Is Trump Admin.'s Suspension Of Clean Water Rule Lawful?

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The Trump administration's efforts to reverse various environmental regulations promulgated by the Obama administration have highlighted important principles of administrative law that limit the manner in which such changes can be made. In February 2018, the Trump administration suspended the Clean Water Rule while it considers how to rescind or revise the rule. This action was immediately challenged in two companion cases filed in a New York federal court. These cases present some interesting issues about when and how an agency can suspend a regulation that has already taken effect.

The Trump Administration's Effort to Revise the Rule

The rule was promulgated by the U.S. Environmental Protection Agency and the Army Corps of Engineers in 2015 to define the "waters of the United States" which are subject to the permitting requirements of the Clean Water Act. The rule defines these waters to include streams and wetlands that have a significant hydrological and ecological connection to traditional navigable waters. The very broad sweep of the rule is controversial.

After taking office, President Donald Trump issued an executive order in February 2017 requiring the agencies to publish, for notice and comment, a proposed rule rescinding or revising the rule — which had not yet taken effect because of pending court challenges to it. In July 2017, the agencies proposed a regulation to rescind the rule and replace it with the preexisting regulations while the agencies considered developing a new "waters of the United States" definition. This proposal generated over 680,000 comments. On June 29, 2018, the agencies issued a lengthy supplemental notice of proposed rulemaking, much of which seeks to refute the legal justification for the 2015 rule and explain how a replacement rule should differ. Thus, while the effort to revise the rule is ongoing, that effort is far from complete and will take a considerable amount of additional time.

The Judicial Challenges to the Rule

The suspension of the rule in February 2018, however, was not based on developments in the administrative process to revise the rule. Rather, it was based on developments in the ongoing litigation which challenges the legality of the rule. That litigation precedes the Trump administration. Originally, the rule was to become effective in August 2015, but it was challenged by 31 states and other parties in federal district and appellate courts around the country. These challenges were made at both judicial levels because the Clean Water Act was unclear about whether judicial review commenced in the district courts or the courts of appeals. On Aug. 27, 2015, the day before the rule was to take effect, a district court in North Dakota enjoined the rule in 13 states that were parties to that suit. In October 2015, the Sixth Circuit — where all of the circuit court petitions for review had been consolidated — issued a nationwide stay of the rule. The circuit court concluded that petitioners would probably succeed on their claims that the rule was flawed, and that the appropriate relief

was to restore the status quo as it existed before the rule went into effect.[1]

The Sixth Circuit subsequently ruled that the Clean Water Act lodged judicial review of the rule in the courts of appeals. This decision was appealed to the U.S. Supreme Court which reversed it in January 2018. The Supreme Court held that judicial review should commence in the district courts.[2] On Feb. 28, 2018, after the case was remanded from the Supreme Court, the Sixth Circuit vacated its stay and dismissed the petitions before it for lack of jurisdiction. Thereafter, challenges to the rule have proceeded before the district courts. Currently, the rule is enjoined in 24 states — the 13 states in the North Dakota suit and 11 more states added in June 2018 by a ruling of a district court in Georgia. Additional motions for preliminary injunction are pending before other district courts.

The Trump Administration's Postponement of the Rule

Meanwhile, on Nov. 22, 2017, the agencies issued a separate proposed regulation to add an "applicability date" to the rule that would delay its effectiveness for two years and, during that interim period, would utilize the preexisting regulations. The announced purpose of this regulation was to provide "regulatory continuity and clarity for the many stakeholders affected by the definition of 'waters of the United States'" in light of (1) the Supreme Court's then-pending jurisdictional ruling which might (and did) dissolve the Sixth Circuit's nationwide stay of the rule; and (2) the agencies' ongoing administrative reconsideration of the rule.[3] The agencies asserted that postponing application of the rule for two years would provide sufficient time to reconsider the definition of "waters of the United States." They solicited comment on whether this postponement was desirable and appropriate but did not solicit comment on the proposed definition of "waters of the United States" (i.e., the preexisting regulations) that would apply during this two-year period.

