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EPA and the Army Corps Propose Rules Expanding Clean Water Act Jurisdiction, Potentially Affecting Everyone Who Uses Lands Where Water Might Be Present

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On March 25, 2014, the United States Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Corps") jointly released a long-awaited proposed rulemaking that would redefine the scope of their shared jurisdiction under the Clean Water Act ("CWA"). Historically, the agencies took a very expansive view of their authority over the nation's waters, but Supreme Court decisions in 2001 and 2006 curbed their authority to regulate less-substantial intrastate water bodies that lacked a "significant nexus" to traditional navigable waters. For more than a decade, the agencies have been operating under informal guidance documents designed to maximize their jurisdiction while still complying with the Supreme Court's holdings. With support from a draft EPA report on the "connectivity" of streams and wetlands to downstream waters, the agencies' proposed rule would again expand the kinds of smaller and more isolated waters that would categorically be deemed jurisdictional, without further analysis. For waters that do not so qualify, EPA would retain the authority to determine, on a case-by-case basis, that the requisite "significant nexus" nevertheless exists with respect to the particular water body (considered in combination with other similarly situated waters in the region). The proposed rule would also codify the agencies' policy of exempting certain types of artificial water features, a relatively minor victory for the regulated community. Furthermore, an "interpretive rule" released the same day clarifies the exempt status of certain agricultural practices designed to protect and enhance water quality.

Just about every major business, not to mention individuals, will be affected directly or indirectly by the outcome of this rulemaking. 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. The deadline for public comment is 90 days after the

rule is published in the federal register; all stakeholders should seriously consider their options for participation in the rulemaking process.

Background

The core of the modern Clean Water Act is its prohibition of the discharge of "pollutants" into "navigable waters" by "point sources" without a permit issued by either EPA or the Corps.[i] The Corps is the lead permitting agency for discharges of dredged or fill material under Section 404 of the CWA, while EPA issues permits for the discharge of other pollutants under the Section 402 national pollutant discharge elimination system ("NPDES") program.[ii] EPA retains enforcement authority over all types of pollutant discharges.

Importantly, the CWA only provides the agencies with jurisdiction over "navigable waters," which the statute later defines as "the waters of the United States, including the territorial seas."[iii] The scope of the agencies' jurisdiction pursuant to these terms has been the subject of a great deal of uncertainty and litigation, especially over areas commonly called "wetlands." Existing Corps and EPA regulations (last updated in 1986) adopt an interpretation that would grant the agencies authority over essentially all waters that the U.S. Constitution would arguably permit, regardless of limits imposed by the CWA itself.[iv] The constitutional authority is derived from the interstate commerce clause, which the Supreme Court has interpreted (broadly) to provide the federal government with authority over all matters that "substantially affect" interstate commerce.[v]

In 2001, the Supreme Court struck a first blow to the outer reaches of the agencies' expansive jurisdictional interpretation. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*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 habitat.[vi] Lower courts interpreted *SWANCC* in radically different ways. For instance, the Fifth Circuit indicated that *SWANCC* limited jurisdiction to bodies of water that were either actually navigable or adjacent to navigable waters.[vii] The Ninth Circuit read *SWANCC* more narrowly as a rejection only of the "migratory bird rule" that was implicated in the case.[viii] As a prelude of things to come, the Fourth Circuit keyed in on language from *SWANCC* suggesting that the agencies had jurisdiction over all waters that had a "significant nexus" to navigable waters, deferring to the Corps' position that the entire tributary system was jurisdictional.[ix]

Five years later, in 2006, the Supreme Court again addressed the scope of CWA jurisdiction in *Rapanos v. United States* ("*Rapanos*").[x] While a majority of the Court could not agree on a single interpretive position, most commentators agree that the deciding vote belonged to Justice Kennedy, who held that, in order for a water 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."[xi] 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.[xii]

Since *Rapanos*, the agencies have taken the position (via guidance document) that any water satisfying *either* the Kennedy "significant nexus" test *or* the pluralities' test qualifies as jurisdictional.[xiii] In most (if not all) cases, a water that has a "significant nexus" would also pass the pluralities' test, but it is more straightforward and less resource-intensive for the agencies to establish that a water is jurisdictional under the pluralities' test. The agencies'

currently effective 2008 guidance also establishes the following classes of waters that are categorically considered to be jurisdictional under the *Rapanos* tests:

- Traditional navigable waters
- Wetlands ***adjacent to*** traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are ***relatively*** permanent where the tributaries ***typically*** flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies assert jurisdiction over these classes of waters without further analysis. Jurisdiction over other waters is currently determined on a case-by-case basis under the "significant nexus" test, which is described in a general way in the 2008 guidance.

