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Environmental Enforcement: What Happens When the COVID-19 Pandemic Is Over?

BY MATTHEW COHN

In a policy that has been praised by some, criticized by others, misunderstood by many, and politicized by many more still, the United States Environmental Protection Agency articulated its expectations for environmental compliance during and after the COVID-19 pandemic. Stated most simply, the EPA's policy explains that if regulated

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Trump Administration's Navigable Waters Protection Rule Reduces the Reach of the Clean Water Act

BY JORGE MIHALOPOULOS

On April 21, 2020, the U.S. Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") achieved a top priority of the Trump Administration's environmental agenda: narrowing the scope of the Clean Water Act ("CWA") by officially replacing the Obama Administration's Clean Water Rule. In its place, EPA and the Corps published the Navigable Waters Protection Rule, which goes into effect on June 22, 2020 and is the latest chapter in a nearly 50-year saga concerning the scope of the CWA.

The Origin of the Navigable Waters Protection Rule

This saga began with Congress's failure to precisely define the scope of the CWA. Although Congress limited the statute's jurisdiction to "navigable waters", it simply defined those waters as "waters of the United States" ("WOTUS");[1] and because those words "are hopelessly indeterminate," the CWA is "notoriously unclear."[2] Thus, with no clear direction from Congress, the task of defining WOTUS—and, by extension, the scope of the CWA—fell to courts.

Yet courts have fared no better. Indeed, the latest effort by the U.S. Supreme Court

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entities cannot achieve environmental compliance due to the pandemic, then they must act as responsibly as possible under the circumstances, document the way in which the pandemic was the cause of any non-compliance at a facility, and return the facility to compliance as soon as possible.[1] In reaction to accusations that the EPA's COVID-19 policy is tantamount to a suspension of the federal environmental enforcement program, on April 2, 2020, the EPA explained to Congress that its policy was only temporary and did not excuse the obligations of regulated entities to comply with permits, regulations and statutes.[2] While the imminent health threat of the COVID-19 pandemic is rightfully receiving so much attention, regulated entities are still expected and obligated to do everything possible to continue to protect the environment.

How Behavior During the COVID-19 Pandemic Will Be Judged

Regulated entities should not take comfort or solace that they have entered a period during which environmental compliance conduct will not be scrutinized. On the contrary, there could very well be a post-pandemic period in which behavior during the pandemic will be judged, perhaps harshly by those who may believe that unlawful advantage was taken. Even if the EPA is less aggressive in carrying out enforcement during this period, certainly others including the states, citizen enforcers, and even the criminal prosecutors at the Department of Justice, could see things differently and assume the lead in enforcing the law later. Environmental enforcement is not just the EPA's domain. With respect to citizen enforcement, Congress authorized citizen suits in various federal statutes for the very purpose of enabling citizens to enforce environmental laws when governmental authorities are unwilling or unable to act in that capacity. Moreover, aside from enforcement, after the pandemic, savvy and conscientious consumers may remember those who exhibited responsible and irresponsible behavior during this challenging period, and could chose to reward in the marketplace those who accepted the circumstances and acted most sensibly, and punish those who did otherwise.

The COVID-19 Policy

It is important first to understand just exactly what is in the EPA's COVID-19 policy. The policy does not relieve regulated entities from environmental compliance obligations. Rather, the EPA only expressed a willingness to use its enforcement discretion in a way that acknowledges that facilities may be short on staff, laboratories may be less timely in performing analyses, and there may be other constraints on timely or complete environmental compliance. Regardless of the circumstances, the EPA expects the following:

1. Entities should make every effort to comply with their environmental compliance obligations.
2. If compliance is not reasonably practicable, facilities with environmental compliance obligations should:
   a. act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
   b. identify the specific nature and dates of the noncompliance;
   c. identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
   d. return to compliance as soon as possible; and
   e. document the information,

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Raymond T. Reott

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

action, or condition specified in a. through d.[3]

Regarding routine monitoring and reporting, regulated entities should:

> use existing procedures to report noncompliance with such routine activities, such as pursuant to an applicable permit, regulation or statute. If no such procedure is applicable, or if reporting is not reasonably practicable due to COVID-19, regulated entities should maintain this information internally and make it available to the EPA or an authorized state or tribe upon request.[4]

