TRANSPORTATION RESEARCH BOARD COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (AL050)

THE NATURAL LAWYER

Volume 24 April, 2017 Number 2

Richard A. Christopher, Editor

HDR Engineering, Chicago

richard.christopher@hdrinc.com

NEW EXECUTIVE ORDER ON WATERS OF THE UNITED STATES HAS MORE LIMITED IMMEDIATE IMPACTS

Debate and uncertainty regarding the extent of federal jurisdiction under the Clean Water Act will continue under the Executive Order.

Submitted by

Mary Lynn Coffee, Sue Meyer, Gina Nicholls, and Ashley Remillard

aremillard@nossaman.com

On February 28, 2017, President Trump issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" ("Order"). The Order requires the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") to review a 2015 regulation referred to by the Obama Administration as the "Clean Water Rule." On March 6, 2017, EPA and the Corps published formal notice of the agencies' intent to review the Clean Water Rule and engage in further rulemaking ("Notice of Review").

The 2015 Clean Water Rule issued by the Obama Administration ("2015 Rule") was intended to clarify regulatory confusion over which waters and aquatic features constitute "waters of the United States," ("WOTUS") and are therefore subject to Clean Water Act ("CWA") protection and permitting jurisdiction. Such jurisdictional determinations are critical to determine whether the "discharge of a pollutant" requires a National Pollutant Discharge Elimination System permit under CWA section 402, or discharges of "dredge and fill" material require a permit under CWA section 404.

Order Requirements. The Order requires EPA and the Corps to review the 2015 Rule and rescind or revise it to be consistent with the following policy statement: "It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." The Order also directs the agencies to consider limiting the features that constitute "waters of the United States" by interpreting the term "navigable waters" in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States,* 547 U.S. 715 (2006). In that famously fractured Supreme Court opinion, Justice Scalia expressed the narrowest view of the reach of the CWA, writing that WOTUS include only "navigable waters," that are navigable-in-fact, "relatively permanent, standing or flowing bodies of waters" and "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right."

Depending on the outcome of the reconsideration process, the Order may make a substantial difference in how jurisdictional WOTUS may be defined *in the future*, by significantly narrowing the scope of aquatic features protected by, and requiring permits under the CWA. Narrowing of WOTUS may occur if EPA and the Corps determine, as suggested by the Order, that it is appropriate to shift away from Justice Kennedy's definition of WOTUS set forth in *Rapanos*, which has been used ever since that case, to Justice Scalia's definition. As a practical matter, Justice Kennedy's definition of WOTUS has led to much broader CWA jurisdiction over aquatic features than Justice Scalia's because WOTUS as defined by Kennedy in *Raponos* includes all of the waters discussed as jurisdictional by Scalia, together with all other aquatic features with a "significant nexus" to such waters. Eliminating aquatic features determined to be WOTUS under the "significant nexus" test in a future regulation would substantially limit the scope of CWA jurisdictional waters, impacts to which require permits.

No Immediate Effects of the Order. Such changes in the scope of WOTUS will not, however, have an immediate effect on the vast majority of current permit applications for three primary reasons. First, the 2015 Rule addressed by the Order and Notice of Review is not currently in effect, and it has not been in effect since late 2015 or early 2016, depending on the State. In February 2016, the United States Court of Appeals for the Sixth Circuit issued a nationwide stay of the 2015 Rule, following a stay issued in November 2015 by the North Dakota District Court, which, though issued earlier, only stayed the 2015 Rule in 13 States (including Texas). The judicial stays have prohibited the operation of the 2015 Rule until after resolution of ongoing litigation challenges to it. As a result of the judicial stays, the federal guidance currently in effect, and which has been governing jurisdictional delineations since fall of 2015 or early 2016 (depending on the State), is *not* the 2015 Rule. Instead, Bush-era joint guidance from EPA and the Corps, entitled "Clean Water Act Jurisdiction Following the U.S Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) ("Joint Memorandum") is, and has been governing jurisdictional delineations for some time. The Order and Notice of Review do not address the Joint Memorandum. Therefore, the

Order and Notice of Review do not impact the vast majority of recent jurisdictional delineations.

