Delay Issuing "Dredge and Fill" Certification under the Clean Water Act Ruled Fatal to Ohio EPA's Enforcement Authority

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In an appeal watched closely by many environmental attorneys in Ohio, on December 9, 2019, the Fifth Appellate District (FAD) affirmed the Stark County trial court's decision in *State of Ohio v. Rover Pipeline LLC, et al.*, 2019-Ohio-5179, a decision that dismissed Ohio EPA's enforcement complaint against the builders of a 713-mile interstate gas pipeline crossing 18 Ohio counties.

In its affirmance, the FAD agreed with Judge Kristin Farmer's ruling that Ohio EPA's failure to comply with the one-year deadline to issue a certification under Section 401(a)(1) of the Clean Water Act (CWA) for proposed dredging/filling of waters during the pipeline's construction constituted a waiver of the Agency's right to sue the companies for alleged failure to obtain permits for the discharge of drilling fluids and stormwater during construction.

The CWA's one-year deadline for states to issue Section 401 certifications for proposed Section 404 dredge or fill permits, and the waiver of the right to object to or limit such permits if the deadline is missed, are nothing new. The deadline has been in the CWA since the early 1970s. However, the additional waiver of the right to sue for alleged unpermitted ancillary discharges occurring during the construction was something Ohio EPA clearly did not anticipate.

In response to Ohio EPA's argument that its Section 401 certification applies only to the "dredging or filling of waters" aspects of a proposed construction project, not to ancillary discharges of pollutants that occur when the project is underway, both Judge Farmer and the FAD cited Section 401(d) of the CWA, a subsection that Ohio EPA, and perhaps other states' environmental agencies, may not have paid sufficient attention to, but are likely to do so in the future.

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Section 401(d) states that certifications for proposed dredge/fill projects *shall* include any applicable effluent limitations or monitoring requirements necessary to ensure compliance with all of the CWA's permitting programs, as well as their state counterparts. The broad scope and clarity of this language was sufficient for the trial judge and the FAD to hold that the waiver for missing the one-year deadline included future enforcement relating to unpermitted discharges of drilling fluids and stormwater during construction. In addition, both courts found that information was provided to Ohio EPA during the permitting process, such that the Agency should have known of the scope of other discharges likely to occur during construction, and thus had the means to impose limits thereon.

In an effort to appease Ohio EPA, the FAD offered in dicta that the Agency could issue a certification with conditions "subjecting all types of [future] discharges to compliance with the laws of Ohio." However, because Section 401(d) of the CWA requires that a certification include all effluent limitations and monitoring requirements necessary to comply with state water pollution control laws, it is questionable whether a generic obligation to comply is sufficient to meet the language of the statute.

The ruling in *Rover Pipeline* applies not just to pipeline projects. It applies to any type of construction where a dredge or fill permit is required under the CWA to grade or fill wetlands or waterways, including residential, commercial and industrial developments, utility line extensions, and water or sewer projects. If you have any questions about the decision or its implications for a particular project, please contact Steve Haughey or another member of the Environmental Practice Group.

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