STEARNS WEAVER MILLER

EPA AND ARMY CORPS RELEASE NEW CLEAN WATER ACT RULE INTERPRETING AND EXPANDING JURISDICTION

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On May, 27, 2015, the United States Environmental Protection Agency ("**EPA**") and the United States Army Corps of Engineers ("**Corps**") issued the final "Clean Water Act Rule," aimed at clarifying the jurisdictional definition of "waters of the United States" ("**jurisdictional waters**") under the Clean Water Act ("**CWA**"). The new rule attempts to increase regulatory certainty by reconciling past agency practices, science, and U.S. Supreme Court decisions. As a result, Florida landowners and developers will likely need CWA permits where they were not previously necessary.

The CWA prohibits the discharge of pollutants into jurisdictional waters. Even though this concept is key to the agencies' regulatory jurisdiction, its outer boundaries have been unclear and have been subject to numerous court challenges. While navigable waters have traditionally been viewed as jurisdictional, most other waters (including wetlands) have been subject to case-by-case analysis to determine whether those waters had a "significant nexus" with navigable waters. Under the Clean Water Act Rule, however, many more waters and wetlands will be categorically defined as jurisdictional waters, in some cases even if the water is relatively isolated and wholly intrastate. Consequently, the rule does give more regulatory certainty, but that certainty gives landowners and developers less flexibility and makes challenges to jurisdictional determinations more difficult.

On August 28, 2015, the Clean Water Act Rule will go into effect and land owners and developers will face increased regulation, translating into additional costs, timing, and permitting requirements for projects. It is unclear whether efforts to delay the rule's implementation will be successful. Legislation blocking implementation of the rule has passed the House and is pending in the Senate, but it would likely face a presidential veto. At least ten federal law suits are challenging the rule, and several seek preliminary injunctions against the rule's enforcement.

In light of this new rule and the uncertainty surrounding it, landowners and developers need to be vigilant in protecting their rights in the federal permitting process.

HISTORICAL & LEGAL CONTEXT

The Clean Water Act Rule goes into effect on August 28, 2015.[2] Its practical importance is that it determines the extent of EPA's and the Corps' jurisdiction in the permitting process.[3] The CWA prohibits the discharge of pollutants into jurisdictional waters. There are two major

permitting schemes under the CWA: the Section 402 National Pollutant Discharge Elimination System ("**NPDES"**) and the Section 404 Fill Material Permit ("**dredge and fill**"). A Section 402 permit is required for any activity that will discharge pollutants from a point source into jurisdictional waters. Section 404 Dredge and Fill permits are required for activities that will cause the discharge of dredged or fill material into jurisdictional waters.[4] The EPA and the Corps implement the CWA concurrently.[5] EPA administers NPDES permits (usually through the states); while the Corps is responsible for issuing dredge and fill permits consistent with regulatory requirements, with the EPA maintaining ultimate, but limited, veto power.[6]

The Clean Water Act Rule is the agencies' first attempt to define jurisdictional waters since their 1986 rule, which defined them as "traditional navigable waters, interstate waters, and all other waters that affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands." Essentially, the agencies interpreted their powers to regulate jurisdictional waters to reach to the outer limits of the Commerce Clause. Three U.S. Supreme Court cases, however, indicated that the agencies' jurisdiction under the CWA is more limited than that.

In *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121 (1985), the Court unanimously afforded deference to the Corps' determination that wetlands directly adjacent to waters within the traditional jurisdiction of the CWA were susceptible to CWA reach. However, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that migratory birds' use of isolated non-navigable intrastate ponds was insufficient to trigger federal regulatory authority under the CWA. Finally, a fractured Court in *Rapanos v. United States*, 547 U.S. 715 (2006), held that CWA jurisdiction could encompass some, but not all, non-navigable waters. The reach of this jurisdiction, though, is unclear, since the plurality, a concurrence by Justice Kennedy, and the dissent all developed different tests.

These decisions have created a great deal of uncertainty about the reach of the agencies' jurisdiction, and the agencies have framed the Clean Water Act Rule as a necessary clarification in response to them. Most efforts to develop a test have focused on Justice Kennedy's "significant nexus" test. Under it, if the water has some appreciable impact on a traditionally-regulated water under the CWA, then that water is also susceptible to federal regulation.[7] While it was clear enough that navigable waters and some of their tributaries were subject to CWA jurisdiction, questions remained about other waters, and about how and when to apply the "significant nexus" test. These questions resulted in the agencies' formulation of informal guidance, including wetland delineation manuals that attempted to use scientific methods to aid case-by-case decision making about whether specific waters were jurisdictional.