Under the Joint Memorandum, on balance, jurisdictional WOTUS are more broadly defined than desired pursuant to the Order, but are more narrowly defined than under the 2015 Rule, particularly for the following types of aquatic features: "tributaries;" "adjacent" wetlands/waters; and certain types of "isolated" or "other" waters, including prairie potholes, and California vernal pools, which would be jurisdictional *per se* under the 2015 Rule, but are not necessarily jurisdictional under the Joint Memorandum depending on the outcome of a technical significant nexus evaluation.

Second, by law, the Order and the EPA/Corps Notice cannot rescind or replace the 2015 Rule, and it will be quite a long time before a new jurisdictional WOTUS rule can take effect. Under the federal Administrative Procedures Act (APA), a full rulemaking process, including public notice, public comment, responses to comment, and development of substantial technical, policy and scientific evidence in support of any newly proposed rule, must be conducted prior to rescinding or revising the 2015 Rule permanently. Pursuant to the Order, in this rulemaking process, EPA and the Corps must consider, but may not necessarily adopt a narrower definition of WOTUS that comports with Justice Scalia's opinion. Further, upon issuance of a new WOTUS rule, an onslaught of litigation can be anticipated that is likely to further delay the effect of any new rule. Challenges that have already been discussed by potential litigants, which appear to have some validity include:

- *Procedural challenges like those raised in the multiplicity of lawsuits currently pending against the 2015 Rule*. Such challenges include the question of original jurisdiction. *See In re Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States,"* 803 F.3d 804 (6th Cir. 2015). In January 2017, the Supreme Court granted certiorari to consider whether, as a threshold matter, federal courts of appeal or federal district courts have original jurisdiction under the CWA to decide challenges to rules governing CWA jurisdiction. *National Association of Manufacturers v. U.S. Dept. of Defense*, Supreme Court Case No. 16-299. Any new rule would likely generate the same the same tortuous litigation process created by the 2015 Rule, particularly to the extent any of the currently pending procedural challenges are not decided by the courts in current litigation based on mootness or other procedural maneuvering to avoid issuance of judicial opinions.

- *APA challenges for insufficient evidence to support rescission of the 2015 Rule.* The Obama Administration's record supporting the 2015 Rule is voluminous and contains thousands of pages of expert opinions, technical information, and other evidence that is unlikely to equally support a new, narrower rule defining WOTUS. Already a coalition of seven scientific societies representing more than 200,000 wetland and environmental scientists has submitted a letter

prospectively opining that the "best available science" supports the 2015 Rule, and concluding that any revisions to the 2015 Rule would be scientifically and technically inappropriate. Letter from Society of Wetland Scientists to President Trump (Mar. 1, 2017), *available at* http://sws.org/images/sws_documents/SocietiesLetterSupportWOTUSAmiciCuriaeBrief_ToPresidentTrump.pdf (last visited Mar. 15, 2017).

- *Substantive challenges for failure to comply with case law precedent decided by several U.S. Courts of Appeal upholding the application of the Justice Kennedy (rather than the Justice Scalia) rule in determining the scope of CWA jurisdiction. See, e.g., United States v. Vierstra*, 492 Fed. Appx. 738 (9th Cir. 2012).

Third, States like California have laws already on the books that are asserted to define permitting jurisdiction for discharges of pollutants and dredge and fill material to aquatic features that not only include, but are broader than federal WOTUS. In California, State jurisdiction under the Porter-Cologne Water Quality Control Act ("Porter-Cologne") extends to all "waters of the state," defined to include "any surface water or groundwater, including saline waters, within the boundaries of the state." Notwithstanding the proposed changes to the 2015 Rule, the California State Water Resources Control Board ("SWRCB") has taken the position that discharges of dredge and fill material and other pollutants require a California permit issued by the state or regional water boards for discharges of "waste" called Waste Discharge Requirements ("WDRs"). The SWRCB has been firm in this position, even though the Porter-Cologne statutory definition of "waste" does not expressly mention discharges of dredge or fill material, and despite the absence of a statewide permitting program and guidance regarding what constitutes jurisdictional "waters of the state." Pursuant to the SWRCB's position, any discharge or pollutants or dredge and fill material to aquatic features excluded from WOTUS pursuant to federal law and regulation, would instead require state law permits, which may be more difficult to obtain.