On Feb. 6, 2018 — after the Supreme Court reversed the Sixth Circuit but before the circuit vacated its stay of the rule — the agencies published the final regulation, which established an applicability date of Feb. 6, 2020, for the rule and reinstated the preexisting regulations until then.[4] This regulation took effect immediately, rather than after the 30-day period that the Administrative Procedure Act normally provides, because the agencies asserted that the anticipated lifting of the Sixth Circuit's nationwide stay constituted good cause to dispense with the 30-day requirement.[5]

On the same day this new regulation was published, it was challenged in two companion suits filed in federal court in New York.[6] These suits focus on the limitations that the APA places on the ability of an administration to suspend or postpone regulations promulgated by its predecessor while it considers how to change or repeal those regulations.

The Limits on Rescinding or Revising a Regulation

The requirements of the APA apply not only to formulating a regulation, but also to amending, or repealing a regulation.[7] Thus, once a regulation takes effect, its provisions can only be altered by again going through the APA's public notice and comment process.

While a change in regulatory position is not subject to heightened judicial scrutiny, it remains subject to normal APA review and potential invalidation if the agency's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The

agency is free to change course but only after establishing an administrative record showing that there are good reasons for the change and articulating why the agency believes the change to be better.[8] Where the regulations to be changed are complex or were based on some sort of detailed analysis (scientific, etc.), it usually will take considerable time and effort for the agency to develop a new set of regulations and/or a solid record to support those regulations. This is certainly the case in attempting to develop a revised definition of the "waters of the United States."

The Limits on Suspending or Postponing Regulations

Where the regulations to be replaced or revised have been in effect for a significant period of time, there is little question that they must remain in effect until the new regulations can be promulgated. But where the regulations at issue have only recently taken effect and there has been little or no reliance on them, the question arises whether an agency may suspend the regulations while it considers how to revise them.

In 2017, the EPA took the position that it could suspend the implementation of portions of regulations concerning methane and other greenhouse gas emissions while it reconsidered those regulations. The D.C. Circuit rejected the argument that a federal agency has "inherent authority" to stay or not enforce a regulation that has already gone into effect, while the agency reconsiders it.[9]

Here, in contrast, the agencies went through the rulemaking process to amend the rule to delay its applicability for an additional two years. This is an established method by which new administrations have delayed or suspended regulations to undertake reconsideration of regulations promulgated by their predecessor.[10] However, that rulemaking process must conform to the requirements of the APA. The plaintiffs in the New York cases contend that the agencies violated various APA requirements.

The Extent of Public Comment Necessary to Suspend or Postpone a Regulation

The most interesting argument raised by the plaintiffs is that the agencies did not provide a meaningful opportunity for the public to comment on the substance of the proposed regulation because they solicited comment only on whether postponing the rule was appropriate, but not on the definition of "waters of the United States" (i.e., the preexisting regulations) that would govern during the two-year delay period. The plaintiffs rely on a decision by the Fourth Circuit addressing a similar situation that arose at the outset of the Obama administration. In that case, the Bush administration had promulgated new regulations regarding foreign agricultural workers that took effect on Jan. 17, 2009. Two months later, the incoming Obama administration proposed to suspend the new regulations for nine months for further review and reconsideration and meanwhile to reinstate the previous regulations. In seeking public comment on this proposal, however, the U.S. Department of Labor stated that comments concerning the substance or merits of the new regulations or the previous regulations would not be considered. The Fourth Circuit concluded that, by preventing any discussion of the "substance or merits" of either set of regulations, the agency violated the APA because it had ignored important aspects of the issue.[11]

