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4 Clean Water Act Cases To Watch

By **Juan Carlos Rodriguez**

Law360, New York (July 30, 2015, 3:52 PM ET) -- Multiple battles over how to interpret the Clean Water Act and what powers it grants its enforcers are brewing in federal courts, including several that challenge the EPA's bid to redefine which waterways are subject to its jurisdiction and when jurisdictional determinations may be challenged.

Here, Law360 looks at four Clean Water Act cases environmental attorneys should be watching and one from California state court that could have national implications.

Waters of the U.S.

Twenty-eight states, the U.S. Chamber of Commerce and Murray Energy Corp. have all challenged a recently finalized rule clarifying which waterways in the U.S. are subject to federal jurisdiction.

The final version of the U.S. Environmental Protection Agency and Army Corps of Engineers' "waters of the United States" rule was finalized in May. It is an effort to make permitting decisions easier and bring regulations up to date with U.S. Supreme Court opinions, according to the agencies.

The rule, also called the Clean Water Rule, redefines the scope of waters protected under the CWA, determinations the agencies claim have been confusing and complex after Supreme Court decisions caused them to evaluate jurisdiction on a case-by-case basis. The agencies for the first time defined which features constitute riparian areas, floodplains and tributaries, among other terms.

Various parties opposing the rule have argued the rule disrupts the balance between federal and state authority, and that the agencies have asserted "unprecedented authority" to regulate the nation's waters, according to the Chamber's complaint. If the final version of the rule takes effect, the business groups said their members will suffer from decreased businesses and property values.

The states, including Texas, Michigan, Arizona, Florida and Kansas, claim the rule unfairly expands the definition of waters protected by the Clean Water Act, defies previous Supreme Court rulings, oversteps states' rights to regulate their own waterways and harms businesses and landowners.

The private plaintiffs are represented by Troutman Sanders LLP, McDonald McCann Metcalf & Carwile LLP, Consovoy McCarthy Park PLLC and Miller & Chevalier Chtd., among others.

The states are represented by their attorneys general.

The cases are filed in jurisdictions around the country.

CWA Jurisdictional Determinations

A series of cases, including one pending at the U.S. Supreme Court, reflect businesses' frustration at the complicated, expensive and time-consuming procedures that are required to challenge a Corps determination that a waterway is subject to CWA jurisdiction.

In Kent Recycling v. Corps of Engineers, the company is asking the high court to overturn a Fifth Circuit holding that an approved jurisdictional determination is not reviewable final agency action under the Administrative Procedures Act and therefore not eligible for judicial review. The Fifth Circuit's decision lined it up with the Ninth Circuit. The Supreme Court initially denied the petition for certiorari, but Kent asked for reconsideration after the Eighth Circuit split from the Fifth and the Ninth.

The Eighth Circuit, in a strongly worded opinion in Hawkes v. Corps of Engineers, held that jurisdictional determinations about whether a water body is subject to Corps authority are indeed reviewable by a court. The panel said the Corps and a lower court ignored the "prohibitive cost" of taking either of two alternative actions to obtain judicial review of the Corps' assertion of CWA jurisdiction over the property.

Neal McAliley, a partner at White & Case LLP, said if the Supreme Court were to take up the question and decide that a party could challenge a final jurisdictional determination, that party could get into court much faster and more frequently to litigate over the proper scope of federal jurisdiction under the Clean Water Act.

"When parties get into court to do that, judges need to decide whether something is within jurisdiction or not. It would start to create a bigger body of common law over what's jurisdictional and what's not, and further define the scope of waters of the U.S." McAliley said.

He said such a ruling would reduce the power the Corps has to decide these issues because if a party has the right to challenge a jurisdictional determination before the whole permitting process is done, there are likely to be a lot more businesses willing to do it.

The cases are Kent Recycling Services LLC v. U.S. Army Corps of Engineers, case number 14-493, in the U.S. Supreme Court; Belle Co. LLC et al. v. U.S. Army Corps of Engineers, case number 13-30262, in the U.S. Court of Appeals for the Fifth Circuit; and Hawkes Co. Inc. et al. v. U.S. Army Corps of Engineers, case number 13-3067, in the U.S. Court of Appeals for the Eighth Circuit.

Water Transfer Rule

The EPA has asked the Second Circuit to overturn a decision striking down a rule that exempted some water transfers from CWA permitting requirements, arguing it properly exercised its discretion in crafting the regulation.

A number of states including New York, Michigan and Washington along with some conservation groups sued the EPA over its 2008 National Pollutant Water Transfer Rule, and in 2014 a New York federal judge decided it was unlawful. **The rule** allows water to be transferred between basins without a permit, even if the water is contaminated.

The EPA had contended that the rule gives states more flexibility to protect water quality without obtaining federal permits and that it had lawfully interpreted the CWA, but U.S. District Judge Kenneth M. Karas found that the agency had failed to provide a reasoned explanation for its interpretation.