After decades of using these methods, the agencies developed the Clean Water Act Rule to "increase CWA program predictability and consistency by clarifying the scope" of jurisdictional waters.[8] As explained in more detail below, the net effect of the new rule is to make many more waters categorically jurisdictional, rather than subject to a case-by-case review. And, because agencies receive a great deal of deference when they make decisions under a promulgated rule, these categorical determinations will be very difficult to challenge.

THE FINAL CLEAN WATER ACT RULE

a. Categorical Treatment Expanded.

The Clean Water Act Rule expands the scope of waters and wetlands that will be classified *per se*, or categorically, as jurisdictional waters. Waters traditionally regulated under the CWA as categorically jurisdictional remain so: waters currently used, previously used, or susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide; all interstate waters, including interstate wetlands; the territorial seas; as well as impoundments of these waters.[9] Under the new rule, however, many "tributaries" and "adjacent" waters that were previously subject to a case-by-base analysis using the *Rapanos* significant nexus test will now be subject to categorical treatment.[10]

Wetlands remain defined as they are today, as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." Wetlands generally include "swamps, marshes, bogs, and similar areas."[11] Today, the Corps uses its 1987 Wetlands Delineation Manual and its regional supplements to determine whether water bodies are jurisdiction on a case-by-case basis; the Clean Water Act Rule may reduce the use of these resources.

b. "Tributary and Tributaries" Waters Now Treated Categorically.

A tributary is "a water that contributes flow, either directly or through another water (including impoundment)" to a traditionally-regulated water. Because a tributary's physical characteristics should indicate the presence of water flow, they are "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark." They may be natural or man-made and can include "rivers, streams, canals, and ditches." Once a water meets this definition of tributary, it does not lose its jurisdictional qualification by virtue of any constructed breaks such as bridges, culverts, pipes, or dams.[12] Under the new rule, tributaries are categorically jurisdictional waters, whereas in the past they have been subject to the significant nexus analysis (in that they must be relatively permanent to be jurisdictional).

c. "Adjacent" Waters Now Treated Categorically.

An adjacent water is one that is bordering, contiguous, or neighboring a jurisdictional water. The definition is not limited to laterally adjacent waters, but rather includes any water that is "neighboring" a jurisdictional water. Under the new rule, adjacent waters are categorically jurisdictional waters, whereas in the past they have been subject to the significant nexus analysis unless they directly abut jurisdictional waters.

d. "Neighboring" Waters Now Treated Categorically.

A neighboring water is, when measured from a jurisdictional water: (1) within 100 feet of the Ordinary High Water Mark (OHWM), (2) within 1,500 feet of the high tide line, or (3) within the 100 year floodplain and also within 1,500 feet of the OHWM. Most waters used for farming and agriculture are excluded from the definition of adjacent. If any portion of the water meets the definition of neighboring, then the entirety of that water is also neighboring.[13] Under the new rule, neighboring waters are categorically jurisdictional waters, whereas in the past they have been subject to the significant nexus analysis in all cases.

e. Use of "Significant Nexus" Test Significantly Reduced.

Drawing on the *Rapanos* decision, the proposed rule includes waters meeting the definition of significant nexus as within the scope of the CWA. Significant nexus "means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water" otherwise identified as jurisdictional. The definition further defines "in the region" as draining to the nearest water traditionally regulated. The rule also defines "similarly situated" as when water "functions alike and is sufficiently close to function together in affecting downstream waters." The rule enumerates scientific and physical factors to determine the water's downstream effect on traditional waters, including sediment trapping, nutrient recycling, runoff storage, and other functions. Moreover, the rule now requires that the significant nexus test be applied to any waters within 4,000 feet of the high tideline or OHWM of a jurisdictional water.

Under the new rule, the use of the significant nexus test will be reduced because of the application of the categorical tests, and it will also be significantly changed, since it will now capture, in a rather vague fashion, the cumulative impact of completely unconnected waters.

f. Policy-Based Exclusions Now Codified.