Where environmental compliance activities are being performed pursuant to an administrative settlement agreement between a regulated party and the EPA, then:

> if, as a result of COVID-19, parties to such settlement agreements anticipate missing enforceable milestones set forth in those documents, parties should utilize the notice procedures set forth in the agreement, including notification of a force majeure, as applicable.[5]

Where there is a consent decree, then regulated parties should be cognizant that the federal court with jurisdiction will make the final decision regarding whether the COVID-19 pandemic legitimately impacted a party's ability to meet environmental compliance obligations. Regarding such consent decrees, the EPA explains:

> EPA staff will coordinate with DOJ to exercise enforcement discretion with regard to stipulated penalties for the routine compliance obligations … and will also consult with any co-plaintiffs to seek agreement to this approach. Courts retain jurisdiction over consent decrees and may exercise their own authority. Parties should utilize the notice procedures set forth in the consent decree, including notification of a force majeure, as applicable, with respect to any noncompliance alleged to be caused by COVID-19.[6]

Aside from these permitting, regulatory and statutory obligations, the EPA expressed its expectation that regulated parties operate their facilities in a safe manner that does not harm public health and the environment.[7] During the duration of the pandemic, the EPA will use its enforcement discretion and apply its resources in a way that targets the most imminent threats to public health and the environment.[8]

Non-EPA Enforcement

While the EPA has issued its policy, it is important to remember that it is not just the EPA that enforces environmental laws.

Enforcement by the States

In our system of "cooperative federalism," the EPA and the states have parallel roles in enforcing federal environmental laws.[9] It is clear to most everyone that the states have taken on perhaps the most visible role in the public's mind in responding to the COVID-19 pandemic. Stay-at-home orders and the like have largely been issued by governors. It is thus state actions that may perhaps be putting the greatest burden on regulated entities to meet their environmental compliance obligations.

When the pandemic is over, we anticipate that the states will scrutinize the behavior of regulated entities during the crisis. The states will have been tuned in and will be aware of what the regulated community was doing during the crisis, and will have noticed conduct that may not have received the attention of the federal government. In such a climate, environmental law enforcement by state environmental agencies and state attorneys general may take a front seat, to the extent that the states may be in the best position to bring enforcement actions against those perceived by state leadership and the public to have taken advantage of the situation with regard to environmental compliance.

Regulated entities should be conscientious and sensitive to state expectations throughout the pandemic to minimize the risk of enforcement when the pandemic ends. Prudent regulated entities are wise to document compliance efforts, impediments, and corrective action taken in real time. *Post hoc* explanations are not likely to be effective without contemporaneous and admissible evidence that follows EPA's directions.

Enforcement by Citizens

Federal environmental laws such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act provide opportunities for private citizens to directly enforce statutory violations when the EPA and the states are unable or unwilling to enforce those laws themselves.[10] The essence of a citizen suit is to "enable affected citizens to push for vigorous law enforcement even when government agencies are more inclined to compromise or go slowly."[11] Clearly, Congress meant to provide enforcement to citizens in addition to government agencies to ensure environmental compliance. Here, the EPA's COVID-19 policy can easily be interpreted by citizens as the EPA's unambiguous decision to compromise with regulated entities and delay – but not excuse – enforcement during a time of crisis, and only for documented and justifiable reasons. When the crisis abates, if the EPA and/or states decline to enforce the law, citizens may pursue their own actions in court against regulated entities alleging they took advantage of the situation in order to avoid environmental compliance obligations.

To extent that regulated entities are unable to meet their environmental compliance obligations during the COVID-19 pandemic, they will be unable to rely exclusively on the EPA's policy as a defense against citizen enforcers. Regulated entities should be careful to make a record with admissible, contemporaneous evidence collected during the pandemic in order to prove impossibility of compliance or the frustration of their attempt to comply.

Criminal Exposure

Similarly, the EPA's COVID-19 policy makes a not-so-veiled threat that criminal enforcement remains possible for regulated entities who fail to comply with environmental obligations not necessarily caused by the pandemic. The EPA's COVID-19 policy explains:

Federal environmental statutes generally authorize criminal penalties for

knowing conduct that violates the law. In screening cases to determine when to seek prosecutorial assistance from DOJ, the EPA will distinguish violations that facilities know are unavoidable as a result of COVID-19 restrictions from violations that are the result of an intentional disregard for the law. EPA's Criminal Investigative Division remains vigilant and is prepared to pursue violators who demonstrate a criminal *mens rea*.[12]

In other words, the EPA is telling regulated entities that it will be on the lookout for those who knowingly and consciously took advantage of the situation to avoid environmental compliance obligations.