New State Laws. Some state legislatures may be motivated to prevent any reduction in environmental protection that would result from the rescission and/or revision of the 2015 Rule by adopting new laws that more broadly protect "waters of the United States." For example, in California, to supplement existing protection of waters of the state under Porter-Cologne, President Pro Tempore of the California State Senate, Kevin de León (D-Los Angeles) recently proposed SB 49, which is intended to negate any reduction in environmental protection that might result from new Trump Administration rules or federal legislation. SB 49 seeks to designate "baseline federal standards" for protection of waters under the CWA that would result in continued protection of the state's resources equivalent to that occurring under Obama Administration regulations, regardless of any actions of the current Congress or President.

Potential Federal Congressional Intervention. At least one federal bill has been proposed to immediately narrow CWA jurisdictional WOTUS, shortcutting the

complicated and time consuming rulemaking process contemplated by the Order. HR 1261, the Federal Regulatory Certainty for Water Act would invalidate the 2015 Rule and other inconsistent guidance, and define "navigable waters" by an amendment to the CWA statute. The proposed amendment would clarify that WOTUS are comprised of waters that are "navigable-in-fact," resolving some longstanding issues, but undoubtedly raising other (e.g., navigable by whom – canoes, container ships, etc.; and navigable at what point in time – historically prior to human modification, at the time the CWA was adopted, or now?).

Legislation like this would be game-changing for federal law, but it remains to be seen whether such legislative "fixes" will gain traction on Capitol Hill. While Republicans could pass such a bill without Democratic votes in the House, given the solid Republican majority, the narrow Republican margin in the Senate – made even slimmer because Senator Susan Collins (R-Maine) is unlikely to vote in favor of any major rollback of environmental laws – could make it nearly impossible obtain the 60 votes necessary to pass.

11th CIRCUIT UPHOLDS FHWA's 4(f) APPROVAL FOR FLORIDA BRIDGE PROJECT, CITING SOCIAL IMPACTS AS A KEY FACTOR IN "PRUDENCE" AND "LEAST HARM" ANALYSES