The Clean Water Act Rule codifies, for the first time, a number of exclusions that remove qualifying waters from the jurisdictional scope of the CWA even if they would otherwise qualify under the definition, most of which are based on past agency policy and practice. Some of the categorically excluded waters include "ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary." The ditches exclusion also extends to "ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands" and to ditches that do not directly or indirectly flow to a traditional jurisdictional water. The exclusions also include small artificial ponds associated with farming, groundwater, stormwater control features, and wastewater recycling structures.[14]

REACTIONS FROM THE REGULATED COMMUNITY

EPA has claimed that the Clean Water Act Rule does not "protect any types of waters that have not historically been covered by the CWA, add any new requirements for agriculture, interfere with or change private property right rights, or address land use."[15] However, some have estimated that the rule will expand federal reach to two million acres of streams and twenty million acres of wetlands that were not previously under the Clean Water Act's jurisdiction.[16] Moreover, the Florida Department of Agriculture estimates that the Rule subjects 13 to 22 percent more wetlands in Florida to federal jurisdiction.[17]

In opposition to the rule, Florida has characterized the rule as an "unlawful attempt to expand [federal] authority to broad categories of non-navigable, intrastate waters and lands." It would extend to "large categories of intrastate water and sometimes wet lands—from minor roadside ditches, to ephemeral streams, to creeks, ponds, and streams that lie where the Agencies believe water may flow once every hundred years—are either per se or potentially subject to federal jurisdiction." The State also believes the rule will result in "significant burdens upon homeowners, business owners, and farmers by forcing them to obtain costly federal permits in order to continue to conduct activities on their lands that have no significant impact on navigable, interstate waters."[18]

Business groups have raised concerns about the effects that the proposed rule will have on their industries. The National Association of Home Builder's Chairman, Tom Woods, expressed opposition to the rule by stating "the rule significantly expands the definition of a tributary to include any dry land feature that flows only after a heavy rainfall." Woods' perception of the law indicates sharp disagreement and confusion about the effect of the exclusion of ditches with only ephemeral flow. The U.S. Chamber of Commerce has opposed the rule out of concern that businesses will "suffer economic harm…because they will be forced to submit to expensive, vague, burdensome, and time-consuming federal regulations before they can perform the most mundane of activities on their property."[19]

Although the agencies codified several exclusions in an attempt to respond to complaints by agribusiness and agriculture, many believe that the Clean Water Act Rule still significantly expands federal jurisdiction related to these industries. If a water meeting the definition in the proposed rule is present on farm land, even if the water is isolated from an interstate water, the farmer might be susceptible to the EPA's regulatory authority. Farming activities like tilling soil are likely to cause sedimentation to run off into streams or other bodies of water that might contribute or connect or lie adjacent to a regulated water, thus bringing it within the scope of federal regulation. Many farmers and ranchers could also see the need to obtain federal permits if they have livestock on their farmland that cause manure to disseminate into nearby waters. Given the expansive definition of pollutants within the CWA regulatory scheme, the agribusiness community could face significantly increased regulatory compliance requirements despite the EPA's specific exclusions in the Clean Water Act Rule.[20]

While there is disagreement about the pragmatic effect of the proposed rule among EPA officials, scholars, and commentators, one thing is clear: "the new definition affects clients in the real estate, construction, mining, manufacturing, state and local government, utility, oil and gas, and agriculture sectors that develop, own or operate real property."[21] The new definition will affect permitting and compliance requirements to CWA programs, including discharge permitting, dredge and fill permitting, and wetlands regulation.[22] Failure to obtain a permit could "result in significant civil penalties of up to $37,500 per day, along with criminal liability."[23]

GOING FORWARD: POLITICAL & LEGAL CHALLENGES

The future of the Clean Water Act Rule is in flux as states, elected officials, and the regulated community have mounted challenges. In Congress, members of both chambers have introduced legislation attacking the rule. Concerned about the impacts on farmers, Senator James Inhofe (R-OK) co-sponsored a bill with Sen. John Barrasso (R-WY) that would force the EPA to rewrite the rule.[24] The House legislation would require the EPA to withdraw the final proposed rule and to further clarify which waters would fit within the jurisdictional definition "waters of the United States."[25] While the legislation seems to be making headway, President Obama has vowed to veto any legislation attacking the final proposed rule.[26]

