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Proposed Rule Redefining Jurisdictional "Waters of the United States" Under the Clean Water Act – Comment Period Closes, but Questions Remain Open

NOVEMBER 17, 2014

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On November 14, 2014, the comment period closed on a proposed rule issued by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) (collectively, the Agencies) that would significantly redefine and expand the scope of jurisdictional "waters of the United States" under the Clean Water Act (CWA). Nearly half a million comments were filed by the deadline—with many commenting parties asking for withdrawal or delay of any further consideration of changes to the definition of "waters of the United States." In particular, there have been many requests to withdraw or delay the proposed rule until the EPA's *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report) has been finalized and further opportunity for public comment has been provided with respect to how a final Connectivity Report should inform any changes to the "waters of the United States" definition. Given these requests and the number of comments received, the timing for final rulemaking and the form it may take, remains uncertain.

KEY CHANGES TO CURRENT DEFINITION

The rule as drafted by EPA and USACE would re-classify and re-number the seven categories of "waters" that are currently in the regulatory definition of "waters of the United States." Key changes are proposed to: tributaries, "adjacent" waters, and "other" waters. Under the proposed rule, **all** tributaries and adjacent waters (as those terms are newly defined in the proposed rule) would be automatically jurisdictional by-rule, meaning that once the Agencies determine a "water" is a tributary or adjacent water, the federal government would have jurisdiction over that water, without any further analysis, and permits for releasing pollution to such a water or adding dredged or fill material to such waters would be required. Additionally, the proposed rule would regulate "other" waters (including all isolated waters) under Justice Kennedy's "significant nexus" analysis from his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

MAJOR ISSUES WITH PROPOSED RULE

Ignores U.S. Supreme Court Precedent. The proposed rule largely ignores U.S. Supreme Court precedent and adopts an expansive interpretation of the CWA that a federal court could find exceeds the regulatory authority Congress granted to the Agencies.

Ignores Primary Right of States to Oversee the Land and Water Resources in their States. The proposed rule is inconsistent with the CWA's policy to preserve the rights of states over land and water resources.

Any "Clarity" in the Rule Comes at the Price of Expanded Jurisdiction. The Agencies' assert that the proposed rule merely "clarifies" jurisdiction. While, it is true that the rule "clarifies" that more waters will be federally regulated, key aspects of the rule remain ambiguous and, in fact, raise more questions than they answer.

Proposed Enlarged Jurisdiction over "Other" Waters and Use of "Ecoregions" to Determine "Other" Waters. Within the "other" waters category, the Agencies would apply the significant nexus test to the same types of isolated waters the U.S. Supreme Court has found to be non-jurisdictional. For example, one

component of the significant nexus test is biological connectivity, which could include use of an isolated pond by migratory birds – the same factor the Supreme Court held could not be the basis for jurisdiction.

The Agencies also requested comment on the potential use of very large "Ecoregions" to make regional jurisdictional determinations regarding "similarly situated," "other" waters. If this concept were implemented, all isolated waters in a geographic landscape could be considered jurisdictional because they are all "similarly situated" if collectively they have a significant nexus to downstream waters. This approach raises numerous implementation questions including due process concerns for notice and comment opportunities to potentially affected landowners.

Narrow Scope of Excluded Waters. The proposed rule creates a category of "excluded waters" that are not jurisdictional, but the list of excluded waters is quite narrow and in many instances raises more questions than it answers. For example:

- Ditches. One of the more controversial aspects of the proposed rule is the proposal by the Agencies to treat all ditches, canals, and other similar artificial channels as jurisdictional "tributaries" unless they fall within one of two very narrow categories of exclusions. If a ditch or similar channel does not fall into one of these two categories, it would be considered a jurisdictional tributary.

- Artificially Irrigated Areas/Stock Ponds. The proposed rule excludes artificially irrigated areas that would revert to upland if irrigation ceased, but it does not discuss the timeframe for determining whether the cessation of irrigation would lead to a reversion to upland. The proposed rule excludes water bodies used for stock watering, but only if used exclusively for stock watering, and the proposed rule does not explain whether use of a stock pond by migratory birds would disqualify a water body from this exclusion.

- Water-filled Depressions. The proposed rule excludes water-filled depressions incidental to construction, but again, does not discuss the timeframe for determining whether a depression was incidental to construction, nor how long after the construction activity takes place that this exclusion applies.

Proposed Rule is Based on a Draft Connectivity Report. The Agencies have relied heavily on a draft Connectivity Report to support their "jurisdictional by-rule" determination. Further, as part of the proposed rule, the Agencies accepted and relied upon a series of scientific conclusions from the draft Connectivity Report. However, the draft Connectivity Report was arguably developed in a legal vacuum, and largely ignores the boundaries that Congress and the U.S. Supreme Court have placed on federal jurisdiction over the nation's waters.

Lack of "Grandfathering" Provision. The proposed rule does not include a "grandfathering" provision addressing members of the regulated public who have already received or applied for permits or jurisdictional determinations.

NEXT STEPS

The path to the issuance of any final rule by the Agencies will have a number of interrelated steps:

- *Review of Comments.* The 492,617 comments received by the close of the comment period must be reviewed by the Agencies.

- *Finalizing the Connectivity Report.* EPA's Science Advisory Board (SAB) recently completed its review of the draft Connectivity Report and released a more than 100-page comment letter in response to the draft Connectivity Report's findings. The Agencies have stated that they will finalize the draft Connectivity Report prior to finalizing the proposed rule. However, a number of entities have called for a further round of public comments on the proposed rule after the Agencies complete and issue a final Connectivity Report.

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- *Addressing Calls for Withdrawal and Revision of the Proposed Rule.* The Agencies will have to address the requests to withdraw the proposed rule and issue a revised draft rule in its place. While several members of Congress and countless members of the public have asked the Agencies to withdraw the proposed rule, the Agencies have not indicated an intent to do so.

- *Possible Congressional Action*. In September, the House of Representatives passed H.R. 5078, the "Waters of the United States Regulatory Overreach Protection Act of 2014," with a bipartisan vote of 262-152. The bill would prevent the Agencies from finalizing or implementing the proposed rule. The Senate has not taken similar action. The 114th Congress, which takes office in January and will be under Republican control, could pass legislation that either prevents the Agencies from finalizing or implementing the proposed rule or directs the Agencies with regard to various aspects of the proposed rule. The President, of course, can veto such legislation, with the Congress having the right to over-ride the veto with two-thirds vote of both the United States House of Representatives and the United States Senate. Given the strong bipartisan interest in the proposed rule, this could be a policy issue where the Republican Congress and the Democratic Administration could reach agreement on how to resolve the controversies surrounding this proposed rule.

Keeping Informed

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact Brent Carson, Joseph Nelson, Duncan Greene, Erin Bartlett, or any member of the firm's Land and Natural Resources and Environmental Practices in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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