Submitted by

William G. Malley
Perkins Coie LLP

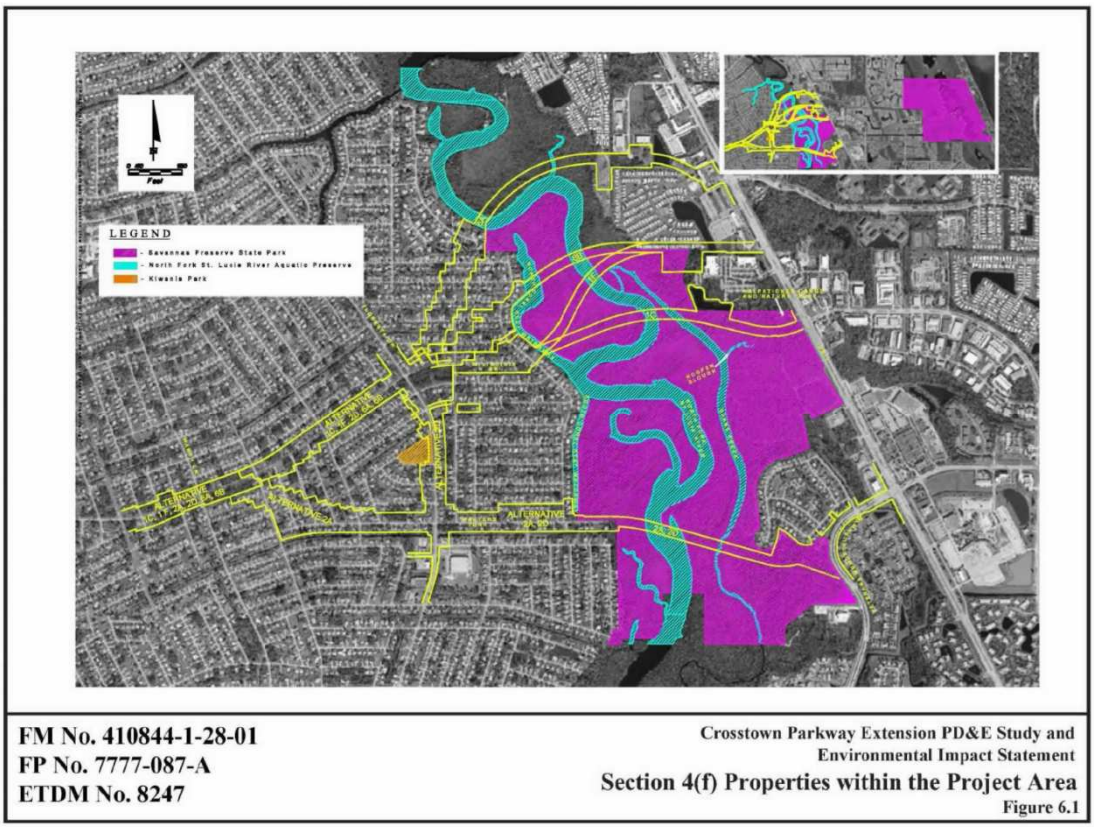
WMalley@perkinscoie.com

In a decision issued in February 2017, the U.S. Court of Appeals for the 11th Circuit affirmed a district court decision upholding FHWA's Section 4(f) approval for a new bridge in the City of Port St. Lucie, Florida. The decision upheld FHWA's determination that there was no feasible and prudent avoidance alternative to using Section 4(f) resources, and that the project included all possible planning to minimize harm.

The project at issue in this case was a proposed bridge across the North Fork of the St. Lucie River in the City of Port St. Lucie, Florida. The city's population had tripled from 1990 to 2010 and was projected to continue growing at a rapid pace. Traffic projections showed a need for a new bridge to provide additional capacity. Through a planning study, the City identified the general corridor within which new capacity was needed. As part of the NEPA process, alternatives were then developed within that corridor. FHWA ultimately decided to carry forward six build alternatives for detailed study in the NEPA process.

As shown in the figure below, taken from the court decision, the project area included two large, publicly owned parks: the North Fork St. Lucie River Aquatic Preserve,

shown in blue, and the Savannas Preserve State Park, shown in purple. All six of the alternatives crossed the Aquatic Preserve; all but one crossed the State Park.



Conservation groups urged FHWA to avoid impacts to Section 4(f) resources altogether by selecting the most northerly route, known as Alternative 6A, and building the project using a "spliced beam" construction method in order to avoid placement of piers in the river, which would have resulted in a use of 0.1 acres of land within the Aquatic Preserve. FHWA rejected Alternative 6A as imprudent due in large part to its "severe social impacts," which resulted from the alternative's diagonal route through city neighborhoods. FHWA also rejected three other alternatives as imprudent for various reasons. FHWA then conducted a "least harm" analysis among the remaining two alternatives and selected Alternative 1C, an alternative that would use 0.2 acres of the Aquatic Preserve and 2.14 acres of the State Park, mostly due to pier placement.

In the lawsuit, the conservation groups claimed that FHWA had erred in rejecting Alternative 6A with spliced-beam construction as imprudent. In upholding FHWA's decision, the court found that a combination of social impacts supported FHWA's determination that Alternative 6A was imprudent. These factors included:

- Alternative 6A "would require the second-highest commercial relocations."
- Alternative 6A "would result in the highest number of properties with noise impacts that could not be benefited by a noise wall."

