Insight

Proposed WOTUS Definition Limits Federal Reach

DAN BOSCH | DECEMBER 11, 2018

The Environmental Protection Agency and the U.S. Army Corps of Engineers (the agencies) released text of a proposed rule Tuesday to redefine the term "Waters of the United States" (WOTUS). The proposal aims to both reduce the scope, and increase the clarity, of the definition finalized by the Obama Administration in 2015.

In the Clean Water Act (CWA), Congress directed the agencies to define the term WOTUS, with the mission of protecting the navigable waters of the United States. The term is important because it determines where the federal government can prohibit or require permits for certain discharges or activities, such as land development. The definition has been the subject of litigation for decades due to the challenge of 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.

In 2015, using a 2006 Supreme Court opinion rendered by Justice Anthony Kennedy as its justification, the agencies settled on a definition that included ephemeral, or temporary, streams that can contain flows of water to navigable waters after heavy rain events and wetlands that are not adjacent to navigable waters. The 2015 rule was challenged in court, and through various decisions, is now in effect in 22 states. When President Trump took office in 2017, he directed the agencies to change the definition to more closely align with a Justice Antonin Scalia opinion from the same 2006 case. The agencies kicked off a two-step process. The first step is to recodify the definition prior to the 2015 rule, which is ongoing, and roughly due to become final in March 2019.

The latest action is the start of step two. The agencies propose to interpret WOTUS as "traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other

jurisdictional waters." The agencies further describe their approach as taking the "ordinary meaning" of the term waters – basically, oceans, rivers, streams, lakes, ponds, and adjacent wetlands – and argue that "not all waters are 'waters of the United States.'" The proposed rule specifically excludes ephemeral streams and also says that only features defined as WOTUS can be covered. This provision provides for additional, but not total, clarity.

The agencies estimate economic impact of the proposed rule via two methods: the proposed rule versus the 2015 final rule, and the proposed rule versus pre-2015 practices (since that will be the state of play once the "step one" rule is finalized). For the first method, the agencies estimate avoided costs of a low range of $9-$15 million and a high range of $98-$164 million (depending on how many states would regulate waters consistent with the 2015 rule under a final "step one" rule) with forgone benefits of anywhere between $3-$33 million. For the second method, the agencies estimate avoided costs of between $28-$266 million, with forgone benefits of $7-$47 million.

To evaluate the proposal, one should view it considering the goals of President Trump's executive order. The main goal is to protect water resources while promoting economic growth. Because it is less restrictive than the 2015 rule, it will better promote economic growth. A key question is whether it adequately protects water resources. Though it covers less territory than the 2015 rule, the proposal protects water resources more closely akin to Congress's navigable water standard in the CWA. It is also important to note that many of the ephemeral waters and non-adjacent wetlands that would no longer be covered could still be regulated by state governments.

A bigger question is whether the proposed WOTUS definition achieves a second goal of the executive order: minimizing regulatory uncertainty. By removing coverage of ephemeral waters and limiting coverage to adjacent wetlands the proposed rule does provide some measure of clarity. Likely litigation over the scope of federal authority once the proposal is finalized will add murkiness until courts weigh in further, however.

The proposal makes progress toward achieving President Trump's goals regarding WOTUS, and perhaps comes as close as the agencies can legally go. Ultimately, to meet the standard of providing regulatory certainty, Congress will need to step up and define the term legislatively.