
Future Regulation of “Waters of the United States”

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Last spring, the US Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) jointly proposed a rulemaking to amend the definition of “waters of the United States” under the federal Clean Water Act (CWA) and substantially enhance their related enforcement roles. The amended “waters of the United States” definition would greatly expand the jurisdiction of EPA and the Corps. With support from a September 2013 draft EPA report on the “connectivity” of streams and wetlands to downstream waters (the draft “Connectivity Report”), the agencies’ proposed rule would expand the types of smaller and more isolated waters that categorically would be deemed jurisdictional. On other waters, EPA nevertheless would retain the authority to determine, on a case-by-case basis, that the requisite “nexus” exists with respect to the particular water body considered in combination with other regional and similarly situated waters.

CWA programs impacted by the definition of “waters of the United States” include (1) Section 402 National Pollutant Discharge Elimination (NPDES) permit program; (2) Section 404 dredge and fill permit program; (3) Section 311 oil spill prevention and response program; (4) Section 303 water quality standards and total maximum daily load programs; and (5) Section 401 water quality certification process.

The proposed rule does not alter the regulatory requirements under the above programs. Rather, it potentially changes what actions within facilities may be subject to these regulatory requirements. If adopted, the rule likely will increase costs and regulatory burdens on business in the development, industrial, manufacturing, retail, energy, and mining sectors; on private and public landowners; and on government at the state, local, and even federal levels, by expanding the types of water bodies that require CWA permits. The proposed rule would also increase the set of properties subject to risk of regulatory enforcement by EPA, the Corps, their state counterparts, or—under the CWA’s robust citizen suit provisions—nongovernmental organizations.

The proposed rule, more than a decade in the making, is needed to clarify numerous ambiguities, including existing guidance, left in the wake of the US Supreme Court’s rulings in 2001 and 2006, namely *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos v. United States*. Since those decisions, the agencies have been operating under informal guidance documents designed to maximize their jurisdiction while seeking compliance with the Supreme Court’s holdings.

The existing Corps and EPA regulations were most recently revised in 1986 and provide an interpretation that would grant the agencies authority over essentially all waters that the US Constitution arguably would permit, regardless of limits imposed by the CWA itself. The constitutional authority is derived from the interstate commerce clause, which the Supreme Court has interpreted to provide the federal government with authority over all matters that substantially affect interstate commerce.

The Supreme Court decisions in SWANCC and *Rapanos* curtailed the agencies’ jurisdictional reach under the existing regulations. In a 5–4 decision, the SWANCC Court addressed the question of CWA jurisdiction over isolated ponds and concluded that CWA jurisdiction could *not* be based solely on the presence of migratory birds. In *Rapanos*, a divided Court could not agree whether the CWA extended to nonnavigable waters and isolated wetlands. Instead, it issued five opinions without commanding a majority. A plurality ruled that nonnavigable waters are subject to CWA reach only if they exhibit a relatively permanent flow and that wetlands are subject to CWA regulation only if they have a continuous surface water connection to a relatively permanent water body. Justice Kennedy required a “significant nexus” between the nonnavigable water and navigable waters in the traditional sense.

In their 2011 Guidance, which has since been withdrawn, the agencies noted that they “believe it is advisable to replace existing guidance documents interpreting SWANCC and *Rapanos* in order to implement the CWA in a manner that is consistent with those opinions, reflects the best available science, and recognizes recent field implementation experience.” This proposed rulemaking furthers that goal, and the rule, if adopted, will supersede a 2003 Joint Memorandum providing guidance on SWANCC and a 2008 Joint Guidance memo issued after *Rapanos*. The rule will expand jurisdiction beyond that under the 2003 and 2008 guidance, but the agencies maintain that the proposed rule will not enlarge jurisdiction beyond what is consistent with the Supreme Court’s narrow reading of jurisdiction. That position, of course, is subject to much debate and will undoubtedly be a question for the courts to answer.

The agencies looked to Justice Kennedy’s “significant nexus” concurring opinion in *Rapanos* to develop the proposed rule. The draft Connectivity Report is intended to provide a scientific basis for the assertion of jurisdiction over additional categories of waters under Justice Kennedy’s “significant nexus” test. Its major conclusions are (1) all tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers; (2) wetlands and open waters in landscape settings that have bidirectional exchanges with streams or rivers are physically, chemically, and biologically connected with downstream rivers; and (3) current literature does not provide sufficient information to generalize about the degree of connectivity or downstream effects of isolated wetlands.

EPA continues to accept public comments on the draft Connectivity Report while a panel of the EPA Scientific Advisory Board (SAB) conducts its mandatory quality review. The report has not yet been submitted to or approved by the chartered SAB or EPA. Many question why the agencies would base the proposed rulemaking on preliminary conclusions in a report that has not been finalized. EPA maintains that any rulemaking will not be finalized until the final version of the scientific assessment is complete. The legitimacy of EPA receiving comment on a proposal before that assessment is complete and then finalizing the rule based on a final assessment not subject to further public comment will certainly be issues open to great debate.

