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

EPA (Environmental Protection Agency) Releases Proposed Rule to Clarify Its Jurisdiction Under the Clean Water Act

Article By:

Government and Regulatory Law Group Michael Best

On March 25, 2014, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (ACOE) jointly released a proposed rule to clarify the definition of "waters of the United States" under the federal Clean Water Act. Because the term "waters of the United States" helps to define the extent of federal regulatory jurisdiction, this rulemaking is expected to expand the reach of the Clean Water Act to additional surface waters, including wetlands and non-navigable tributaries.

Even though this may affect federal jurisdiction, be mindful of state jurisdictional issues. For example, in Wisconsin the analogous state definition, "waters of the state" has long included wetlands and groundwater resources. The proposed rule may have less impact in states that have already asserted jurisdiction over these kinds of waters. The rest of this alert provides additional information on the proposed rule.

Background on "Waters of the United States":

This jurisdictional discussion began as early as 2001 in the Supreme Court case, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001). Prior to*SWANCC*, the ACOE had asserted jurisdiction over so-called "isolated" wetlands, or wetlands that are not connected to a navigable waterway, based on the theory that migratory birds use the wetlands as resting places while flying interstate, and therefore the federal government had a substantial interest in protecting those wetlands. The court rejected this theory, focusing on the failure of this test to reflect a "significant nexus to navigable waters." The court's analysis emphasized Congress' use of the term "navigable" in defining "waters of the United States" and questioned the navigable value of wetlands.

After *SWANCC*, EPA responded with an interpretation that "waters of the United States" included any water "connected" to navigable waters. Then, in 2006, the United State Supreme Court rejected the agency's "any hydrological connection" theory of jurisdiction as being overly broad in *Rapanos v. United States*, 547 U.S. 715 (2006). Instead, the court found that the term "waters of the United States" is limited to "wetlands with a continuous surface connection to" "relatively permanent waters." In addition, the court found that wetlands are "waters of the United States" "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."

What Does the Proposed Rule Include?

This rulemaking is the regulatory response to *Rapanos*, and it codifies the process to determine which waterbodies, whether truly navigable or not, are under federal jurisdiction based on their hydrologic or ecologic relationship to other waters. To support this approach, the EPA released a draft report in late September entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. Relying on this report, the proposed rule is meant to "provide the intended level of certainty and predictability, and minimiz[e] the number of case-specific determinations" and "allow agencies to make categorical determinations of jurisdiction, in a manner that is consistent with the scientific body of information before the agencies."

The proposed rule defines "waters of the United States" for all sections of the Clean Water Act to mean:

- Traditional navigable waters;
- Interstate waters, including interstate wetlands;
- The territorial seas;
- Impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters;
- Tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and
- Adjacent waters, including adjacent wetlands

While these are all considered "waters of the United States" by rule, "other waters" not fitting into these categories could still be included as federal jurisdictional waters through a case-by-case basis showing that, either alone or in combination with a similarly situated "other waters" in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. The proposed rule offers, for the first time, definitions for the terms "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." Existing exemptions under the Clean Water Act, such as those granted to farming, silviculture, ranching, and other specified activities, will continue under the proposed rule.

What Might the Rule Mean?

EPA has expressed the opinion that this proposed action helps to clarify jurisdiction by providing clear categories of waters that are considered under federal Clean Water Act jurisdiction. The agency claims this is not an expansion of jurisdiction because the case-by-case test proposed by the Supreme Court in *Rapanos* could establish jurisdiction in all of the waters in the categories defined by the proposed rule. Others are concerned the rule is overly broad—for example, the preamble to the rule explains that certain kinds of ditches are exempt from "waters of the United States": (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2)

ditches that do not contribute flow, either directly or through another water, to a water identified [as a jurisdictional water]. There is concern that the effort to distinguish these ditches from jurisdictional waters could mean, by implication, the other common ditches will be regulated under the Clean Water Act.

This proposed rulemaking defines federal jurisdiction, but some states have taken different appropriates to establishing their regulatory reach. In Wisconsin, for example, it is unclear how directly this expansion of federal jurisdiction will impact activities. The state definition of jurisdictional waters—“waters of the state”—has long included reference to both groundwater and wetlands. As a result, more waterbodies in Wisconsin have been considered state jurisdictional waters. This proposed rule may, however, broaden jurisdiction beyond what has been exercised in the past.

The draft rule released the week of March 23 has not yet been published. Before it becomes final, EPA will need to publish the rule in the Federal Register, accept public comments, and publish a final rule. In addition, EPA has promised to issue a final draft of the Connectivity Report. It remains to be seen whether that final document will provide the scientific support for the notion that these aquatic ecosystems support one another in such a way as to justify the regulatory jurisdiction proposed by the draft rule.

National Law Review, Volume IV, Number 90