Client Alert.

May 3, 2011

Don't Go Near the Water . . . Stymied by Congress, EPA and the Corps Issue New CWA Jurisdictional "Guidance"

By Edgar Washburn, Christopher Carr, Zane Gresham, Alejandra Núñez- Luna, and Jennifer Jeffers

On April 27, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") ("the Agencies") issued draft guidance ("Proposed Guidance") that signals a dramatic expansion of asserted regulatory authority for the Agencies under the Clean Water Act ("CWA"). The Proposed Guidance identifies waters subject to the CWA in light of two U.S. Supreme Court decisions that interpret the statute, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). The Proposed Guidance is part of a broader "clean water framework" released by the Obama Administration on the same day.

Once finalized, the Proposed Guidance would supersede existing guidance interpreting the scope of the Agencies' jurisdiction under the CWA, issued in 2003 following the *SWANCC* decision,[1] and then updated in 2008 after *Rapanos*.[2] Until the final guidance is issued, both the 2003 and 2008 CWA jurisdictional guidances remain in effect. Previously issued jurisdictional determinations will not be re-opened as a result of the Proposed Guidance.

Like the earlier guidance it is intended to replace, the Proposed Guidance will affect the scope of regulatory jurisdiction not only under the CWA Section 404 dredge and fill program historically associated with wetlands, but also under the Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program, which covers all other discharges of pollutants to waters of the U.S., the Section 311 oil spill program, Section 303 water quality standards, and Section 401 water quality certification. The Proposed Guidance does not change any of the existing agricultural, forestry, ranching, and wastewater treatment system exemptions. While the public comment period ends on July 1, 2011, the EPA has declined to disclose specific timelines for the formal rulemaking process.

THE SUPREME COURT DECISIONS IN *SWANCC* AND *RAPANOS* AND EPA/CORPS AUTHORITY UNDER CWA

The Supreme Court addressed the scope of "waters of the United States" protected under the CWA in three cases (*United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985), *SWANCC*, and *Rapanos*), the last two of which are addressed specifically in the Proposed Guidance. In *SWANCC*, the Court eliminated CWA jurisdiction over isolated, intrastate, non-navigable waters, where jurisdiction is asserted solely on the basis of the use of the waters as habitat for migratory birds that cross state lines. *Rapanos* offered two tests for determining jurisdiction over wetlands adjacent to non-navigable tributaries. Justice Scalia's plurality opinion concluded that CWA jurisdiction extends to relatively

[1] Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003).
[2] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, December, 2008, *available at* http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

permanent, standing, or continuously flowing bodies of water connected to traditional navigable waters, and to adjacent wetlands with a continuous surface connection to jurisdictional waters. Justice Kennedy, in a concurring opinion, explained that CWA jurisdiction extends to wetlands that have a "significant nexus" to traditional navigable waters "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'." As it stands, *Rapanos* provides the most recent Supreme Court opinion of when wetlands are to be considered waters of the United States under the CWA. Now, interpreting *Rapanos*, the Agencies' Proposed Guidance aims to expand significantly both the scope of waters covered under the statute and the application of Justice Kennedy's "significant nexus" test.

MAJOR CHANGES UNDER THE PROPOSED GUIDANCE

The Proposed Guidance interprets the *Rapanos* plurality opinion and the "significant nexus" standard to assert broad jurisdiction over certain waters beyond what the regulations provide. Highlights of the Proposed Guidance include:

1. Interstate Waters. The Proposed Guidance asserts that interstate waters, including interstate wetlands that flow across or that form a part of state boundaries, are jurisdictional under the statute and do not require a significant nexus analysis. Interstate waters need not be traditionally navigable waters; thus, under the Proposed Guidance lakes, ponds and similar water features that cross state boundaries would become jurisdictional in their entirety.

2. "Other Waters." The Proposed Guidance appears to re-define the Agencies' long-standing regulatory definitions of "other waters" as "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 CFR § 328.3(a)(3). "Physically proximate" waters are defined as non-wetland waters that would satisfy the regulatory definition of "adjacent" (33 CFR § 328.3(c)) – bordering, contiguous, or neighboring to jurisdictional waters – if they were considered wetlands. This includes waters separated by man-made dikes or barriers, natural river berms and the like. On the other hand, "not physically proximate" waters are isolated, intrastate, non-navigable waters and wetlands that would not meet the definition of "adjacent" under the regulations. The Proposed Guidance provides that, in either case, their jurisdictional determination requires a "significant nexus" analysis. However, it does not require an interstate or foreign commerce connection for either physically proximate or not-physically proximate "other waters" to be jurisdictional. Absent such a connection, there is no basis in the regulations to subject adjacent non-wetland waters and isolated intrastate other waters to CWA jurisdiction. Moreover, the regulatory definition of adjacency applies only to wetlands. The Proposed Guidance conflicts with the regulations by applying such requirement to lakes, ponds, and other non-wetland waters.

3. Non-Jurisdictional Waters. Notably, certain waters that were not subject to the CWA under the 2008 guidance may become jurisdictional under the Proposed Guidance. For example, ditches may be considered tributaries and ditches or swales may be considered wetlands, and thus be subject to the "significant nexus" test.