Public Expectations of Corporate Responsibility

Nearly everyone in the United States has been personally impacted in some way by the COVID-19 pandemic. With that shared experience, it would be prudent to anticipate outrage directed at those who are perceived to have taken advantage of the circumstances for personal gain. A record and admissible evidence will serve to inoculate a regulated entity from an unfounded charge of being a scofflaw during this time of national crisis. Moreover, after the pandemic abates, the experience will be raw for many, and for some consumers, learning of irresponsible environmental behavior while environmental compliance was possible in spite of the pandemic, will be enough to make those consumers look for different suppliers who behaved better and acted more responsibly. While no one would seek the pandemic under any circumstances, the opportunity to provide evidence of compliance even during a crisis is an opportunity to show consumers, citizens and agencies that a regulated entity is and remains a responsible corporate citizen. Even without legal enforcement and penalties, consumers can use the marketplace to express their disapproval of those businesses they believe chose to act improperly in times that challenged everyone.

Conclusion

While most attention is properly focused on the imminent health threat of the COVID-19 pandemic, now is not the time to avoid or ignore environmental compliance obligations. Regulated entities should make every effort to comply with permits, and with regulatory and statutory obligations, or be able to provide real-time evidence of reasonable and responsible alternatives. If non-compliance is unavoidable, then it is essential that regulated entities make a record of all the facts and circumstances surrounding their non-compliance. Furthermore, regulated entities must return to compliance as quickly and expeditiously as possible. Regulated entities should also be cognizant that this crisis will end, and like in any crisis, it is natural and foreseeable that there could be a reckoning for those who were perceived to have taken advantage of the situation. Behavior will be judged after the fact, and those who are viewed as having behaved below expectations, if not subjected to traditional EPA civil enforcement, could be the subject of state enforcement, citizen enforcement, and even criminal enforcement. Moreover, consumers could choose to reward good behavior and rebuke bad behavior in the marketplace.■

For more information, please contact Matt at mcohn@greensfelder.com or 312-345-5003.

1. Memorandum, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program, by Susan Parker Bodine, EPA, March 26, 2020 ("COVID-19 Mem."), https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf (visited Apr. 5, 2020).
2. Letters to Senator Diane Feinstein, Representative Katie Porter, and Representative Mike Quigley, by Susan Parker Bodine, EPA, April 2, 2020, https://www.epa.gov/newsroom/april-2-2020-letters-susan-bodine-oeca-aa-feinstein-porter-quigley (visited Apr. 5, 2020).
3. COVID-19 Memorandum, *supra* note 1 at 1-2.
4. *Id.* at 2.
5. *Id.* at 4.
6. *Id.*
7. *Id.* at 4-5.
8. *Id.* at 7.
9. Cooperative Federalism at EPA, https://www.epa.gov/home/cooperative-federalism-epa (visited Apr. 5, 2020).
10. Clean Air Act, 42 U.S.C. § 7604(a), Clean Water Act, 33 U.S.C. § 1365(a), RCRA 42 U.S.C. § 6972(a).
11. *Adkins v. VIM Recycling*, 644 F.3d 483, 501 (7th Cir. 2011).
12. COVID-19 Memorandum, *supra* note 1 at 7.

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to address this issue created more problems than it solved. Specifically, in *Rapanos v. U.S.*, a fractured Court failed to provide a coherent answer to the question at the heart of the WOTUS debate: when are *non-navigable* waters—and, in particular, wetlands and intermittent streams—subject to the CWA?[3] According to Justice Scalia, writing for the plurality, the answer was more of a bright-line rule: CWA jurisdiction only attaches to traditionally navigable waters or those tied to such waters by a "continuous surface connection."[4] Justice Kennedy, on the other hand, developed an expansive case-by-case test: CWA jurisdiction attaches to any water bodies with a "significant nexus" (i.e., biological, physical, or chemical impact) to traditionally navigable waters, irrespective of an actual surface connection.[5]

