



Clean Water Rule Gets Doused

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In a significant setback for the Obama Administration, the U.S. Court of Appeals for the Sixth Circuit has temporarily blocked implementation of the Clean Water Rule issued jointly by EPA and the U.S. Army Corps of Engineers last June. The rule defined "Waters of the United States" and was designed to put to rest years of controversy about the extent of federal jurisdiction under the Clean Water Act over wetlands and other waters. That didn't happen. Within weeks of its issuance, over 70 parties – including 31 states – filed suit to overturn the rule. Three federal judges in different states were petitioned to temporarily block it while it was challenged in court. Only one of the three – a federal judge in North Dakota – granted an injunction. His order – issued on August 27, just one day before the effective date – blocked the rule from taking effect in 13 western states. Undeterred, EPA issued a press release the next day saying it would enforce the rule in the rest of the country.

Enter the Sixth Circuit. Its order entered on October 9 suspends the rule temporarily *nationwide*, at least until that court can determine whether it has jurisdiction over the case. (Yes, not only is the rule unclear, but it's also unclear which of the many courts in which challenges have been filed has jurisdiction to decide the case on its merits.) In an opinion accompanying the order, the court in a 2-1 panel decision expressed serious reservations about the rule and found that those challenging it "have demonstrated a substantial possibility of success on the merits." The court said "the rulemaking process by which the distance limitations were adopted is facially suspect," and that EPA has not identified "specific scientific support substantiating a reasonable basis for their adoption." Chief among the court's concerns was the fact that the proposed rule did not include distance-based limitations; those limitations were only in the final rule, meaning the public had no opportunity to know about or comment on them until the final rule was issued. EPA argued that "bright-line tests are a fact of regulatory life," and that it had used its technical expertise to determine them, but the court said that argument was "not sufficient." And the court gave short shrift to EPA's (weak) argument that "the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced."

It's important to note what the Sixth Circuit's order is not ? is it not a ruling on whether the rule survives or is invalidated. Instead, it's a temporary injunction that the court says will remain in place until it decides whether it has jurisdiction. Assuming it does have jurisdiction, we expect the injunction to remain in place until the court issues a decision on the fate of the rule.

The bottom line is that the Clean Water Rule is in trouble. We expect all or parts of it to be scuttled by the Sixth Circuit or some other court.

Ohio v. U.S. Army Corps of Engineers, No. 15-3799 (6th Cir. Oct. 6, 2015)

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