EPA AND THE ARMY CORPS ISSUE FINAL CLEAN WATER RULE, BUT DOES THIS NEW "LINE IN THE WATER" CLARIFY, EXPAND OR NARROW CLEAN WATER ACT JURISDICTION?

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Energy Alert

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INTRODUCTION

On May 27, 2015, the United States Environmental Protection Agency (“EPA”) and Army Corps of Engineers (“Corps”) jointly released a final rule (the “Clean Water Rule”) redefining the scope of their shared jurisdiction under the Clean Water Act (“CWA”). This rule comes after decades of uncertainty regarding the extent of federal authority over the nation's waters. The proposed rule was released in March 2014.

The final rule provides some increased certainty regarding which types of waters are subject to agency jurisdiction. In some ways, the new rule arguably expands the agencies' jurisdiction, while in others it may contract their jurisdiction. Notable aspects of the final rule include:

- Allows the agencies to assert jurisdiction over all “tributaries” that contribute flow to other jurisdictional waters.
- Allows the agencies to assert jurisdiction over all waters that are “adjacent” to other jurisdictional waters, and establishes distance limitations with respect to the concept of “adjacency.”
- Provides a new definition of “significant nexus” that relies upon the evaluation of a defined list of aquatic “functions.”
- Provides geographic limits on the agencies' authority to assert jurisdiction over isolated waters using the “significant nexus” test.
- Establishes jurisdictional exclusions for an expanded array of ditches and other artificially constructed waters.

However, in comparison to the agencies' March 2014 proposed rule, the final rule may also represent a slightly more restricted (or at least more concretely defined) view of agency jurisdiction. For example, the final rule tightens the definition of a “tributary” to include only waters contributing flow to a jurisdictional water that also has a bed, banks, and ordinary high water mark (“OHWM”), as opposed to all waters the contribute flow, directly or indirectly, to a jurisdictional water. Further, the final rule also restricts what is considered an “adjacent” water to

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those within 100 feet of the OHWM, 1,500 feet of high tideline, or within the 100 year floodplain (if also within 1,500 feet of the OHWM) of a jurisdictional water. (Whether these specific distance limits are 'restrictions' or expansions is a matter of perspective).

This rule affects just about every major business, not to mention individuals, directly or indirectly. Those engaged in construction and land use activities will be directly impacted, as they are the ones likely required to obtain permits to conduct activities near questionably jurisdictional waters. Companies seeking to relocate their operations (retail, manufacturing, or otherwise) to new or different locations will also be impacted, as project scheduling, timing, and cost will be affected by the need to determine whether a permit is required (and, if necessary, to obtain a permit) to conduct activities in these areas (under the CWA, any person, not just permittee, is obligated to comply with the law). Investors would also be impacted, as the scope, timing, and risk to their investment - if it involves land use - would need to be adjusted to account for the expanded requirements and new permit requirements. Energy companies might be particularly impacted as their activities necessarily involve use of lands, be it for pipelines, utility poles, or staging areas. Cities and towns seeking to revitalize or develop areas that are not apparently connected to waters of the United States may need permits from the Corps for these newly covered areas.

BACKGROUND

The CWA prohibits discharges of pollutants to “navigable waters,” and then defines “navigable waters” as “the waters of the United States, including the territorial seas.”[1] The agencies' current rules defining “waters of the United States,” have not been substantively changed since the 1980's. Many argue that these rules reflect the agencies' historical practice of asserting jurisdiction over essentially all waters that the U.S. Constitution's Commerce Clause[2] would arguably permit, regardless of limits imposed by the CWA itself.[3] The problem is these rules have been largely rendered obsolete by intervening court decisions. First, in *Riverside Bayview Homes, Inc. v. United States* (1985),*[4]* the Supreme Court unanimously upheld the Corps' extension of its jurisdiction to a wetland which actually abutted a navigable water. Then, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) (“SWANCC”), the Court held that the Corps had no jurisdiction over an abandoned sand and gravel pit merely because migratory (i.e., interstate) birds used the site as a habitat.[5] Lower courts struggled to discern the precedential rule from *SWANCC,*[6]leading the Supreme Court to address the scope of CWA jurisdiction for a third time in *Rapanos v. United States* (2006) (“Rapanos”).[7] While a majority of the Court could not agree on a single interpretive position, most commentators agree that the deciding vote belonged to Supreme Court Justice Anthony M. Kennedy, who held that, in order for a wetland to be regulated under the CWA, it “must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.”[8] A plurality opinion, signed by four of the Court's justices, would have interpreted the CWA more narrowly to apply only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters.[9]

