TRUMP ADMINISTRATION BEGINS "ROUND 4" IN THE BATTLE OVER CLEAN WATER ACT JURISDICTION

Date: 14 January 2019

Environmental, Land, and Natural Resources and Public Policy and Law Alert

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Last month the Trump Administration announced a proposed rule that would dramatically reduce the scope of federal authority under the Clean Water Act ("Act"). [1] If finalized in its current form, the rule would eliminate federal jurisdiction over a significant number of streams, wetlands, and other waters. The proposed rule will impact a wide range of individuals and businesses—as well as agencies and municipalities—that engage (or have a financial stake) in land and project development activities on these areas, while reducing the time and costs associated with obtaining Army Corps of Engineers 'dredge and fill permits.' While the proposal would not restrict the ability of states to regulate activities in these areas, the extent to which states will step in and do so is unclear. The 60 day period for commenting on the rule will start as soon as it is published in the Federal Register.

BACKGROUND

The Clean Water Act grants to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") the authority to require federal approval before any entity discharges pollutants, including dredged or fill material, into the "navigable waters." [2] That means that any project impacting the use of these areas requires federal approval which can be a long, arduous, and expensive process, if it is granted at all.

The Act defines the term "navigable waters" as "the Waters of the United States, including the territorial seas." [3] The ambiguity of what Congress meant by defining the scope of "navigable waters" to include all so-called "waters of the United States" ("WOTUS") has led to a long history of shifting interpretations and legal challenges.

Round 1: In the 1970's and 1980's, EPA and the Corps (consistent with a 1985 Supreme Court decision) [4] issued regulations and guidance—including the Corps' infamous1987 "Wetlands Delineation Manual"—establishing relatively broad and convoluted applications of WOTUS. Under these early rules and guidance, the agencies would assert jurisdiction over a wide swath of waters far removed from those which are navigable-in-fact, often requiring landowners to retain geological, hydrologic, and other experts to help them determine if their property contained 'jurisdictional' wetlands—wetlands that were subject to permitting requirements.

However, Supreme Court decisions in 2001 (in *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*) [5] and in 2006 (in *Rapanos v. United States ("Rapanos")*), [6] swung the pendulum in the opposite direction, with the Court placing renewed emphasis on the statutory and constitutional limits to federal authority over what constitutes "navigable waters." In its most recent case, *Rapanos*, the court failed to

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reach agreement on the scope of Clean Water Act jurisdiction. As a result, in *Rapanos*, a plurality of four Justices signed onto an opinion, authored by the late Justice Antonin Scalia, which limits federal authority 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. [7] In contrast, Justice Anthony Kennedy, who cast the deciding fifth vote in the case—but wrote a separate concurring opinion—concluded that Clean Water Act jurisdiction can extend to all waters that possess a "significant nexus" to navigable waters (regardless of the existence of a surface connection). [8]

Round 2: EPA and the Corps (in the final year of the Bush Administration) issued guidance that was intended to address the confusion caused by the differing opinions in *Rapanos*. It said that the agencies would assert jurisdiction over waters that met *either* Justice Scalia's or Justice Kennedy's jurisdictional tests, and explained how the agencies would apply those tests in the field. [9] Of course, the difficulty of determining what constitutes a "significant nexus" or a "continuous surface connection" in the real world led to continued confusion over whether federal permits would be needed for projects.

Round 3: In 2015, the Obama Administration issued the landmark Clean Water Rule to replace the guidance issued during the Bush Administration. As explained in more detail in our prior Alert, the Clean Water Rule expansively interpreted both (a) the array of waters that the agencies would deem categorically jurisdictional, and (b) the nature and scope of the case-by-case "significant nexus" analysis that the agencies would apply to other water bodies. For instance, under the Clean Water Rule, *all* tributaries of navigable waters (without regard to frequency of flow), and *all* waters adjacent to such tributaries, are deemed by rule to have a significant nexus to downstream waters, and thus are categorically jurisdictional (with broad definitions of "tributary" and "adjacent," among other terms). The foundation for the Clean Water Rule was provided in a final report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Downstream Waters." [10]

Since 2015, the Clean Water Rule has been mired in litigation. As of the date of this writing, various courts have enjoined the Clean Water Rule in 28 states. [11] In those states, the agencies continue to implement the Clean Water Act in accordance with prior practice as informed by *SWANCC, Rapanos*, and agency policy documents (including the guidance noted above). In the remaining 22 states, the Clean Water Rule is the law of the land.

ROUND 4: THE TRUMP ADMINISTRATION & THE PROPOSED RULE

On February 28, 2017, President Trump issued an Executive Order directing EPA and the Corps to review the Obama Administration's Clean Water Rule and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." [12] The Executive Order also directed the agencies to "consider" interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*.

On December 11, 2018, the agencies proposed a rule that would substantially reduce the geographic scope of the waters of the United States. Specifically, the new proposed rule defines waters of the United States—and federal jurisdiction to regulate them—as follows:

- Traditional navigable waters (i.e., "[w]aters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide"). This is essentially the *status quo* for these waters, except

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comment has been solicited on whether the term 'interstate' should be included and how it should be defined.