With "no opinion commanding a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act," confusion reigned in the aftermath of *Rapanos*.[6] In an attempt to provide clarity, the Obama Administration endorsed Justice Kennedy's case-by-case approach and incorporated it into a new regulatory definition of WOTUS called the Clean Water Rule.[7] This rule was immediately challenged in courts throughout the country, with its opponents arguing that the adoption of Kennedy's case-by-case analysis perpetuated uncertainty and led to government overreach.[8]

On the campaign trial, President Trump promised to repeal the Clean Water Rule

and, in one of his first actions upon taking office, initiated a process to replace it. Specifically, on February 27, 2017, he issued an Executive Order calling on EPA and the Corps to review the Clean Water Rule and consider interpreting CWA jurisdiction more narrowly.[9] In fact, the Executive Order instructed EPA and the Corps to "consider interpreting the term 'navigable waters'… in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*."[10] Based on this directive, the agencies initiated a two-step rulemaking process: step one was to repeal the Clean Water Rule and step two was to replace it.

Step one was completed when the EPA and Corps published the formal repeal in the Federal Register on October 22, 2019; it took effect on December 23, 2019[11] and was the subject of an article in the February 2020 edition of this newsletter. Step two was accomplished with the publication of the Navigable Waters Protection Rule ("New Rule").

The Effect of the Navigable Waters Protection Rule

The New Rule is a significant departure from the Clean Water Rule that it replaces. At is core, the New Rule represents a shift from Justice Kennedy's case-by-case "significant nexus" test to Justice Scalia's "continuous surface connection" approach. Specifically, the New Rule declares that its "application of a clear test for categorically covered and excluded waters…is inherently less complicated than a complex multi-factored significant nexus test that must be applied on a case-by-case basis to countless waters and wetlands across the nation."[12] The New Rule further proclaims that it "is intended to establish categorical bright lines that provide clarity and predictability," and that "[c]onsistent with that goal, the final rule eliminates the case-specific application of Justice Kennedy's significant nexus test, and instead establishes clear categories of jurisdictional waters and non-jurisdictional waters and features that adhere to the basic principles articulated in… Justice Scalia's plurality opinion."[13]

Effectively, this shift results in the New Rule trimming the categories of waters subject to the CWA. Gone is the jurisdiction over isolated wetlands and ephemeral streams.[14] And, although jurisdiction over intermittent tributaries is possible, it only exists if they contribute surface water flow to traditional navigable waters in a "typical year" when "precipitation and other climatic variables are within the normal periodic range…based on a rolling thirty-year period."[15] In other words, intermittent tributaries that just contribute surface water flow in wetter-than-normal years no longer fall within the scope of the CWA.

The New Rule similarly shrinks federal jurisdiction over wetlands. Indeed, jurisdiction only attaches to those wetlands that actually touch other jurisdictional waters, are inundated by flooding from those waters, or are merely separated from those waters by a natural feature such has a bank or dune.[16] If wetlands are separated by an artificial structure, like a road, jurisdiction is only possible if a hydrological surface connection exists between the wetland and a jurisdictional water at least once in a typical year.[17] Finally, unlike previous definitions and interpretations of WOTUS, a wetland is no longer covered if it is adjacent to another wetland; thus, eliminating protection for chains of wetlands.[18]

The Fate of the Navigable Waters Protection Rule

Like the Clean Water Rule before it, the New Rule was destined for litigation from the moment it was conceived. Lawsuits challenging the New Rule have already been filed across the nation even though the New Rule has not gone into effect. Unsurprisingly, environmental groups have led the charge, vehemently opposing the Trump Administration's take on the CWA. In fact, a total of 24 environmental groups have filed lawsuits in three separate courts along the east coast, with each complaint challenging the new definition of WOTUS on multiple grounds.[19] Meanwhile, on the other side of the country, a group of 17 "blue" states filed suit in the Northern District of California.[20] This group of states, which includes Illinois, is challenging the New Rule primarily on procedural grounds—arguing the Trump Administration violated the Administrative Procedures Act.[21]

Yet, the fate of the New Rule may be decided before any judgment is rendered in these cases. In our hyper-partisan era, the definition of WOTUS has become a political football and if November's election ushers in a new administration, it will almost certainly rescind the New Rule. Alas, for the environmental law practitioner, the scope of the CWA remains a moving target for the foreseeable future.■

Jorge is the head attorney of the environmental/construction/tort division of the Metropolitan Water Reclamation District of Chicago. For more information, please feel free to contact Jorge at Mihalopoulos@mwrd.org or 312-751-6588. The opinions expressed in this article are those of the author and do not represent the official views of the MWRD.