Since the Supreme Court's decisions, both the EPA and the Corps have grappled with how to determine which waters have the requisite “significant nexus” to traditional navigable waters. The agencies' controlling 2008 guidance[10] provided for jurisdiction, in all cases, over the following classes of waters:

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- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable, but relatively permanent, tributaries of traditional navigable waters
- Wetlands that directly abut such tributaries

Furthermore, the 2008 guidance directed agency personnel to assert jurisdiction, on a case-by-case basis, over other tributaries and adjacent wetlands if they were determined to have a “significant nexus” with traditional navigable waters. In determining whether a “significant nexus” exists, the agencies were to consider the flow and functions of the water in question in addition to all other “similarly situated” waters, meaning a tributary and all of its adjacent wetlands, as a single collective unit. The 2008 guidance also indicated that the agencies generally would not assert jurisdiction over certain categories of ditches, swales, and erosional features, but did not foreclose the possibility of doing so on a case-by-case basis.

THE PROPOSED RULE

The agencies' proposed Clean Water Rule, released in March 2014, would have provided the agencies with jurisdiction over an expanded array of smaller and more isolated waters without having to conduct a resource-intensive “significant nexus” analysis. Specifically, under the proposed rule, all “tributaries” and all waters “adjacent” to such tributaries would have been deemed categorically jurisdictional. Further, the proposed rule would have allowed EPA and the Corps to assert jurisdiction, on a case-by-case basis, over any other waterbody having the requisite “significant nexus” to other jurisdictional waters. The proposed rule provided a new, expanded definition of the term “significant nexus” that included a novel description of what it meant for waters to be “similarly situated,” requiring the agencies to determine whether waters in the same watershed were “sufficiently close together” to be evaluated as a “single landscape unit.”The proposed rule also would have codified the agencies' policy of exempting certain types of artificial water features, ditches, groundwater, and gullies.

THE CONNECTIVITY REPORT

In September 2013, prior to the release of the proposed rule, EPA released a draft report summarizing peer-reviewed scientific literature on the connectivity of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans (the “Draft Connectivity Report”).[11] The final connectivity report, titled “Connectivity of Streams and Wetlands to Downstream Waters,” (the “Final Connectivity Report”) was released in January 2015.[12] The Connectivity Report attempts to summarize the current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters. In relation to the Clean Water Rule, the Connectivity Report is intended to provide a scientific basis for the agencies' assertion of jurisdiction using Justice Kennedy's “significant nexus” test. The report addresses the effect of: (1) ephemeral, intermittent, and perennial streams on downstream waters; (2) riparian or floodplain wetlands and open waters on downstream waters; and (3) wetlands and open waters in non-floodplain settings on downstream waters. The Final Connectivity Report sets forth the following five major conclusions:

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- Streams, regardless of their size of frequency of flow, are connected to downstream waters and strongly influence their function.
- Wetlands and open waters in riparian areas and floodplains are physically, chemically, biologically integrated with rivers via functions that improve downstream water quality. These systems act as effective buffers to protect downstream waters from pollution and are essential components of river food webs.
- Many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Evaluations of the connectivity and effects of individual wetlands or groups of wetlands are possible through case-by-case analysis.
- Variations in the degree of connectivity are determined by the physical, chemical, and biological environment, and by human activities.
- The incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.