4. "Significant Nexus" Standard. In *Rapanos*, Justice Kennedy concluded that wetlands should be considered "either alone or in combination with similarly situated lands in the region" to find a significant nexus with navigable waters. The Proposed Guidance takes the language "in the region" from the opinion to be equivalent to a "watershed," defined as the area draining into the nearest traditional navigable water or interstate water through a single point of entry, and advises the Agencies to identify the "similarly situated" waters in the watershed as the first step of the significant nexus analysis. This area can total up to 250,000 acres in size. The Proposed Guidance also claims that, where a significant nexus has

been established for a particular wetland, it is permissible under *Rapanos* to presume covered status for other comparable wetlands in the same watershed. Thus, once jurisdiction over a certain wetland or physically proximate water has been established, the Agencies can apply the "significant nexus" analysis for that water to any subsequent jurisdictional determinations if the new water at issue is of the same type and in the same watershed.

LEGAL AND POLITICAL ISSUES

The manner in which the Proposed Guidance was released raises serious questions about its legal validity. The Agencies publicly announced that the guidelines "clarify their existing understandings" and made assurances that formal rulemaking procedures will be followed once the guidance is finalized. After a draft of the Proposed Guidance was leaked earlier this month by *Inside EPA*, a bipartisan coalition of 170 House lawmakers called for the EPA to reconsider the guidelines and instead pursue formal rulemaking or work with Congress to amend the CWA. Yet the Agencies proceeded with the Proposed Guidance and it is unclear how long the review and formal rulemaking process will take. In the meantime, the Agencies apparently intend the Proposed Guidance, once finalized, to be used to guide their decisions about CWA jurisdictional requirements.

The Proposed Guidance is likely to create an intense reaction in Congress, as it considers legislation to decrease the EPA's funding for rulemaking and as the presidential campaign draws near. Representative Bob Gibbs (R-OH), who chairs a subcommittee with CWA jurisdiction, stated that he will hold oversight hearings on the EPA's release of the Proposed Guidance. Congress, however, has not announced any plans to introduce legislation to amend the CWA in response to the Proposed Guidance. The absence of formal rulemaking is also likely to increase litigation over CWA jurisdiction that will raise the issue of judicial deference to agency guidance documents. Earlier this year, in *Precon Development Corp., Inc. v. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011), the Fourth Circuit held that the Corps' interpretation of *Rapanos*'s "significant nexus" test in a non-binding guidance document is entitled to less deference than an interpretation of "navigable waters" that incorporates the concept through notice and comment rulemaking procedures under the Administrative Procedure Act. Courts in other circuits may follow suit if the Proposed Guidance goes into effect.

The Agencies' interpretation of the CWA under the Proposed Guidance also raises serious constitutional and federalism questions, just like the Corps' interpretation of the CWA did in *SWANCC.* In *SWANCC,* the Supreme Court clearly stated that states have a "traditional and primary power" over water use, and that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." There, the Court found no clear statement that Congress intended Section 404 to reach isolated waters. Now, as the Agencies release their Proposed Guidance, there is no clear indication that Congress intended such an expansive interpretation of the "significant nexus" test under *Rapanos*. The Agencies argue that Congress intended the term "navigable waters" to include interstate waters, but remain silent as to Congress' intent regarding physically proximate, and especially non-physically proximate waters, many of which could be subject to state jurisdiction. Congress itself failed to pass the "Clean Water Restoration Act" in 2009 and the "America's Commitment to Clean Water Act" in 2010, both of which were aimed at clarifying "waters of the United States" through an expansive interpretation of waters subject to the CWA. Since Congress has twice refused to expand the scope of the CWA, it is apparent that Congress did not intend the expansive interpretation of *Rapanos* that is articulated in the Proposed Guidance.

WHAT YOU SHOULD DO

This client alert merely scratches the surface of issues raised in the Proposed Guidance. If and when the Proposed Guidance is finalized, industrial entities, landowners, and developers who might discharge pollutants or dredged or fill

material into water will necessarily require a careful analysis of the physical facts of their property and of the physical, chemical, and biological factors of the watershed involved in order to determine whether the water body is subject to the CWA. Clients that may be affected by or subject to the Proposed Guidance should provide public comments to the Agencies by July 1, and should track further opportunities for commenting. The Agencies have asserted that the Proposed Guidance will increase clarity and reduce costs in the CWA permitting process. To the contrary, the new guidelines in fact will add expense, time, and undue burdens by their expansive and controversial approach to navigable waters under the CWA.

Morrison & Foerster LLP is widely recognized as a leader among law firms in matters pertaining to the CWA and maintains a full-service environmental law practice. For further information relating to the EPA and the Corps' Proposed Guidance or other important CWA developments, please contact:

Christopher Carr
(415) 268-7246
ccarr@mofo.com

Robert Falk
(415) 268-6294
rfalk@mofo.com

Edgar Washburn
(415) 268-7860
ewashburn@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for seven straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.