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Waters of the United States/Clean Water Act: Federal District Court Addresses Conservation Groups' Motion for Intervention in U.S. EPA/Corps of Engineers Final Rule Litigation

03/13/2023

A United States District Court (E.D. Kentucky) (“Court”) addressed in a February 8th Memorandum Opinion and Order (“Opinion”) various conservation groups’ (“CGs”) Motion to Intervene (“Motion”) in litigation involving a rule promulgated by the United States Environmental Protection Agency and United States Corps of Engineers (collectively, “EPA”) revising the Clean Water Act definition of waters of the United States (“WOTUS”). See *Commonwealth of Kentucky, et al. v. United States Environmental Protection Agency*, 2023 WL 2415219.

A previous blog post describing EPA’s revised WOTUS rule can be found [here](#).

The Commonwealth of Kentucky (“Kentucky”) filed suit against EPA in this Court alleging that the WOTUS rule violated the:

- Clean Water Act
- Administrative Procedure Act
- United States Constitution

Kentucky also filed a Motion of Preliminary Injunction asking that EPA be enjoined from enforcing the WOTUS rule.

Various industry groups and the Kentucky Chamber of Commerce also initiated a separate action seeking the same relief. The cases were consolidated.

The CGs subsequently filed a Motion seeking intervention of right and by permission.

The Court notes that they have argued a:

... “significant protectable interest in the scope of the Clean Water Act and the ecological integrity of waters affected by the Rule” because they represent “hunters, anglers, conservationists, and outdoor enthusiasts who use and enjoy water resources.”

The CGs also argued that their interest was sufficiently distinct from EPA’s interests in litigation to make those agencies inadequate representatives.

Kentucky and the industry groups objected to intervention on either basis by the CGs. EPA opposed intervention of right but not permissive intervention.

The Court cites case law interpreting Federal Rules Civil Procedure 24(a)(2) as establishing the standard for determining whether a non-party is entitled to intervention of right:

. . . the proposed intervenors [must] demonstrate that the following four criteria have been met: (1) the motion to intervene is timely; (2) the proposed intervenors have a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the proposed intervenors' ability to protect their legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenors' interest.

The CGs argue that EPA is only partially aligned with their interest. This is based on their belief that EPA answers to a “far broader constituency.” Cited is the CGs advocacy of a different scope for the WOTUS rule.

The Court holds that the EPA and the CGs share an interest in upholding the WOTUS rule. In other words, it notes that they share the same “ultimate objective” and the Court therefore presumes adequate representation. It cites the failure of the CGs to identify any interest that EPA will pursue which is adverse to their own.

The Court holds that the CGs failed to demonstrate that all four of the criteria set out in the case law for intervention by right is met.

The request for permissive intervention pursuant to Rule 24(b) is also addressed, noting that:

. . . the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.

If the two requirements are demonstrated, the Court is required to balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the Court’s discretion, intervention should be allowed.

The Court declines to permit permissive intervention again holding that EPA will adequately represent the CGs’ interest. In addition, it states that the intervention:

- Would prejudice the parties
- Burden judicial economy
- Would not address a unique argument that will contribute to the litigation

Therefore, the Court finds that allowing intervention would not serve the interest of judicial economy.

The CGs will be allowed to file a memorandum amicus curiae to the extent they have a different perspective of the relevant issues.

A copy of the Opinion can be downloaded [here](#).