The EPA's proposed Clean Water Rule was released before the Draft Connectivity Report underwent mandatory peer review by EPA's Scientific Advisory Board. Some questioned whether it was appropriate for EPA to base its proposed rule on the preliminary conclusions of the Draft Connectivity Report. EPA responded stating that the rulemaking would not be finalized until the publication of the Final Connectivity Report. However, many still question whether this was appropriate, given this essentially meant EPA took comment on its proposed Clean Water Rule before the connectivity report was finalized, and then finalized the Clean Water Rule based on a final assessment that was not yet available for public comment during the proposed rule's comment period.

THE FINAL CLEAN WATER RULE

The Final Clean Water Rule was released on May 27, 2015. The agencies received over one million comments. Generally, the final rule provides some increased clarity with respect to scope of waters subject to agency jurisdiction, but in so doing may well expand the agencies' jurisdiction in comparison to prior practice under the post-*Rapanos* 2008 guidance. The final rule recognizes three basic categories of waters: (1) waters that are categorically jurisdictional (i.e., jurisdictional in all instances); (2) waters that are subject to case-specific analysis to determine whether they are jurisdictional; and (3) waters that are specifically excluded from federal jurisdiction.

The final rule introduces several notable changes from prior agency practice under the 2008 guidance, including (1) the definition and treatment of tributaries; (2) the treatment of adjacent waters; (3) which waters will be analyzed on a 'case-specific' basis; and (4) the addition of several categorical exclusions.

Tributaries

The final rule establishes the definition of a 'tributary' and provides a water meeting the definition of a tributary is categorically jurisdictional. Under the new rule, a water is a tributary (and is therefore jurisdictional) if it is

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characterized by the presence of physical indicators of flow — bed, banks, and OHWM — and contributes flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas.

Adjacent Waters

The final rule defines “adjacent” as bordering, contiguous, or neighboring. The final rule establishes a definition for “neighboring,” identifying three circumstances where a water would be “neighboring” and therefore jurisdictional: (1) waters located in whole or in part within 100 feet of the OHWM of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary; (2) waters located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the OHWM of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary; and (3) waters located in whole or in part within 1,500 feet of the high tideline of a traditional navigable water or the territorial seas and waters located within 1,500 feet of the OHWM of the Great Lakes. Under current practice, whether such areas are jurisdictional allowed potentially regulated parties to prove using the three party water/plant/soils test contained in the Corps' wetlands delineation manual, to prove that an area, even if within 100 feet of the OHWM, was not jurisdictional. That will no longer be the case under the final rule.

Case-Specific Significant Nexus

The final rule identifies five specific types of waters in specific regions that, regardless of location, are subject to the 'significant nexus' analysis: (1) Prairie potholes; (2) Carolina and Delmarva bays; (3) pocosins; (4) western vernal pools in California; and (5) Texas coastal prairie wetlands. In addition, the final rule also provides other waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tideline or OHWM of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations. These limits should provide at least some regulatory certainty to regulated entities with respect to truly isolated waters, but in many areas, the 4,000 foot buffer will be broad enough to encompass entire regions.

The final rule also includes a new definition of “significant nexus,” requiring the agencies to assess a wide array of aquatic “functions” to determine whether or not a water has the requisite jurisdictional connection to a downstream water. The functions include (A) sediment trapping; (B) nutrient recycling; (C) pollutant trapping, transformation, filtering, and transport; (D) retention and attenuation of flood waters; (E) runoff storage; (F) contribution of flow; (G) export of organic matter; (H) export of food resources; and (I) provision of life cycle dependent aquatic habitat.

Categorical Exclusion

Finally, the final rule adds several types of categorical exclusions. Some have been excluded historically as a matter of policy, but this rule establishes their exclusion by rule for the first time. In addition, the final rule excludes from jurisdiction certain ditches that were not previously excluded, including ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. Further, the final rule adds exclusions for groundwater and erosional features, stormwater control features, and cooling ponds created in dry land, amongst others.