Recently, a federal district court in California employed a similar rationale to invalidate an

effort by the U.S. Department of the Interior to postpone compliance dates for certain methane waste reduction regulations. The department justified its decision to postpone the deadline based on the substantial cost of complying with the new regulatory requirements and the uncertain future those requirements faced in light of the agency's decision to reconsider them. The court ruled that this rationale was arbitrary because the agency failed to consider both the costs and the benefits of postponing the compliance dates.[12]

These decisions by the Fourth Circuit and the California court are sound. The requirements of the APA would be circumvented if an agency could simply initiate a review of regulatory requirements established by the previous administration, and then rely on its own pending review as justification to vacate the new regulations and reinstate the predecessor regulations, all without assessing the relative merits of the new versus the old regulations.

Does this mean, then, that the postponement of the rule is invalid because the agencies deliberately avoided addressing how the "waters of the United States" should be defined during the two-year delay period? Can an agency never temporarily suspend a rule pending reconsideration — regardless of the costs imposed by the rule in the interim — unless it engages in the same level of analysis for the suspension as it would for any future substantive revision? Not necessarily.

The APA precludes an agency from unilaterally suspending a regulation and reinstating its predecessor without considering the merits of the new and old regulatory regimes. But a different situation is presented when a federal court has weighed in and concluded that the new regulation is flawed (or, in the context of a preliminary injunction, probably is flawed). As one court recently observed, "a federal judge's reasoned skepticism outlined in a judicial order regarding the propriety of [a regulation] … may serve to justify a suspension or delay of specific provisions addressed by the court ..."[13] The ruling by an independent branch of government provides a legitimate basis for the agency to propose delaying the new regulation based solely on issues such as providing regulatory continuity and clarity for the stakeholders and minimizing the administrative burdens for the agency, without considering the relative merits of the new regulation and its predecessor.

Furthermore, if a court has enjoined the new regulation in certain states, the agency is faced with an administrative quandary. It need not honor the injunction in other regions, but the result will be disparity in the law across the nation. While agencies sometimes are willing to live with this result and administer two different sets of regulations in different parts of the country, there are obvious benefits in avoiding such an outcome.

At the time when the agencies proposed to delay the rule, two different courts had already opined that it is probably flawed and that the equities of the situation call for preserving the status quo by continuing to use the preexisting regulations until the validity of the rule is finally adjudicated. Although the nationwide stay of the new rule by the Sixth Circuit subsequently was vacated, the rule remains enjoined in a number of states. These judicial rulings provide an ample basis for the agencies to propose and adopt a regulation postponing the applicability of the rule for two years without reopening debate on how the "waters of the United States" should be defined during that interim period.

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[1] In re EPA, 803 F.3d 804 (6th Cir. 2015).

[2] Nat'l Ass'n of Manufacturers v. Dep't of Def., 138 S.Ct. 617 (2018).

[3] 82 Fed. Reg. 55,542 (Nov. 22, 2017).

[4] 83 Fed. Reg. 5200 (Feb. 6, 2018).

[5] 5 U.S.C. § 553(d).

[6] State of New York v. Pruitt, No. 18-cv-1030 (JPO) (S.D.N.Y.); Natural Resources Defense Council v. EPA, No. 18-cv-1048 (S.D.N.Y.).

[7] 5 U.S.C. § 551(5).

[8] FCC v. Fox Television Stations Inc., 556 U.S. 502, 515 (2009).

[9] Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017).

[10] William M. Jack, Comment, Taking Care That Presidential Oversight of the Regulatory Process Is Faithfully Executed, 54 Admin. L. Rev. 1479, 1499-1504, 1516-17 (Fall 2002).

[11] North Carolina Growers' Ass'n Inc. v. United Farm Workers, 702 F.3d 755, 769-70 (4th Cir. 2012).

[12] California v. Bureau of Land Mgmt., 277 F.Supp.3d 1106, 1123 (N.D. Cal. 2017).

[13] California v. Bureau of Land Mgmt., 286 F.Supp.3d 1054, 1068 (N.D. Cal. 2018).