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Environmental Protection Agency (EPA) Proposes Rule to Clarify Federal Clean Water Act (CWA) Jurisdiction

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On March 25th, EPA released a draft of the long-awaited and highly-anticipated intended to clarify the scope of the Federal Clean Water Act ("CWA"). According to the EPA, the proposed rule does not expand the scope of the CWA and will benefit permittees through increased permitting efficiency and regulatory certainty. To say that industry disagrees with this characterization would be a huge understatement.

At the heart of this debate is the meaning of "the waters of the United States" as used in the CWA. These are the water bodies to which the CWA's protections apply, including the Section 404 permitting program administered jointly by EPA and the Army Corps of Engineers (the "Corps"). The statute itself does not define the phrase although EPA attempted to do so through regulations, last amended in 1986; 33 C.F.R. § 328.3 and 40 C.F.R. § 122.2. Under the C.F.R. definitions (still on the books), "waters of the U.S." include traditional navigable waters; interstate waters; other waters, the degradation or destruction of which could affect interstate commerce; impoundments of listed waters; tributaries of listed waters; territorial seas, and adjacent wetlands.

In 2001, the Supreme Court issued the first of two important decisions modifying EPA's definition of "waters of the U.S." ("SWANCC"). In this case, the Court held that the presence of migratory birds alone was not sufficient to bring an otherwise isolated water within the requirements of Section 404. Prior to this decision, the presence of migratory birds established a water body as jurisdictional under the theory that it could have an effect on interstate commerce.

Five years later, the Supreme Court revisited the issue in the infamous case of Rapanos vs. U.S. This case involved two separate wetlands that were adjacent to non-navigable tributaries of traditional navigable waters. Although the Court voted to reverse EPA by a 5-4 margin, the majority could not agree on a singe test for determining whether the wetlands were "waters of the U.S." Justice Scalia's opinion, joined by three other justices, concluded that only "relatively permanent" waters and wetlands with a "continuous surface connection" to such waters should be subject to the CWA. The fifth member of the majority, Justice Kennedy, issued a separate opinion proposing that any water with a "significant nexus" with navigable waters should be subject to regulation.

Not surprisingly, the agencies responded to the Rapanos decision by issuing a essentially claiming jurisdiction over waters that meet either the Scalia or Kennedy test. However, for the majority of

waters that are not clearly jurisdictional, this guidance requires a case-by-case, fact-specific analysis to determine whether the CWA applies. This process is currently known as obtaining a “jurisdictional determination” (“JD”) from the Corps before beginning activities that could require a CWA permit.

This brings us back to EPA’s recent proposal. According to EPA, the purpose of the rule is to “provide … certainty and predictability, and minimiz[e] the number of case-specific determinations.” According to most industry observers, the rule would provide clarity and predictability only in the case of waters which are arguably not jurisdictional at present, by making them categorically jurisdictional. Obviously, most property owners and developers would prefer the “uncertainty” of a case-specific JD over the certainty of needing a permit. While EPA claims the rule will not expand the scope of the CWA, it is apparently referencing the scope of the CWA prior to the Supreme Court’s decisions in SWANCC and Rapanos.

The proposed rule would define “waters of the U.S.” in the CWA to include: “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.” “Other waters” could be jurisdictional based on a significant nexus analysis.

In addition to the reassertion of jurisdiction over waters excluded from regulation by the Supreme Court, the proposed rule includes several other problematic provisions. For example, the rule excludes gullies, rills, and non-wetland swales from regulation but does not define these terms or provide a test for identifying when a gully or rill turns into a regulated tributary. It also does not explain whether existing JD’s — most importantly, those that found no jurisdictional waters — will be valid once this rule is finalized.

Individuals and companies that could be affected by the rule should consider filing public comments in the administrative record. EPA will accept public comments on the proposed rule for 90 days after it is published in the Federal Register. Under the Administrative Procedure Act, EPA is then required to respond to all comments before issuing a final rule.

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