Essentially, the proposed rule includes three main revisions to the current regulations. First, under the proposed rule, all tributaries of traditional navigable waters, interstate waters, or the territorial seas would be defined as “waters of the United

States” and thus subject to federal jurisdiction. Also, all waters, including wetlands, adjacent to traditional navigable waters, interstate waters, or the territorial seas, would similarly be automatically subject to federal jurisdiction. Thus, most intermittent and seasonal streams, as well as wetlands near rivers and streams, would be regulated under the CWA as a matter of law.

Second, for water bodies more distant from perennial waterways, the proposed rule would allow those water bodies to be examined on a case-by-case basis, either alone or in conjunction with regional and similarly situated waters. The agencies would consider whether these other waters had a “significant nexus” to navigable water, interstate water, or territorial seas.

Third, the proposed rule seeks to clarify that certain man-made ponds and various types of ditches are exempt from regulation—in essence, formalizing some relief for the regulated community.

Although some of the categorical determinations are uncontroversial, the agencies propose to greatly expand their jurisdiction by defining all tributaries and adjacent waters as “waters of the United States.” The breadth of the agencies’ reach is revealed in the definitions and interpretations of key terms such as “tributary,” “adjacent,” “neighboring,” and “riparian area.” Using the draft Connectivity Report as justification, the agencies also broadly interpret what they mean for a water body to have a “significant nexus” to “waters of the United States.”

If implemented, the rule will have a particularly significant impact in the arid and semi-arid west because the broad definition and interpretation of “tributary” signals the agencies’ intentions to reach the vast majority of intermittent and ephemeral drainages. The proposed rule defines a “tributary” as a water physically characterized by the presence of a bed and banks and an ordinary high water mark that contributes flow, either directly or through another water, to traditional navigable waters, interstate waters, or the territorial seas. Nevertheless, a water that qualifies as a tributary does not lose its status if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes and dams), or one or more natural breaks (such as wetlands, debris piles, boulder fields, or a stream that flows underground) so long as the bed and banks and ordinary high water mark can be identified *upstream* of the break. Flow in the tributary may be ephemeral, intermittent, or perennial, but the tributary must drain or be a part of a network of tributaries that drain into traditional navigable waters, interstate waters, or the territorial seas or impoundments thereof. Tributaries can be natural, man-altered, or man-made.

The agencies’ interpretation that a tributary may exist even when an ordinary high water mark disappears seems directly aimed at addressing intermittent and ephemeral tributaries, including dry-land systems in the arid and semi-arid west, where ordinary high water mark indicators are discontinuous. Thus, where a drainage or wash has a bed and bank and ordinary high water mark upstream of a tailings impoundment, the impoundment would be located in a water of the United States and activity downstream of the impoundment could be regulated despite the absence of traditional tributary features and regular flow immediately downstream of the impoundment. In addition, although not waters of the United States, gullies and rills that lead to a wash or drainage that qualifies as a tributary may function as point sources such that discharges of pollutants through these features could require a NPDES permit.

The regulated community may derive some relief in the proposed rule via the following categorical exemptions: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; (2) ditches that do not contribute flow, either directly or through another water, to traditional navigable waters, interstate waters, or the territorial seas; (3) artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; (4) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (5) artificial reflecting pools or swimming pools created by excavating and/or diking dry land; (6) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (7) water-filled depressions created incidental to construction activity; (8) groundwater, including groundwater drained through subsurface drainage systems; and (9) gullies and rills and non-wetland swales.

However, most of the above water features are currently considered nonjurisdictional as a matter of policy. Nevertheless, the agencies have, until now, reserved their right to assert jurisdiction. The proposed rule would appear to eliminate the agencies’ discretion to assert jurisdiction. One remaining ambiguity, however, for which agency discretion is not necessarily constrained, relates to who has the burden of proving that the exemption applies or does not apply.

Although this rulemaking presents an opportunity to provide long overdue clarity to CWA regulation, as currently proposed, it clearly enlarges the agencies’ jurisdiction compared to prior guidance. The proposed rule would not only alter permitting under the CWA, such as the NPDES or Section 404 programs, but it may also expand other regulatory obligations, such as the requirement to develop spill prevention, control and countermeasure (SPCC) plans, on the basis that a release of oil could reasonably discharge into jurisdictional waters.

Because CWA jurisdictional determinations are highly fact specific and dependent upon the terrain and hydrology of the land, it is difficult to identify all precise impacts of the proposed rule. In general, however, the expanded definition of “waters of the United States” means that many facilities may be obligated to obtain a Section 404 dredge and fill permit more often for site activity. The proposed rule has the potential to significantly increase the amount of daily operational activity at facilities subject to the CWA requirements. Also, existing releases, seeps, and discharges not currently permitted could now become subject to NPDES permit requirements. The additional permitting can be expected to add cost and delay to many projects by increasing the regulatory burden and oversight at a facility. Unpermitted and accidental releases may be more likely to be treated as CWA violations because of the change in the regulatory status of the site features, particularly drainages and washes.

Although, initially suggesting a ninety-day public comment period, the agencies quickly extended it another ninety days, with comments now due in October 2014. Comments are expected to be voluminous as are future associated hearings. The final rule itself may not be implemented until 2016. However one feels about the proposal, the time to be heard is now. Despite strong engagement from stakeholders, it seems the agencies’ proposal, at least in its current form, is almost certainly headed back to the courts.

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