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40 Years Of Clean Water Act: Muddy Aspects Remain

Law360, New York (October 18, 2012, 4:49 PM ET) -- Forty years ago this week, Chuck Berry topped the music charts, and the first movie in the Godfather series was the top movie. In the news, both the U.S. House of Representatives and the U.S. Senate overrode a veto by President Richard Nixon, and the Clean Water Act became law.

The Clean Water Act, having been born in controversy and remained there ever since, has survived numerous challenges in the courts and tinkering in Congress in the years since and has served as the guiding federal law on how to clean up our nations polluted lakes, rivers and coastal waters. The idea of such a law first rallied public support after Cleveland's Cuyahoga River, filled with pollutants discarded by decades of industry, caught fire from sparks from a passing train, serving as a symbol and a catalyst for national action.

While the Clean Water Act has generally been considered a success because there have been "no more Cuyahogas," enforcement of the law has evolved, and new interpretations are leading to potential new battles about where things go from here. Lawsuits pending across the country reveal fundamental disagreements about what the law now covers.

There are watersheds around the country, notably the Chesapeake Bay, that are impaired by nutrients from runoff from agricultural activities, where opponents of the U.S. Environmental Proctection Agency's restoration plan take the position that the runoff is not covered by the Clean Water Act. The opponents argue that the EPA's use of the Clean Water Act is being stretched to cover nonpoint source pollution, on top of the original intent of the act, to prevent pollution from industry and municipalities.

Now, 40 years into the Clean Water Act, agricultural interests are drawing a legal "line in the sand" against the EPA and challenging the agency's newly found legal authority. The argument is that there exists no authority for the Clean Water Act to regulate nonpoint source pollution.

This fundamental difference in point of view on interpretation of the Clean Water Act has now "muddied" the law to the point where this is an opportune time for Congress, in addition to the courts, to review the act and determine how it should be adapted to meet the current needs of the environment. Clarity, with the benefit of 40 years of hindsight, would benefit industry, communities, states and also the EPA itself, as it uses its resources to enforce the act.

Regardless of perspective, almost all who work with the Clean Water Act today can agree that the current state of the law is much too wide open in some areas and open to too much varying interpretation — new guidance is needed. There must be some sort of change, even if it is piecemeal on particular issues within the act, such as a clear, consistent determination as to the scope and breadth of the wetlands regulations.

This undertaking will require more than just a change of policy in the White House. During my experience enforcing and construing environmental laws as an attorney for the U.S. Department of Justice for 13 years, I saw first-hand how different administrations' policies impact enforcement and regulation.

While elections may change those who hold the power in the White House, Congress and the federal agencies, the Clean Water Act's fundamental mission tends to be a steady march by the EPA, which should be continued, regardless of which party wins in November. In order for the Clean Water Act to be revamped, reformed and reengineered to meet today's needs, it would take time and a public prioritization for Congress and the White House to reach a consensus on reform.

In the meantime, the courts will be forced to consider Clean Water Act issues on a case-by-case basis. This can often seem a never-ending circle — the EPA issues rules, then they are challenged in court. On an increasingly frequent basis, the courts have ruled against the EPA and sent the rules back, with the issues never really being resolved because of the breadth of the act and the numerous interpretations that can be developed by a creative agency.

Just this year, in the U.S. Supreme Court's Sackett v. EPA decision, the court ruled that property owners have the right to challenge an EPA compliance order from the time it is issued, rather than waiting for the agency to begin enforcement actions. That shortens the legal arm the EPA has been trying to extend or at least, it "bends the elbow."

But, in order for Congress to step in and fix any flaw of the Act, it seems that it would take a major industrial sector with significant economic impact to motivate lawmakers to act, likely after the Supreme Court would uphold the most stringent of rules. Because of the significance of agriculture to the economy and the volume of litigation now in the courts, the stretching of the act to cover nonpoint source pollution could end up being the tipping point that begins to reshape and refocus at least portions of the act.

As enforcement of this now 40-year-old law continues to evolve, it remains more important than ever for environmental law professionals to stay aware of the changes. As the EPA continues to push the limits of its authority, those impacted by this law often must use vigilance to ensure that the law is enforced in the ways in which it was originally intended.

Now, more than ever in the history of this law, it is imperative to align with experts and advocates who understand how the law is being and will be enforced and interpreted by the EPA, challenged in court and potentially changed on Capitol Hill.

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