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Clean Water Act Jurisdiction Proposed Rule Released: Would Expand Federal Jurisdiction over Streams and Wetlands

After several years of false starts, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have released their proposed rule, **Definition of 'Waters of the United States' Under the Clean Water Act**, which identifies the waters that are jurisdictional under the federal Clean Water Act (CWA). This proposed rule would codify the Administration's view that CWA jurisdiction is broad and expansive. The proposal has unleashed a flurry of action, both criticizing and supporting the rule, which shows no sign of abating.

Some key points under the proposal:

- Tributaries are jurisdictional and are broadly defined as any feature with a bed and bank that provides any flow to downstream waters.
 - Duration and volume of flow are not important factors to defining a tributary or other connection between a wetland and other waters.
 - Tributaries can be natural, man-altered, or man-made and include rivers, streams, lakes, impoundments, wetlands, canals, and ditches that do not meet either of two very narrow exclusions (exempted are: ditches built in and draining only uplands or ditches that don't contribute flow to jurisdictional waters).
- "Neighboring waters" are redefined to include locations within a *riparian area* or *floodplain* (each term is newly defined in the proposal), or waters with a shallow subsurface connection or confined surface hydrologic connection to a water of the U.S. Uplands, or infrequently inundated locations may be jurisdictional under this term.
- Groundwater, however, is expressly excluded from CWA jurisdiction.
- Significant nexus is newly defined to be "more than speculative or insubstantial."
 - Significant nexus jurisdiction can be based on "similarly situated" wetlands, which is defined to mean "performing similar functions and located sufficiently close together so that they can be evaluated as a 'single landscape unit.'"

This proposed rule, if finalized, culminates a long and contested process of modifying CWA jurisdictional standards in response to the Supreme Court 2006 decision in *Rapanos v. United States*. The proposed rule largely relies on the Kennedy concurring opinion in *Rapanos* for the expansion of jurisdiction. A draft of the proposal was leaked in late 2013, and approximately the same proposal was released for public comment as draft guidance in 2011. Most of the regulated communities have already commented on those earlier releases, saying that government's position illegally expands CWA jurisdiction. Communities supporting the rule have also submitted extensive comments.

Now there will be a 90-day public comment period after publication of the proposal in the *Federal Register*. You must participate in the comments if you want to retain the right to challenge the rule in court.

All industries that involved earth moving – any construction, real estate development, transportation, mining, or agriculture – need to understand how this proposal will impact their projects and permitting.

Background

The CWA applies to "navigable waters," defined in the statute as "waters of the U.S." The Supreme Court has held that the CWA applies to waters that are navigable in a traditional sense, as well as certain other waters with an "interstate commerce" connection to traditional navigable waters. While EPA and the Corps have historically asserted broad jurisdiction over various waters and wetlands, including isolated waters, the Supreme Court has expressly rejected such claims. In *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 2001, the Court rejected jurisdiction over isolated waters. In *Rapanos v. United States*, 2006, a 4-1-4 decision held that jurisdiction does not extend to waters far removed from navigable waters. The plurality opinion emphasized the importance of flowing water between the wetlands and navigable waters, while the concurring opinion was based on the concept that jurisdiction could be based on a "significant nexus" to navigable waters.

Since 2001, rather than modify their regulations, EPA and the Corps have addressed jurisdiction through guidance documents, including those issued in 2007 and 2008 and a draft released in 2011. However, the Supreme Court has chastised the agencies to initiate a formal rulemaking to update the regulations and clarify the extent of federal CWA jurisdiction. In September 2013, the agencies acquiesced, withdrew the 2011 draft guidance document, and initiated the current rulemaking.

Summary of the Proposed Rule

The pre-publication document is 371 pages; the proposed rules occupy the last 47 pages, repeating largely the same terms as they will appear in various different regulations of EPA and the Corps. Essentially, the rule treats as *per se* jurisdictional all traditionally navigable and interstate waters, as well as all impoundments of such waters, all tributaries of such waters and their impoundments, and all waters (including wetlands) adjacent to traditionally navigable and interstate waters and their impoundments and tributaries. Additionally, the rule requires a case-by-case analysis of all other waters, and asserts jurisdiction over those waters if they alone, or "in combination with other similarly situated waters, including wetlands," have a "significant nexus" to a traditionally navigable or interstate water.

The new and revised definitions in the proposal are incredibly broad and could lead to increased CWA jurisdiction, despite EPA's claims that the "proposed rule is narrower than existing regulations." As summarized above, many terms that have been used in post-*Rapanos* application of the significant nexus standard would be defined. The regulations never defined "tributary." Under the proposal, tributaries include any feature with a bed, bank, and ordinary high water mark that "contributes flow" to a navigable or interstate water. Quantity, frequency, or duration of flow does not matter. Based on discussion in the lengthy Preamble, the hydrology needed for a tributary would be based on what is customary in the region, thus capturing as tributaries features that have intermittent or ephemeral flow.

The proposal has separate definitions for "adjacent waters" (similar to current definition) and "neighboring waters," which are those located in a riparian area or floodplain or have a shallow subsurface connection or confined surface hydrologic connection to a water of the U.S. This expands the footprint since neither riparian area nor floodplains are themselves, waters; there may be no hydrological connection between these locations and other waters, yet they can be jurisdictional and regulated under the CWA.

The proposed definition of "significant nexus" includes the concept that a wetland "alone or in combination with other similarly situated waters in the region," with "region" being defined as the watershed of the pertinent navigable or interstate water. The term "similarly situated" means "performing similar functions and located sufficiently close together so that they can be evaluated as a 'single landscape unit.'" While not defining "nexus," the target water or wetland (alone or in combination) must be one that "significantly affects the chemical, physical, or biological integrity of a 'navigable or interstate water.'" The Preamble discusses what might/can be evidence of these "affects." "Significant" is defined as "more than speculative or insubstantial."

It is worth noting that the rule allows finding jurisdiction based on showing a significant nexus to "interstate waters" as well as "navigable waters." Even though the Supreme Court decisions were based on applying the CWA definition of "navigable waters," the rule would allow non-navigable interstate waters to be the basis for jurisdiction.

While there will be new definitions for the key terms under the "significant nexus" standard, they have been very confusing under the past Guidance and the proposed rule does not resolve that confusion.

It is also important to recall that the draft scientific report underpinning many of EPA's claims in the proposed rule, **"Connectivity of Streams and Wetlands to Downstream Waters: A Review and**

Synthesis of the Scientific Evidence" (Sept., 2013 External Review Draft), is still undergoing peer review, and peer review panel members have identified multiple deficiencies with the report. One such deficiency is the fact that the report does not include any way to quantify the spectrum of connections between waters – a scientific concept that is central to determining which waters have the requisite significant nexus to downstream waters, despite EPA's statement that "'significant nexus' is not itself a scientific term." EPA **recently announced that it would hold phone conferences on this Report** on April 28 and May 2, 2014, providing information on how to participate and review the most recent draft document. EPA expects to have the Connectivity Report completed before the proposed rule is finalized.

Next Steps

The battles over CWA jurisdiction are hardly over. The proposed rule will go through its comment period, after which the agencies can promulgate a final rule. At that time, there will be litigation challenging the final rule.

In the meantime, expect a lot of noise over the proposal. Various groups and Congressional committees have come out against the proposal, and there is likely to be action in Congress over this rule. While all of this is pending, CWA permit applications are being processed under the 2008 Guidance, although the lines between that Guidance and the proposed rule are highly blurred.

Venable is working with many clients to assess the proposed rule and to advise clients who are involved in CWA jurisdiction and permitting actions now. Please contact us if we can be of assistance.