Published on *The National Law Review* https://natlawreview.com

Proposed "Waters of the U.S." Rule Improves Regulatory Clarity – In Part

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On March 28, we looked at the question of whether the rule proposed by the U.S. **EPA** and **Army Corps of Engineers** redefining their **Clean Water Act** jurisdiction was just a restatement of the current law. Today we will look at another assertion the agencies make: that the rule will increase regulatory clarity. Setting aside the question of whether the definitions we looked at on Friday are clear (we'll examine that tomorrow), the short answer is that the rule does increase clarity, in part – it provides additional clarity as to what waters *are* under federal jurisdiction; it provides very little clarity as to what waters *are not*. So unfortunately, for many activities, the regulated community will still be left wondering whether it needs federal approvals.

The regulatory agencies and regulated community have both been looking for clarity since the split Rapanos decision and the rise of the "significant nexus" test. Since the 2006 Rapanos decision, the agencies have issued two guidance documents, and proposed and abandoned a third, in an attempt to describe what waters are jurisdictional under the significant nexus test. The last guidance document finalized (in December 2008) stated that

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they **significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.**

(Our emphasis.) It was this test, and the need to implement it on a case-by-case basis, that created the uncertainty that the agencies are trying to resolve in the proposed rule. They have done so by essentially proposing two different tests for jurisdiction.

Jurisdiction Test #1:

We discussed the first test on March 28: all waters adjacent to tributaries of navigable waters have a significant nexus and so are always jurisdictional.

Jurisdiction Test #2:

But the agencies have also proposed a second test (making the reach of the proposed rule even more broad than the portion we discussed yesterday): waters that don't meet the first test can still be jurisdictional if, "on a case-specific basis. . . alone, or in combination with other similarly situated waters. . . located in the same region, [they] have a significant nexus" to a traditionally navigable or interstate water or the territorial seas.

In other words, the agencies have identified (in test one) certain waters that always have a significant nexus and so are always jurisdictional, but retained (in test two) the case-by-case significant nexus test. In the proposed rule, they define "significant nexus" much the same as they did in their 2008 guidance document, to mean

> a water, including wetlands, either alone or in combination with other similarly situated waters in the region. . . [that] **significantly affects the chemical, physical, or biological integrity of a [traditionally navigable or interstate water or the territorial seas]**. For an effect to be significant, it must be more than speculative or insubstantial. . .

(Our emphasis.) So the case-by-case significant nexus test remains, it will just be applied in fewer circumstances. When applied, it will be just as nebulous and hard to divine in advance whether a particular water is jurisdictional. Thus, the agencies have clarified circumstances in which the regulated community *does* fall under federal jurisdiction. They have done little to identify when the regulated community does not.

For part one, click here.
For part two, click here.
For part three, click here.

For part five, click here.
For part six, click here.

National Law Review, Volume IV, Number 90