1. 33 U.S.C. § 1362(7), (12).
2. *Sackett v. EPA*, 132 S. Ct. 1367, 132-133 (2012) (Alito, J., concurring).
3. *Rapanos v. U.S.*, 547 U.S. 715 (2006).
4. *Id*. at 739-43.
5. *Id*. at 759.
6. *Id*. at 758.
7. Final Rule, Clean Water Rule: Definition of "Waters of the U.S.," 80 Fed. Reg. 37054-01 (Jun. 29, 2015).
8. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015); *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015).
9. Presidential Executive Order No. 13778: Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (Feb. 28, 2017).
10. *Id*.
11. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).
12. Final Rule, The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 FR 22250, 22271 (Apr. 21, 2020).
13. *Id*. at 22325.
14. *Id*. at 22251-52.
15. *Id*. at 22251, 22274.
16. *Id*. at 22251.
17. *Id*.
18. *Id*. at 22312.
19. *South Carolina Coastal Conservation League, et al. v. Wheeler, et al*., Case No. 2:20-cv-1687 (D. S.C. 2020); *Conservation Law Foundation et al. v. U.S. EPA, et al*., Case No. 20-cv-10820 (D. Mass. 2020); *Chesapeake Bay Foundation, Inc., et al. v. Wheeler, et al*., Case No. 1:20-cv-1064 (D.C. Mar. 2020).
20. *State of California, et al. v. Wheeler, et al*., Case No. 3:20-cv-03005 (N.D. Cal. 2020).
21. *Id*.

U.S. Supreme Court Confirms Landowners' Right to Seek Remediation Costs at Superfund Sites Under State Law

BY SHARI LUMB MILEWSKI & ROBERT PETTI

On Monday, April 20, 2020, the U.S. Supreme Court decided Atlantic *Richfield Co. v. Christian*, (2020), a case involving landowners who sought to use state law claims in nuisance, trespass, and strict liability to compel Atlantic Richfield Co. ("Atlantic Richfield") to conduct a more extensive cleanup than the U.S. Environmental Protection Agency ("USEPA") had required under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). At the state court level, the Montana Supreme Court rejected Atlantic Richfield Co.'s arguments that §113(b) of CERCLA gave federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]," and that the landowners were "potentially responsible part[ies]" who, under §122(e)(6), were not permitted to undertake any remedial action without EPA approval.

The U.S. Supreme Court affirmed in part and vacated in part the decision of the Montana court. The Court held that §113 did not preclude the Montana state court's jurisdiction over the landowners' claims because the state common law claims did not arise under CERCLA. However, the Court found that as owners of property located within the Superfund Site, despite not receiving notice of settlement negotiations from EPA as required under §122, the landowners were required to seek EPA approval for any additional remedial activities.

The importance of the opinion for those involved in Superfund sites is twofold: 1) it upholds the state court's overall jurisdiction in the matter for state law claims; and 2) it permits landowners impacted by Superfund sites to seek recovery for their own remediation work beyond that required under the Act, subject to EPA approval for the remedial work intended. This ruling opens a pathway for landowners impacted by Superfund sites to use state law remedies to compel more stringent cleanups. Even at sites where EPA has reached a decision and site cleanup has taken place, there now remains opportunity for regulators to expand cleanup determinations and potentially allow local residents to pursue additional cleanup. In the case discussed here, EPA did not approve of the landowners' plan because the plan presented environmental risks; EPA could come to a different conclusion in other circumstances of under a different administration.

In sum, this decision creates additional uncertainty in determining when or if liabilities at any Superfund sites are ever in fact closed.■

If you have any questions about this article, please contact Robert W. Petti at rpetti@maronmarvel.com; or Shari Lumb Milewski at slm@maronmarvelcom (312) 579-2021 or (302) 472-1747 Maron Marvel Bradley Anderson & Tardy LLC