At least half of the states[27] and numerous business groups[28] have filed suits attacking the Clean Water Act Rule. Texas, Louisiana, and Mississippi jointly filed a law suit, alleging that the EPA's final rule is "an unconstitutional and impermissible expansion of federal power over the states and their citizens and property owners."[29] Florida recently joined the effort out of federalism concerns, arguing that states are better-suited to establish regulatory control over unique intrastate waters.[30] The Florida lawsuit alleges that the final proposed rule usurps state sovereignty and constitutes a violation of Congress' Commerce Clause authority and the Tenth Amendment.[31]

The U.S. Chamber of Commerce, National Federation of Independent Businesses, and three other groups filed suit in Oklahoma against the EPA and Army Corps of Engineers alleging that the rule is an overreach by the federal government. The business groups argue that the rule will cause real economic harm because of the increased federal permitting process that businesses will have to pursue. The lawsuit claims that the increased federal permitting will apply to mundane operational tasks.[32]

The Pacific Legal Foundation ("**PLF**"), which has been extremely successful in litigating high-profile property rights issues, has filed suit in the United States District Court of Minnesota. Representing ranchers, farmers, and other private parties from five states, PLF argues that the Clean Water Act Rule exceeds agency authority. Highlighting the expansive nature of the rule, PLF argues that "[t]he new rule covers virtually all waters in the U.S. and much of the land, extending to every tributary of a 'navigable water,' isolated pools and potholes, the 100-year flood plain covering millions of stream miles, and, on a case-by-case basis, any water within 4,000 feet of a tributary." The complaint also alleges violations of the Federal Administrative Procedures Act, arguing that the final proposed rule is arbitrary and capricious, and that the

agencies improperly denied the notice and comment process because the final rule substantially deviated from the proposed rule. The plaintiffs are seeking an injunction barring enforcement of the rule.[33]

CONCLUSION

While the Clean Water Act Rule may give more regulatory certainty, those efficiency gains come with the cost of categorically defining as jurisdictional many previously marginal water. Moreover, because agencies are given significantly more deference when they make decisions under a promulgated rule, jurisdictional determinations may prove more difficult to overturn in the future. The implication is that landowners and developers will need to be more vigilant in protecting their rights in the permitting process by planning their courses of action well before submitting any application, and by working with experienced legal counsel every step of the way.

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[2] 80 Fed. Reg. 37054 (June 29, 2015).

[3] Thaddeus R. Lightfoot, et al., *EPA and Corps Final Clean Water Rule's Potential Impacts on Farming*, Dorsey (June 1, 2015), *available at* http://www.dorsey.com/eu-epa-clean-water-rule-impact-farming/.

[4] Kathryn Kusske Floyd, et al., *The EPA's Expanding Interpretation of Its Regulatory Authority Under Section 404 of the Clean Water Act – Practical Implications for the Mining Industry*, Dorsey & Whitney LLP, *available at* http://www.dorsey.com/files/Publication/c4c36d16-82fe-4578-8839-7e0aeac3ba99/Presentation/PublicationAttachment/8d5febd3-3d82-4642-8e83-80566a5bfbe2/Johnson%20Clean%20Water%20Act%20Article.pdf.

[5] The Corps, on the other hand, protects the navigibility of waters under the Rivers and Harbors Act of 1899. It regulates projects and activities that affect navigable waters of the United States. Section 9 of the Rivers and Harbors Act prohibits the construction of any impediment to navigable waters absent congressionally-delegated Corps approval. Section 9 applies to dams, dikes, bridges, and causeways that cross navigable waters. Section 10 of the Rivers and Harbors Act prohibits the obstruction or alteration of any navigable water of the United States. US Army Corps of Engineers, Rivers and Harbors Appropriation Act of 1899, (last visited August 4, 2015), *available at* http://www.sam.usace.army.mil/Missions/Regulatory/RegulatoryFAQ/RiversandHarborsAppropriationActof1899.aspx.

[6] *See* 33 U.S.C. §§ 1342, 1344; *see e.g.*, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608 (D.C. Cir. 2013) (cert. denied) (holding that the EPA impermissibly expanded its authority under Section 404 permit of the Clean Water Act by retroactively reneging on specification of discharge sites three years after the initial permit approval).

