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Final Rule Defining "Waters of the United States" Under the Clean Water Act

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U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Issue Final Rule Defining "Waters of the United States" Under the Clean Water Act

On May 27, 2015, the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers (collectively, the "Agencies") issued a final rule defining "Waters of the United States" ("WOTUS") under the Clean Water Act.

Among other things, the Final Rule attempts to clarify those waters that constitute "tributaries" and "adjacent" waters, which are per se jurisdictional. Additionally, the Final Rule clarifies the Agencies jurisdiction over what was previously referred to as "other waters" and is now defined as "those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region." The Final Rule also specifically excludes certain waters from federal jurisdiction. The rule does not change the Agencies' existing jurisdiction over (i) traditionally navigable waters, (ii) interstate waters, (iii) territorial seas (collectively (i) thru (iii) referred to herein as "Traditional WOTUS"), or (iv) impoundments of jurisdictional waters.

Tributaries

"Tributaries" are defined by the Final Rule as waters: (i) contributing flow, "either directly or through another water (including an impoundment)" to Traditional WOTUS and (ii) exhibiting "physical indicators" of flow including "a bed and banks and an ordinary high water mark." Tributaries include rivers, streams, and canals, and can be man-made, natural or man-altered.

Adjacent Waters

The definition of the term "adjacent" in the Final Rule includes, in part, waters that are "bordering, contiguous, or neighboring" per se jurisdictional waters. The term "neighboring" is defined by the Final Rule to clarify that the following waters are jurisdictional:

- Those within 100 feet of an ordinary high water mark of a Traditional WOTUS, impoundment or tributary;
- Those located within the 100-year floodplain of a Traditional WOTUS, impoundment or tributary and not more than 1,500 feet from the high water mark of such water;

- Those within 1,500 feet of the high tide line of Traditional WOTUS and those within 1,500 feet of the ordinary high water mark of the Great Lakes.

Adjacent waters include wetlands, ponds, oxbows, lakes, impoundments and similar water features but do not include "waters that are subject to established normal farming silviculture, and ranching activities as those terms are used in Section 404(f) of the CWA."

Case Specific Analysis

Waters that are located outside of the boundaries of the above-described "neighboring" waters are not jurisdictional by rule but, if within the 100-year floodplain of a Traditional WOTUS or within 4,000 feet of the high tide line or high water mark of a Traditional WOTUS, impoundment or tributary, such waters are to be evaluated through a case-specific significant nexus analysis.

The Final Rule also identifies five specific types of waters that will be subject to a case-specific significant nexus analysis: (i) Prairie potholes, (ii) Carolina and Delmarva bays, (iii) pocosins, (iv) western vernal pools in California and (v) Texas coastal prairie wetlands. The Final Rule requires that when performing a case-specific significant nexus analysis, these waters must be analyzed in combination, rather than individually, in the watershed that drains to the nearest Traditional WOTUS.

Significant Nexus

The Final Rule clarifies that for water to have a significant nexus with a Traditional WOTUS it, either alone or in combination with other similarly situated waters, must significantly affect the chemical, physical or biological integrity of that Traditional WOTUS. Functions relevant to finding a significant nexus include: (i) sediment trapping, (ii) nutrient recycling, (iii) pollutant trapping, transformation, filtering and transport, (iv) retention and attenuation of flood waters, (v) runoff storage, (vi) contribution of flow, (vii) export of organic matter, (viii) export of food sources, and (ix) provisions of life cycle dependent aquatic habitat.

Excluded from Regulation

The Final Rule provides that the following are not waters of the United States: (i) waste treatment systems; (ii) prior converted cropland; (iii) ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; (iv) ditches with intermittent flow that are not a relocated tributary or excavated in a tributary or drain wetlands; (v) ditches that do not flow into a Traditional WOTUS; (vi) artificially irrigated areas that would revert to dry land absent continued application of water; (vii) artificial ponds such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; (viii) reflecting pools or swimming pools created in dry land; (ix) small ornamental waters created in dry land; (x) water-filled depressions in dry land incidental to mining or construction activity; (xi) erosional features such as gullies, rills and other ephemeral features; (xii) puddles; (xiii) groundwater; (xiv) storm-water control features; and (xv) wastewater recycling structures constructed in dry land.

Conclusion

The Final Rule becomes effective on August 28, 2015 and is likely to be subject to legal challenge by stakeholders on grounds that the rule exceeds the Agencies' authority delegated pursuant to the Clean Water Act because, among other things, it expands the Agencies' jurisdiction to drylands and those which, arguably, are not sufficiently related to navigable waters.

Update: North Dakota Federal District Court Grants Preliminary Injunction Halting Implementation of EPA's Final Rule

On August 27, 2015, the United States District Court, District of North Dakota, granted a preliminary injunction temporarily halting the enforcement of the Agencies' Final Rule in 13 states. The 13 states are Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, and Wyoming (collectively the "States"). The court determined that the States were likely to succeed on the merits of their claim that promulgation of the rule would exceed EPA's congressional grant of authority because the Final Rule encompasses "waters that are unlikely to have a nexus to navigable waters". Additionally, the court determined that the States would suffer irreparable harm if a preliminary injunction were not granted. In particular, the court stated that "[o]nce the Rule takes effect, the States will lose their sovereignty over intrastate waters that will then be subject to the scope of the Clean Water Act." The EPA has stated that it will honor the court's ruling in the 13 states that sought the injunction but will move forward with the Final Rule in the rest of the country.

Update: Sixth Circuit Court of Appeals Grants Nationwide Stay of the Final Rule

On October 9, 2015, the United States Court of Appeals for the Sixth Circuit granted a nationwide stay of the Agencies' Final Rule. The Court found that the petitioner-States demonstrated a substantial possibility of success on the merits of their claim that the Final Rule runs afoul of the Supreme Court's decision in *Rapanos* and that the rulemaking process failed to comply with the notice and comment requirements of the Administrative Procedures Act.

This Cullen and Dykman advisory is intended to provide an overview of the Agencies' Final Rule; it does not address every component of the Final Rule or its implications with respect to Clean Water Act compliance and should not be construed as providing specific legal advice. For specific advice, or if you have any questions about the Clean Water Act or the Final Rule or its effect on your particular organization, please contact Brendan Mooney at 516-357-3757 or bmooney@cullenanddykman.com or Cynthia Thomas at 516-357-3853 or cthomas@cullenanddykman.com.

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