- "Tributaries" of traditional navigable waters, defined to include only those surface waters that contribute *perennial* (continuous year-round) or *intermittent* (more often than in direct response to precipitation) flow to traditional navigable waters in a typical year. This eliminates ephemeral—or precipitation-dependent—streams, which represents a significant number of stream miles and headwaters.
- "Adjacent wetlands" of other jurisdictional waters, defined to include only those wetlands that abut or have a direct hydrologic surface connection to a jurisdictional water in a typical year. (This eliminates a significant number of wetlands that are connected to downstream waters only via shallow subsurface flow. Also eliminated are all wetlands separated from downstream waters by a natural or man-made berm (e.g., linear features such as roads and railways), which represents a significant departure from the long-standing definition of "adjacent.")
- "Ditches" (i.e., "artificial channels") constructed in a tributary or adjacent wetland, or that relocate or alter a tributary, but only if otherwise satisfying the "tributary" definition (e.g., contribution of perennial or intermittent flow). (This could eliminate the vast majority of ditches, particularly those constructed in uplands such as many irrigation ditches.)
- Lakes and ponds that qualify as traditional navigable waters, contribute perennial or intermittent flow to a traditional navigable water, or that are flooded by other jurisdictional waters in a typical year.
- Impoundments of other jurisdictional waters.

The new proposal would eliminate the agencies' current practice of conducting fact-intensive, case-by-case "significant nexus" analyses for waters not falling within the above categories. This could reduce the need for landowners and developers to hire experts steeped in delineating wetlands and conducting ecological evaluations especially in what seem to be dry (ephemeral) streambeds. The proposed definition may also simplify and accelerate the process by which the agencies determine whether waters are subject to Clean Water Act jurisdiction, and, in turn, the applicability of the various federal programs administered by the EPA and the Corps, including Section 404 dredge and fill permits from the Corps or state-authorized programs; Section 402 National Pollutant Discharge Elimination System ("NPDES") permits from EPA or state-authorized programs; Section 311 oil spill prevention and response plans required by EPA; Section 301 federal enforcement for unauthorized discharges; and Section 303 water quality standards approved or adopted by EPA.

If this proposed rule is finalized in its current form, two significant legal issues will arise. First, will the rule be perceived to be an impermissible elimination of the Kennedy "significant nexus" test? [13] Anticipating this argument, the agencies have gone to great lengths in their rulemaking preamble to explain how their proposal is consistent with a narrower reading of Justice Kennedy's opinion. [14]

Second, there will be challenges to whether the factual basis for the change adequately addresses the record established under the Clean Water Rule and the 2015 Connectivity Report. While the agencies relied on aspects of the Connectivity Report to inform their proposal, their justification for narrowly interpreting the scope of waters subject to the Clean Water Act is ultimately tethered to the Trump Administration's policy choice, reasoning that

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"science cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the [Clean Water Act]." [15]

IMPACT ON STATE PERMITTING PROGRAMS

In considering the potential impacts of the agencies' proposal, it is important to recognize that the Clean Water Act does not preclude states from regulating all waters within their borders, regardless of whether they are subject to federal regulation under the Clean Water Act. As explained by the agencies, states and tribes are free to manage all waters under their independent authorities. [16]

Therefore, state-level responses to the agencies' new rule (if finalized) will be just as critical for the regulated community to understand as the rule itself. In states that do not regulate those waters that would no longer qualify as WOTUS, the agencies' new rule would clearly be impactful—many projects that would otherwise have required a permit would be able to move forward without one. In contrast, in states that regulate intrastate waters that may no longer be covered by the Clean Water Act as WOTUS, the impact of the agencies' new rule would be relatively less significant, but by no means trivial. For example, such states may decide to split off state law permits from federal NPDES or dredge and fill permits, instead of maintaining a unified permit system. As another example, projects that benefit from federal preemption, such as interstate railways or pipelines, would only be subject to the new Clean Water Act requirements notwithstanding more expansive state programs. The WOTUS rule may also create opportunities to lobby states to amend their programs to better match the new federal approach.

CONCLUSION

The proposed rule will be subject to a 60-day comment period once it is published in the Federal Register. The agencies will be soliciting comment on all aspects of the proposed definition and whether "it would strike the proper balance between the regulatory authority of the Federal government and States, meets [sic] its obligation to provide fair notice to members of the regulated community, and adheres [sic] to the overall structure and function of the CWA by ensuring the protection of the nation's waters." [17] The agencies scheduled a public hearing for Wednesday, January 23, 2019, but that hearing is postponed due to the current government shutdown. [18] The agencies have previously expressed a goal to finalize the rule by September 2019, but delays can be reasonably be expected.

Businesses that are potentially impacted by the rule—including those in just about every major business sector, from construction to energy to manufacturing to finance—should consider their options now for participating in the rulemaking process—and just as importantly, gearing up for the inevitable legal challenges that are sure to follow.

NOTES:

[1] Proposed Rule, *Revised Definition of "Waters of the United States",* RIN 2010-AF75, available at https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf.
[2] 33 U.S.C. §§ 1342(a), 1344(a).

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[3] 33 U.S.C. § 1362(7).
[4] *See U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985).
[5] 531 U.S. 159.
[6] 547 U.S. 715.
[7] 547 U.S. at 739-42.
[8] *Id.* at 759.
[9] EPA-Corps Guidance, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision In Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008).
[10] *See* https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414.
[11] *See* https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update.
[12] Presidential Executive Order No. 13778: Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule (Feb. 28, 2017).
[13] *See United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *Northern California River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011); *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).
[14] *See supra* note 1 at 80-81, 116-21, 156-60.
[15] *Supra* note 1 at 82, 83.
[16] *Supra* note 1, at 58.
[17] *Supra* note 1, at 59.
[18] *See* https://www.epa.gov/wotus-rule/epa-and-army-postpone-public-hearing-proposed-new-waters-united-states-definition.

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