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Is Regulatory Limbo the New Normal For WOTUS?

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In environmental law, it's hard to imagine a topic shrouded in more uncertainty and confusion than the definition of “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”). After numerous Supreme Court opinions and various iterations of interpretive guidance, it has now become the norm for the Environmental Protection Agency (“EPA”) and Army Corps of Engineers (the “Corps”) to rewrite the regulatory definition of WOTUS each time a new President is elected. Given this new normal, water professionals and project developers have been anxiously waiting to see what the next stage in the WOTUS saga will bring with the Biden Administration. Given the significant distinctions between recent administrations' versions of the rule (both of which are still the subject of litigation), how the next stage unfolds has very real and practical consequences for the regulated community and for pending projects.

Litigation Challenging the 2020 WOTUS Rule

In April 2020 under the Trump Administration, EPA and the Corps jointly published the Navigable Waters Protection Rule (the “2020 WOTUS Rule”). Notably, the 2020 WOTUS Rule significantly narrowed definitions of tributary streams and adjacent wetlands, with the intended effect that many water features were now outside the scope of EPA oversight and permitting requirements. The 2020 WOTUS Rule was immediately challenged in district courts throughout the country by environmental advocates and others; but despite many challengers' best efforts, the Rule became effective in 49 states on June 22, 2020. Colorado was the lone holdout, but only until March 2, 2021 when the Tenth Circuit overturned the district court's decision staying the effective date of the Rule. Now, the 2020 WOTUS Rule is in effect in all 50 states as various legal challenges continue making their way through the courts.

In many of these ongoing cases, the district court issued a stay or extended the briefing schedule to give the Biden Administration time to review the 2020 WOTUS Rule, though many of these stays and extensions have already expired. Depending on the administration's approach moving forward, and whether courts are willing to delay further or otherwise rule in favor of EPA and the Corps, many cases challenging the 2020 WOTUS Rule will continue. This, coupled with the fact that other cases related to the scope of federal jurisdiction under the CWA could end up in the Supreme Court before the Biden Administration can finalize any action at the agency level, means that EPA and the Corps may have limited time to act on WOTUS.

Potential for Future Agency Action

At the agency level, President Biden has directed EPA to review 48 Trump-era regulations, including the 2020 WOTUS Rule. While the results of EPA's review have not been made public, it's clear that a re-write—whether by repealing and replacing the 2020 WOTUS Rule or by amending it—will occur. In the last few months, EPA Administrator Michael Regan has indicated that he intends to develop a balanced strategy toward WOTUS by engaging in discussions with environmental and agricultural groups and developing a process that includes various stakeholders. This suggests the Biden Administration may take a more measured, less drastic approach than repealing and replacing the 2020 WOTUS Rule.

To achieve Administrator Regan's goal, EPA recently initiated a series of listening sessions to take place over the summer. These listening sessions will provide an opportunity for stakeholders to weigh in on which streams and wetlands should be considered WOTUS for CWA purposes. After conducting these listening sessions, EPA plans to work with the Corps to conduct regional roundtable discussions. Of course, whether a truly balanced approach to WOTUS can be achieved remains to be seen. Given the divisiveness of the issue, disagreement on the outcome is certain. Regardless of the approach taken, any action by the Biden Administration to develop an updated definition of WOTUS could take years to finalize and will almost certainly be challenged in court.

Implications

The WOTUS saga has had and will continue to have significant implications for development projects and industrial operations. In many instances around the country, streams and wetlands that would have required a Corps permit for any impacts – or a permit for any discharges of wastewater – have been left without federal permitting requirements under the CWA as a result of the 2020 WOTUS Rule. Similar complications are playing out with enforcement actions for unpermitted impacts, presenting questions about which version of the CWA jurisdictional scope applies. Any changes made by the Biden Administration will very likely continue this regulatory limbo for pending project applications, so project proponents need to carefully weigh their options in light of this uncertainty.

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