In a brief to the Second Circuit, the agency said that, faced with "ambiguous text in a complex statute with multiple goals," it exercised its discretion to resolve whether water transfers require a permit under the National Pollutant Discharge Elimination System.

The states opposing the rule have argued the EPA has no statutory authority to exempt transfers of polluted water from the Clean Water Act's permit requirement. They said an exemption would authorize the pumping of salt water into fresh water or toxic water into pristine water, thus subverting the act's plain language and Congress' objective of protecting individual water bodies and their users from the harmful effects of pollutants.

The EPA is represented by U.S. Attorney Preet Bharara and Assistant U.S. Attorneys Robert William Yalen and Benjamin H. Torrance.

The states and local entities that support the rule are represented by their respective attorneys general, general counsels or city attorneys and by Peter D. Nichols ofBerg Hill Greenleaf & Ruscitti LLP, Don Baur and Paul Smyth of Perkins Coie LLP, Shawn Draney of Snow Christensen & Martineau PC, Steven E. Clyde of Clyde Snow & Sessions and Dallin W. Jensen of Parsons Behle & Latimer.

The states opposing the rule are represented by their respective attorneys general.

The environmental groups opposing the rule are represented by Daniel E. Estrin and Karl S. Coplan of Pace Environmental Litigation Clinic Inc., David G. Guest ofEarthjustice and Yinet Pino of the Miccosukee Tribe of Indians of Florida, among others.

The case is Catskills Mountains Chapter of Trout Unlimited et al. v. EPA, case number 14-1823, in the U.S. Court of Appeals for the Second Circuit.

Des Moines v. Sac County

The Des Moines, Iowa, Board of Water Works Trustees has sued three counties for allegedly discharging nitrate pollution into the Raccoon River and failing to obtain a National Pollution Discharge Elimination System permit or other state permit in violation of the CWA.

While the act provides two significant exemptions for agriculture — for stormwater that runs off of fields, and for excess irrigation water called irrigation "return flows" — Des Moines has sought to avoid them by suing the authorities that collect and discharge upstream water that is contaminated with nitrates from agricultural runoff and return flows.

The board's lawsuit argues that a major source of nitrate pollution in the Raccoon River watershed is the artificial subsurface drainage system infrastructure, such as those created, managed, maintained, owned and operated by the drainage districts, consisting of pipes, ditches and other conduits that transport high concentrations of nitrate contained in groundwater.

According to the complaint, the discharge of nitrate by the drainage districts is pollution by a point

source in violation of the CWA, and requires an NPDES permit or other permit.

Christopher Rich, a partner at Perkins Coie LLP, said the suit highlights an inherent "urban vs. rural" conflict in the Clean Water Act.

“Agricultural stormwater and irrigation return flows are exempted, but downstream cities face huge costs providing clean drinking water and managing upstream contaminants,” Rich said. "Des Moines is using a novel approach in going after the irrigation districts that collect and discharge water that, arguably, originated as exempt agricultural runoff and return flows. This case could set a very significant precedent."

The board is represented by Richard A. Malm and John E. Lande of Dickinson Mackaman Tyler & Hagen PC.

The counties are represented by Charles F. Becker, Michael R. Reck, Stephen H. Locher and Mark McCormick of Belin McCormick PC and David Yolun Chung of Crowell & Moring LLP.

The case is Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors et al., case number 5:15-cv-04020, in the U.S. District Court for the Northern District of Iowa.

California Drought Measures

While not federal Clean Water Act cases, lawsuits filed in California over the state’s attempt to regulate water rights present important state, regional and national implications.

With California facing a historic drought, the California Water Resources Control Board in June **issued curtailment orders** to 114 senior water rights holders with “pre 1914” permits — permits that predate state regulation — to stop pumping water from the San Joaquin and Sacramento watersheds, a normally fertile area encompassing most of northern California. Curtailment notices were sent to the city of San Francisco, among others.

In response, a group of senior water right holders called the San Joaquin Tributaries Authority, made up of the South San Joaquin, Oakdale, Modesto, Turlock and Merced irrigation districts and the city of San Francisco, sued the state to block the orders.

The lawsuit claims that the state has no jurisdiction or authority to curtail water rights that predate state regulation.

Rich called the challenges to the curtailment orders “a conflict 100 years in the making.”

“The authority of the state to restrict pre-1914 senior rights is a major issue in California water law, but could also have ramifications for the prior-appropriation systems in other drought-impacted states. Water rights advocates will be watching the legal arguments and decisions closely,” he said.

On July 10, a Sacramento County Superior Court judge issued a temporary restraining order that bars the board from enforcing the curtailment in a separate case that involves the West Side Irrigation District, saying the notices violate the parties’ due process rights.

The cases are San Joaquin Tributaries Authority v. California State Water Resources Board, case number

2015366, in the Superior Court of California, County of Stanislaus, and West Side Irrigation District et al. v. California State Water Resources Control Board et al., case number 34-2015-80002121, in the Superior Court of California, County of Sacramento.

--Additional reporting by Kat Greene. Editing by John Quinn and Brian Baresch.
