Insight

A Clear(er) WOTUS?

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The federal government issued its latest attempt to clearly define the Waters of the United States (WOTUS), limiting federal authority to align more closely with the statutory language of the Clean Water Act (CWA). The definition of WOTUS is important because it determines where the federal government can prohibit or require permits for certain discharges or activities — rules that can have an enormous economic impact on agricultural and land development industries. While the rule creates relatively more certainty over the definition, a perfectly clear regulatory definition of WOTUS is ultimately unattainable.

In the CWA, Congress directed the Environmental Protection Agency and the U.S. Army Corps of Engineers (the agencies), to define the term WOTUS, with the mission of protecting the navigable waters of the United States. While the new definition created by the agencies' final rule adds some clarity by limiting the federal government's authority, it does not clearly delineate every possible resource that could fall under federal authority. Many determinations will still have to be made on a case-by-case basis due to many inherent natural factors. No definition could comprehensively incorporate those factors.

The fact that the definition has been the subject of litigation for decades demonstrates the difficulty in defining WOTUS. At issue has been clearly delineating which waters affect the downstream quality of navigable waters, as well as how far Congress intended the federal government's reach to extend.

A 2015 Obama Administration rule expanded on a 1986 definition and rankled many for being over-reaching and unduly burdensome. A series of court decisions about the rule left a mess where the rule applied in some states, but not others. Upon entering office, President Trump directed the agencies to limit the scope of federal authority. The agencies did so in two steps: Last year they repealed the 2015 rule and reinstated the 1986 rule, and with this latest action, they narrowed their authority even further. Most important from a jurisdictional standpoint, the new final rule clearly specifies that one of the most burdensome aspects of the Obama-era rule — regulating ephemeral waters, i.e. those that flow only after heavy rainfalls — will not continue. This provision alone will be enough to satisfy many that saw the Obama rule as an overreach.

Aside from the inherent uncertainties of trying to define WOTUS, the rule is notable in two other respects. First, it is the third-largest deregulatory action of the Trump Administration in terms of present-value savings. The agencies estimate the rule will bring total savings of $3.2 billion, which will count toward the administration's fiscal year 2020 regulatory budget savings target of $51.6 billion. The actual savings may be even larger. The agencies were only able to quantify savings from one (albeit large) program area under CWA jurisdiction.

Second, environmentalists are harshly criticizing the final rule. The most common criticism of the rule is that it substantially scales back federal "protection of" waters. When the changes are described this way, the term "protection of" implicitly means "authority over." While the rule intentionally scales back federal authority, the waters that are no longer covered by the rule are still subject to state and local government regulation. State and local governments have no incentive to allow the degradation of their waters. Instead, they are better placed than the federal government to determine the relevant threats and, when necessary, the protective regulations needed. The agencies' final rule allows state and local governments to find the appropriate protective balance. Any

assertion that the federal government's lack of authority over certain waters means those waters are categorically unprotected is misplaced.

The Resource and Programmatic Assessment (RPA) that accompanies the final rule helps explain that federal authority is not equal to protection. In this document, the agencies explain the difficulties in determining the scope of resources covered by federal authority at any definition. As the RPA shows, federal experts over decades have been unable to determine the true federal scope because case-specific analysis of a resource is often needed to know if water there is covered. The challenge continues today despite technological advances. It is problematic, therefore, to criticize the level of protection offered by a rule when its full scope has never been known.

The new definition of WOTUS achieves a major objective of the Trump Administration's deregulatory agenda. While uncertainty about federal jurisdiction remains — and the expected lawsuits over the rule will only exacerbate that uncertainty — the agencies justifiably reduced federal authority and allowed states and local governments to protect many smaller waters, as they are in a better position to regulate appropriately.