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Traditionally Navigable Waters and the Possibility of Future Use: The Final Waters of the US Rule

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Yesterday, we looked at one of the core definitions in the ***Waters of the U.S. rule*** – that of "***wetlands***" – and suggested that, while the agencies didn't change it, perhaps they should have. Today we'll look at another static term – "Traditionally Navigable Waters." It, too, has been unchanged for the last three decades and probably should have been modified in the final rule. Given the term's newfound significance in the regulatory structure, the failure of the Agencies to do so adds unnecessary complexity and confusion to the process of identifying jurisdictional waters.

First, we have to clarify that the term "traditionally navigable waters," which is used throughout the rule's preamble, doesn't actually appear in the regulatory definitions. TNWs are the Agencies' shorthand way of referring to the first prong of the test for jurisdictional waters – "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." This language has appeared in the regulations since 1980 and, as you can see, refers to waters that are not just traditionally navigable, but also ones that "may be susceptible" to navigation (i.e., use in commerce). As we noted on Tuesday, "commerce" includes "commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)."

So, in short, TNWs include those that the agencies believe **could be used** for boat rentals and the like, even if they never have been in the past. That's not only a fairly expansive list of waters, it is not static.

And the fact that the TNWs do not constitute a set, knowable group of waters is a potential source of confusion. Under the previous set of regulatory definitions, the open-ended nature of the definition was less significant. That's because, originally, TNWs were not the most broad assertion of the Agencies' jurisdiction. That distinction went to the following group of waters, identified as jurisdictional in the regulation being supplanted by the final rule:

> all. . . 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 including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

This very broad assertion of authority meant that the precise scope of the TNWs "susceptible to use in commerce" was not very significant, since the same waters (and more) would be covered by this provision.

However, the final rule eliminates the above portion of the definition, and therefore clarifying the scope of TNWs becomes much more important when trying to identify the outer limits of federal jurisdiction. In addition, TNWs are the "single point of entry" for the significant nexus test watershed analysis (i.e., the waters aggregated for the significant nexus test are those in the watershed draining to the nearest TNW). This may lead to the government and the regulated community occasionally arguing contrary positions regarding TNWs – an expansive interpretation of a water's susceptibility to use in commerce would cause that water to be jurisdictional, but lessen the geographical expanse of the surrounding watershed in applying the significant nexus test.

Either way, without a clear understanding of what TNWs are, identifying regulated waters is more difficult than it should be, and so a modification to the definition could have increased that clarity.

Finally, before we turn next week to a couple of practical implications of the rule, for those of you keeping a scorecard of the potential challenges to the rule, we note that TNWs are one of the three types of core waters (along with interstate waters and the territorial seas) that the Agencies consider to be jurisdictional without reliance on the significant nexus test. Given this in combination with the commerce clause basis for their assertion of jurisdiction (particularly over waters susceptible to future commercial use), to successfully defend the rule, the Agencies will need to distinguish this assertion of commerce clause authority from that asserting jurisdiction over migratory birds and their habitat, the latter having been struck down by the Supreme Court in its 2002 decision in *Solid Waste Authority of Northern Cook County*.

On Monday, we'll look at what it will mean in practice to apply the newly-modified significant nexus test.

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