Water Rule" by environmental activists, has already spawned multiple lawsuits and is generating heated commentary across the ideological spectrum. Regardless of where you fall on that spectrum, Ohio EPA's decision to assume significant portions of the federal regulatory jurisdiction that would otherwise be withdrawn by the rule means that such commentary may have little practical relevance in Ohio.

For more information, please contact a member of Benesch's Litigation Practice Group.

Kevin D. Margolis at kmargolis@beneschlaw.com or 216.363.4161.

Reed W. Sirak at rsirak@beneschlaw.com or 216.363.6256.