- Alternative 6A "would create a substantial visual impact" west of the river.
- Alternative 6A "would diagonally bisect neighborhood streets that are laid out on a grid system, thus creating substantial numbers of dead ends, cul-de-sacs, redirected roads, and continuity cuts."
- Alternative 6A "was also the only alternative with the potential for affecting neighborhoods with a higher than average number of minority households."
- Alternative 6A "would also require relocation of the access road into the La Buona Vita retirement community, which would change traffic flows within the community, increasing noise and visual impacts."

Based on all of these factors, the court found that FHWA "acted well within its discretion in concluding that the cumulative harms rendered Alternative 6A imprudent."

Further, the court rejected the plaintiffs' argument that FHWA had erred by failing to make a specific determination that these factors caused impacts of "extraordinary magnitude" or involved "unique problems" – the terms used by the U.S. Supreme Court when it defined the concept of "prudence" in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). In rejecting this argument, the 11th Circuit agreed with the 1st Circuit's that "[t]he [Supreme] Court's mention of 'truly unusual,' 'extraordinary,' and 'unique' circumstances was intended as a gloss on the application of section 4(f) in a particular type of situation. Those descriptive terms were never meant to displace the statutory directive that the agency determine whether an alternative is 'prudent.'" *See Safeguarding the Historic Hanscom Area's Irreplaceable Resources, Inc. v. Fed. Aviation Admin*., 651 F.3d 202, 208 (1st Cir. 2011).

The plaintiffs also challenged FHWA's "least overall harm" analysis supporting the selected route, Alternative 1C. The court upheld this analysis as well, finding that this analysis properly considered each of the seven factors listed in FHWA's Section 4(f) regulations for consideration in a "least overall harm" analysis. See 23 C.F.R. § 774.3(c)(1). Notably, the key distinguishing factor in this analysis was the relative degree of harm to non-Section 4(f) resources, in particular impacts to communities. The court recognized that Alternative 1C had higher impacts to Section 4(f) resources than other alternatives, including Alternative 6A, but upheld FHWA's determination that Alternative 1C caused less overall harm, principally because it caused far lower impacts to communities. The court cited several factors in support of this conclusion:

- The impacts of Alternative 1C on parkland were small as a percentage of the total size of the affected parks. The court noted that the 2.14-acre impact within the State Park was less than 0.03 percent of the park's total area, the 0.02-acre impact in the Aquatic Preserve was less than 0.00068 percent of the preserve's total area.

- The project included extensive mitigation for the impacts to the Section 4(f) properties, including the acquisition of 108.55 new acres (1.5 percent of total acreage) of wetland area for the State Park.

- The state agency with jurisdiction over the Aquatic Preserve and State Park worked with the FHWA to design the mitigation plan and agreed that the mitigation would fully compensate for the impacts of Alternative 1C.

- The selected alternative included numerous measures to minimize harm from construction, including "reduction in bridge width over natural habitats, use of a top-down construction method, placement of bridge piers to avoid restricting water movement, use of storm-water management systems, use of retaining walls, use of noise-minimization techniques, and use of specialized equipment."

- FHWA reasonably rejected "spliced beam" construction as a method for any of the build alternatives, because while that method would avoid impacts within the Section 4(f)-protected areas, it would require much larger piers on the river banks and therefore would have much greater impacts on wetlands.

In conclusion, the court recognized that that Section 4(f) "requires a thumb on the scale in favor of alternatives that avoid the use of § 4(f) lands" but found that FHWA had met that requirement here with its "ambitious mitigation plans" and "thorough and careful" analysis.

Conservation Alliance of St. Lucie County, Inc. v. USDOT, 11th Circuit No. 15-15791, 2/3/17.

NEXT DEADLINE JUNE 15, 2017

The next deadline for submissions for this newsletter is June 15, 2017. Please send articles to richard.christopher@hdrinc.com. Please use Microsoft Word.