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Subject[13]	2008 Guidance	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Jurisdictional	Jurisdictional
Interstate Waters	Jurisdictional	Jurisdictional	Jurisdictional
Territorial Seas	Jurisdictional	Jurisdictional	Jurisdictional
Impoundments	Jurisdictional	Jurisdictional	Jurisdictional
Tributaries to the Traditionally Navigable Waters	Jurisdictional: Relatively permanent, non-navigable tributaries of traditional navigable waters ("TNWs"). Significant Nexus Analysis: Non-navigable tributaries that are not relatively permanent.	Jurisdictional Defines "tributary" as any water that contributes flow, directly or indirectly, to a jurisdictional water, including but not limited to those with a bed, banks, and OHWM.	Jurisdictional Defines "tributary" as waters with a bed, banks, and OHWM that contribute flow to a jurisdictional water.
Adjacent Wetlands/Waters	Jurisdictional: All wetlands adjacent to TNWs; all wetlands directly abutting relatively permanent tributaries. Significant Nexus Analysis: Wetlands adjacent to non-navigable tributaries that are not relatively permanent; wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.	Jurisdictional Defines "adjacent" as being within the riparian area or floodplain, or with a surface or shallow subsurface connection to, a jurisdictional water.	Jurisdictional Defines "adjacent" as being within 100 feet of the OHWM, 1,500 feet of the high tide line, or within the 100 year floodplain (if also within 1,500 feet of the OHWM), of a jurisdictional water.
Isolated or "Other" Waters	Not addressed.	Subject to "significant nexus" analysis.	Includes as jurisdictional specific waters that are similarly situated (prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands) if they have a significant nexus to jurisdictional

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			waters. Significant nexus analysis also applies to other waters within the 100-year floodplain or 4,000 feet of a jurisdictional water.
Exclusions to the definition of "Waters of the U.S."	Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow); ditches (including roadside ditches) excavated wholly in an draining only uplands and that do not carry a relatively permanent flow of water.	Includes exclusions from the 2008 guidance plus several others.	Includes the proposed rule exclusions plus several others, including a broader exclusion for ditches and new exclusions for stormwater control features and wastewater recycling structures.

CONCLUSION

Whether this rule actually becomes effective is open to question. Currently, there is a bill in Congress which, if passed, would prevent the agencies from implementing the final rule. This bill has already passed the House and is currently pending at the Senate. Many observers believe the President will veto the bill, and it is unclear if the bill has sufficient votes to overcome the veto. Moreover, there are certainly going to be legal challenges to the final rule's validity. While the Clean Water Rule provides increased certainty to an area of the law that has for too long confounded Congress, courts, state and federal agencies, and industry participants alike, it also makes it certain that areas not previously regulated will now be considered "waters of the United States." Furthermore, the final rule may well reduce, but not eliminate, the number of instances where significant factual investigation and inquiry - "wetlands delineations" - are required to determine jurisdiction. Thus, from the perspective of the regulated community, the final rule is a mixed bag at best. All those potentially impacted by this rulemaking—including those in the construction, real estate, energy, agriculture, manufacturing and investment sectors, not to mention landowners and other individuals — should take appropriate steps to evaluate and protect their interests now that the final rule has been released. The final rule will go into effect 60 days after publication in the Federal Register. Once published, the final rule will be subject to legal challenge in federal court.

Notes:

[1] *See* 33 U.S.C. §§ 1311(a), 1362(7), & 1362(12).

[2] U.S. Const. art. I, § 8, cl. 3.

[3] *See*, *e.g.*, 33 C.F.R. § 328.3(a)(3) (extending jurisdiction to any "water … the use, degradation or destruction of which could affect interstate or foreign commerce ….").

[4] *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121 (1985).

[5] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

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[6] *See*, *e.g.*, *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).

[7] *Rapanos v. United States*, 547 U.S. 715 (2006).

[8] *Id.* at 759.

[9] *Id.* at 739-42.

[10] EPA-Corps Guidance on "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision In *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008), available here. The agencies have relied on 'guidances' to describe how they will implement the various court decisions, perhaps reflecting the difficulty they have had trying to promulgate corrective regulations, created largely by intensive lobbying efforts by interested parties.

[11] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, (External Review Draft Sept. 2013).

[12] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, (January 2015) available here.

[13] Chart adapted from here.

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