[7] *Id*. at 10-11.

[8] Preamble at 1-2, 10.

[9] *Id*. at 81-82.

[10] *Id*. at 18, 83-84.

[11] *Id*. at 79, 204.

[12] *Id*. at 203-04.

[13] *Id*. at 203.

[14] *Id*. at 201-05.

[15] *What the Clean Water Rule Does Not Do*, Environmental Protection Agency, *available at* http://www2.epa.gov/cleanwaterrule/what-clean-water-rule-does-not-do.
[16] Natasha Geiling, *New Lawsuit Says Clean Water Rule Threatens the 'Very Structure of the Constitution,'"* (June 29, 2015), *available at* http://thinkprogress.org/climate/2015/06/29/3675363/state-lawsuit-epa-clean-water-rule/.
[17] Fla. Dep't Agric. & Cons. Svcs., Comments Docket ID No. EPA-HQ-OW-2011-0880, at 1 (Oct. 31, 2014).
[18] Complaint, Fla., et al v. EPA (S.D. Ga.) (no case number), *available at* http://myfloridalegal.com/webfiles.nsf/WF/KMAN-9XYL5A/$file/WOTUS.pdf.
[19] *See generally* Katie Valentine, *Business Groups Are Suing the EPA Over Its New Drinking Water Protections* (July 14, 2015), *available at* http://thinkprogress.org/climate/2015/07/14/3680325/business-groups-sue-waters-us-rule/; Susan Salisbury, *Florida Joins Lawsuit Against EPA's Clean Water Rule* (June 30, 2015), *available at* http://protectingyourpocket.blog.palmbeachpost.com/2015/06/30/florida-joins-lawsuit-against-epas-clean-water-rule/.
[20] Brian Barth, *The EPA's New Clean Water Rule and Why Agribusiness Wants to Overturn It*, Modern Farmer (July 13, 2015), *available at* http://modernfarmer.com/2015/07/the-epas-new-clean-water-rule-and-why-agribusiness-wants-to-overturn-it/.
[21] Lewis Roca Rothgerber LLP, *New U.S. EPA Rule Challenges the Scope of Federal Clean Water Act Jurisdiction*, The National Law Review (June 16, 2015) *available at* http://www.natlawreview.com/article/new-us-epa-rule-changes-scope-federal-clean-water-act-jurisdiction.
[22] *Id.*
[23] A. Keith "Kip" McAlister, Jr., *Clean Water Rule Opens Litigation Floodgates*, Williams Mullen (July 9, 2015), *available at* http://www.williamsmullen.com/news/clean-water-rule-opens-litigation-floodgates.
[24] Senator John Barraso, *Senators Introduce Bipartisan Bill to Protect Navigable Waters in the United States*, Press Release (April 30, 2015), *available at* http://www.barrasso.senate.gov/public/index.cfm/2015/4/senators-introduce-bipartisan-bill-to-protect-navigable-waters-in-the-united-states.
[25] Timothy Cama & Christina Marcos, *House Passes Bill to Stop EPA Water Rule*, The Hill (May 12, 2015), *available at* http://thehill.com/blogs/floor-action/house/241857-house-passes-bill-to-stop-epa-water-rule.
[26] Pgilip Brasher, *White House Threatens Veto of Clean Water Act Bills*, Agri Pulse (April 29, 2015), *available at* http://www.agri-pulse.com/Obama-threatens-veto-WOTUS-bill-04292015.asp
[27] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin and Wyoming have all joined law suits against the EPA and Army Corps in response to the rule.
[28] Valentine, *supra*.
[29] Geiling, *supra* (quoting the complaint).
[30] Susan Salisbury, *Florida Joins Lawsuit Against EPA's Clean Water Rule*, Pam Beach Post, *available at* http://protectingyourpocket.blog.palmbeachpost.com/2015/06/20/florida-joins-lawsuit-against-epa.com (last visited 7/9/2015).
[31] *Id.*
[32] Valentine, *supra*.
[33] Reed Hopper, PLF Sues the Corps and EPA over Expansive Water Rule, PLF Liberty Blog, (July 15, 2015) *available at* http://blog.pacificlegal.org/plf-sues-the-corps-and-epa-over-expansive-water-rule/.