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Current Events and Roiling Waters: A Series Update on Recent Clean Water Act Developments

The past few months brought a steady storm of change in the rules governing the activities that impact our country's water resources. Regulatory agencies and the regulated community—especially utilities, municipalities and businesses breaking ground on new projects—are grappling with how to navigate these new rules and restrictions. This is Part 1 of a five-part series that will summarize each new Clean Water Act development, explain its significance and current status, and look ahead to potential future developments. Part 1 offers an overview about the issues that will be addressed in this series.

Part 1: A Sea of Change

The Clean Water Act (CWA) establishes a national framework for regulating discharges of pollutants into the "waters of the United States," requiring permits and approvals for those discharges, and establishing water quality standards. The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) are the federal agencies charged with implementing and enforcing the CWA's requirements. Under the CWA, if a water resource qualifies as "waters of the United States" (WOTUS), a permit is needed for activities impacting that resource. Thus, whether a particular water resource is a WOTUS subject to CWA jurisdiction directly impacts the costs, timelines, and compliance responsibilities that will apply to a particular activity.

However, because the CWA does not itself define WOTUS, the question of exactly which water resources are subject to CWA jurisdiction has long been a source of dispute, particularly where wetlands are involved. EPA and the Corps have defined WOTUS by regulation since the 1970s, but confusion about how that definition applied in practice led to recurring litigation. Under the Obama administration in 2015, EPA and the Corps developed and adopted new regulations redefining WOTUS (the 2015 Rule), which many states and private parties swiftly sued to challenge for allegedly exceeding the CWA's scope of authority. Until 2018, a court order stayed implementation of the 2015 Rule nationwide and, though some lawsuits proceeded at the district court level, the agencies were already working to repeal and replace the 2015 Rule. In 2019, EPA and the Corps under the Trump administration formally repealed the 2015 Rule altogether as part of a lengthy process to again redefine WOTUS.

On April 21, 2020, EPA and the Corps issued new regulations that significantly change which waters qualify as WOTUS (the WOTUS Rule), thereby impacting which waters qualify for CWA regulation and permitting. The WOTUS Rule purports to streamline the WOTUS definition and a deluge of litigation soon followed. Environmental groups, Native American tribes and more than a dozen states challenging the WOTUS Rule contend that it jeopardizes U.S. water resources by leaving many resources unprotected. However, criticisms also remain that the WOTUS Rule still goes too far. For example, an industry group representing farming and ranching interests challenges the rule for bringing non-navigable waters under the CWA umbrella in the first place.

Colorado succeeded in obtaining a stay of the WOTUS Rule on June 19, 2020, meaning its provisions do not apply in Colorado for the time being. Elsewhere, however, the new WOTUS Rule took effect on June 22, 2020. This means that the provisions of the WOTUS Rule can be enforced outside Colorado (unless a court issues a stay) while the various lawsuits proceed through the courts. Part 2 will detail how WOTUS is now defined under the new WOTUS Rule, how it differs from prior definitions, and the status of litigation challenging the WOTUS Rule.

On July 13, 2020, EPA revised the rule governing water quality certifications under CWA § 401 (the Section 401 Rule). CWA § 401 requires applicants for federally permitted projects that could discharge pollutants into a WOTUS to submit a certification from the state where the discharge originates that the discharge will comply with applicable water quality requirements. Under CWA § 401, federal agencies cannot issue their approvals for those projects until the state affirmatively issues this "water quality certification" (WQC) or waives the requirement. This Section 401 framework has historically resulted in significant project delays, particularly for interstate pipeline projects. The Section 401 Rule purports to bring consistency in Section 401 implementation and regulatory certainty to the federal permitting process by clarifying the narrow scope of state and tribal review authority and establishing a one-year deadline for those agencies to make their certification decisions. The revised rule is viewed by states, tribal authorities and environmental proponents as a major restriction of long-standing Section 401 authority. The same day that the Section 401 Rule was adopted, the Delaware Riverkeeper Network filed the first lawsuit to challenge it, asserting the Section 401 Rule "eviscerates the ability of states, tribes, and interstate authorities to protect water quality from Federally-approved projects." Part 3 will detail the new requirements under the Section 401 Rule and the claims raised in the litigation.

During this period, federal courts have also been active on CWA questions, issuing new decisions that rocked the boat on existing interpretations and practices in the regulated community about the CWA's applicability and permits. First, on April 15, 2020, the U.S. District Court for the District of Montana issued an order in Northern Plains Resource Council, et al., v. U.S. Army Corps of Engineers, et al. vacating Nationwide Permit 12, which authorizes utility line work affecting WOTUS, because the district court found the Corps violated the Endangered Species Act by failing to conduct the required consultation with the U.S. Fish and Wildlife Service. After a flurry of litigation, a stay of the decision was issued by the U.S. Supreme Court on July 6, 2020, limiting the application of the district court's ruling to only the Keystone Pipeline project (the actual project in dispute in that case). Part 4 will address how the district court arrived at its ruling and what concerns it raises for future utility line activities requiring CWA permits.

Second, on April 23, 2020, in the case of County of Maui v. Hawaii Wildlife Fund, the U.S. Supreme Court held that the CWA requires a permit when pollutants originating from a point source are conveyed to a WOTUS via a nonpoint source like groundwater. The court held that when discharges through groundwater would be the "functional equivalent" of a direct discharge into navigable waters, the CWA's permitting regime applies. This decision upset long-held interpretations about the extent of the CWA's reach. Part 5 will discuss the Supreme Court's ruling and how it impacts discharges and regulated activities going forward.

If you are have questions about this in this series, please contact any attorney in the Environmental and Energy practice or the attorney at the firm with whom you are regularly in contact.