The Connectivity Report

In September 2013, 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").[xiv] This report is intended to provide a scientific basis for the blanket assertion of jurisdiction over additional categories of waters under Justice Kennedy's "significant nexus" test, so that the agencies can dispense with the administrative burden of establishing such a connection on a case-by-case basis. The draft Connectivity Report's major conclusions are:

- All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.
- Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically connected with downstream rivers.
- Current literature is insufficient to generalize about the connectivity or downstream effects of isolated wetlands.

EPA is continuing to accept public comments on the draft Connectivity Report while a panel of the EPA Scientific Advisory Board ("SAB") performs a mandatory quality review (a future federal register notice will establish a final closing date for comments). The report has not yet been submitted to or approved by the chartered SAB or the EPA Administrator. Some have questioned whether it is appropriate for EPA to base its proposed rulemaking on preliminary conclusions in a report that has not been vetted and finalized. EPA's response is that any rulemaking will not be finalized until the final version of the scientific assessment is complete. Whether the agency can take comment on a proposal before that assessment is complete and then finalize the rule based on a final assessment that is not subject to further public comment is an open question.

Proposed Rule

On March 25, 2014, the agencies released their proposed rulemaking to amend the regulatory definition of "waters of the United States." Relying heavily on the findings from the draft Connectivity Report, the proposed rule would establish that the following classes of waters—in addition to those identified in the 2008 guidance—are always jurisdictional:

EPA and the Army Corps Propose Rules Expanding Clean Water Act Jurisdiction, Potentially Affecting Everyone Who Uses Lands Where Water Might Be Present

- ***All "tributaries"*** (not just those that are relatively permanent) of downstream traditional navigable waters, interstate waters, or the territorial seas. The rule would broadly define "tributaries" to include any water (including wetlands, lakes, and ponds) that contributes flow, either directly or through another water, to these more substantial downstream waters.
- ***All waters that are "adjacent" to such tributaries***. The rule would broadly define "adjacent" to include all waters located within the "riparian area" or "floodplain" of jurisdictional waters, in addition to waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.

This proposal may substantially reduce the use of the Corps' 1987 "Wetlands Delineation Manual"[xv] to establish whether remote waters are jurisdictionally connected by "wetlands" to downstream traditional navigable waters. The agencies created the 1987 Manual to provide science-based criteria for making wetland determinations. Both the agencies and the regulated community have used it when controversies exist over whether an area not obviously connected to "waters of the United States" is nonetheless jurisdictional because it is near a wetland that has an appropriate hydrological connection to other waters of the United States. In many cases the Corps or EPA has found itself unable to rely on the Manual to assert jurisdiction in the face of scientific evidence developed consistent with the Manual and presented by the potentially regulated parties. The proposed rule would likely reduce the use of the Manual substantially in this regard by bringing many of those questionable areas within jurisdiction by rule, with parties unable to contest it. Whether the certainty of expanding jurisdiction is beneficial remains to be seen. It will likely reduce the amount of human activity that may take place in these questionable areas because permits will be denied. It will also increase the cost of activity that is permitted based on conditions associated with the permit. Whether these new rules are based on sound science is also a question that comments are likely to address. Either way, it will certainly reduce the use of the Manual and replace case-by-case science with a rule.

All other waters (with limited exceptions mentioned below) would continue to be evaluated on a case-by-case basis under the significant nexus test. The rule would define the term "significant nexus" in a way that generally comports with current practice under the 2008 guidance, tracking key language from Justice Kennedy's opinion in *Rapanos*:

> The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region . . . significantly affects the chemical, physical, or biological integrity of a [traditional navigable water, interstate water, or territorial sea]. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a [traditional navigable water, interstate water, or territorial sea].[xvi]

The proposed rule may provide some relief to the regulated community in the form of categorical exemptions for the following water features:

EPA and the Army Corps Propose Rules Expanding Clean Water Act Jurisdiction, Potentially Affecting Everyone Who Uses Lands Where Water Might Be Present

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow
- Ditches that do not contribute flow, either directly or through another water, to traditional navigable waters, interstate waters, or the territorial seas
- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease
- 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
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created incidental to construction activity
- Groundwater, including groundwater drained through subsurface drainage systems
- Gullies and rills and non-wetland swales

Most of these water features are currently considered non-jurisdictional as a matter of policy, but the agencies have, until now, reserved the right to assert jurisdiction over these features on a case-by-case basis.[xvii] Arguably, the rule would eliminate the agencies' discretion to do so. However, the inclusion of these exemptions in the rulemaking raises a host of new questions, for which agency discretion is not necessarily constrained. For example, who has the burden of proving that the exemption does or does not apply? If a feature does not quite fit within the exemption—a "near miss"—will it be regarded as an implicit and unrebuttable recognition of jurisdictional status? For instance, if a landowner installs an ornamental water for some non-aesthetic reason, does that imply that the feature is jurisdictional? Does the landowner need to prove that the ornamental water is "small," and if so, what does "small" mean?

Finally, simultaneous with the release of the proposed rule, the agencies issued an "interpretive rule" regarding the applicability of CWA § 404(f)(l)(A). This statutory provision establishes an exemption from permitting requirements for the discharge of dredged or fill material "from normal farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."[xviii] The new interpretive rule indicates that discharges associated with specific Natural Resources Conservation Service ("NRCS") conservation practices (listed by practice number in a separate document) are exempted from permitting requirements as "normal farming" activities under CWA § 404(f)(l)(A). It is unclear whether discharges associated with other NRCS conservation practices can still qualify for the exemption on a case-by-case basis, now that the agencies' general policy has been converted to an "interpretive" rule. This interpretive rule, which was developed in coordination with the Department of Agriculture, has already been signed by EPA and the Corps and became effective immediately.

EPA and the Army Corps Propose Rules Expanding Clean Water Act Jurisdiction, Potentially Affecting Everyone Who Uses Lands Where Water Might Be Present

Conclusion

If promulgated in its current form, not only would this rulemaking expand upon the agencies' already broad jurisdictional interpretations, but it would also likely provide their existing policies and practices with the legal protections afforded to a duly promulgated rule (such as entitlement to *Chevron* deference if challenged).

The agencies have specifically requested comment on several key aspects of the proposed rule, including (1) the parameters of the case-by-case significant nexus test, and (2) identifying additional classes of waters that might categorically be deemed jurisdictional or non-jurisdictional, though comments need not be limited to the issues framed by the agencies. The regulated community, which encompasses a variety of stakeholders with multifaceted interests, should use this opportunity to strategically present their arguments to EPA and the Corps in a way that is both scientifically and legally justifiable. This rulemaking presents perhaps the best opportunity yet to provide clarity to an area of the law that has for too long confounded Congress, courts, state and federal agencies, and industry alike.

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EPA and the Army Corps Propose Rules Expanding Clean Water Act Jurisdiction, Potentially Affecting Everyone Who Uses Lands Where Water Might Be Present

[i] *See* 33 U.S.C. §§ 1311, 1362(12).
[ii] *See* 33 U.S.C. §§ 1342, 1344.
[iii] 33 U.S.C. § 1362(7).
[iv] *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).
[v] U.S. Const. art. I, § 8, cl. 3; *U.S. v. Lopez,* 514 U.S. 549 (1995). *But see National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).
[vi] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
[vii] *See Rice v. Harken Exploration Co.,* 250 F.3d 264, 269 (5th Cir. 2001).
[viii] *See Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 533 (9th Cir. 2001).
[ix] *See United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003).
[x] *Rapanos v. United States*, 547 U.S. 715 (2006).
[xi] *Id.* at 759.
[xii] *Id.* at 739-42.
[xiii] *See* 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).
[xiv] 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).
[xv] http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.
[xvi] *See* page 328-329 of the pre-publication proposed rule, available at http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act.
[xvii] *See* 51 Fed. Reg. 41205, 41217 (Nov. 13, 1986).
[xviii] 33 U.S.C. § 1344(f)(1)(A).