

Proposed Rule Defining “Waters of the United States” Under the Clean Water Act

July 17, 2014

Overview

On April 21, 2014, the United States Army Corps of Engineers and the Environmental Protection Agency (collectively the “Agencies”) released a proposed rule to define the scope of waters protected under the Clean Water Act (“CWA”). The definition of “waters of the United States” (“WOUS”) determines the applicability of the CWA’s permitting regime — including Section 402 (National Pollutant Discharge Elimination System permit program), Section 404 (dredge and fill permit program), Section 311 (oil and hazardous substance spills), and Section 401 (water quality certification). The Agencies claim that the purpose of the proposed rule is to clarify the definition of WOUS in light of the Supreme Court’s decisions in *United States v. Riverside Bayview*,^[1] *Rapanos v. United States*,^[2] and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,^[3] the latter two of which narrowed the scope of WOUS and the Agencies’ CWA jurisdiction.

However, the proposed rule, if adopted, would significantly expand the geographic scope of the Agencies’ CWA permitting jurisdiction.

The Proposed Rule

The proposed rule would not affect the Agencies’ jurisdiction over navigable waters, interstate waters, or territorial seas. Purportedly, the Agencies drafted the proposed rule with the primary intent of clarifying their jurisdiction over three other categories of water: 1) tributaries, 2) adjacent waters/wetlands, and 3) “other waters.” Under the proposed rule, tributaries and adjacent waters/wetlands would be jurisdictional, requiring no additional analysis. “Other waters” would require a case-by-case analysis to determine whether they constitute WOUS.

Tributaries

Currently, tributaries are deemed WOUS under the CWA when they are relatively permanent or have a significant nexus to traditionally navigable water.

The proposed rule defines a CWA “tributary” as 1) water physically characterized, by “a bed and banks and ordinary high water mark...which contributes flow, either directly or through another water to [a navigable water,

interstate water, territorial sea, an impoundment of these waters, or an impoundment of a tributary],” and 2) “wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a [navigable water, interstate water, or territorial sea].”

In addition to the above definition, and perhaps most notably, the proposed rule purports to “clarify” that a tributary can be natural, man-made, or man-altered; can be discontinuous; and can be perennial, intermittent, or ephemeral, since its flow need not be permanent.

Adjacent Waters

Currently, the CWA explicitly establishes jurisdiction over wetlands adjacent to traditional navigable waters.

The proposed rule would expand the currently jurisdictional “adjacent wetlands” to a broader category of WOUS designated as “adjacent waters.”

The scope of what is included in “adjacent waters” is broadened by the proposed rule’s definition of the term “neighboring.” According to the proposed rule, “neighboring” waters include those “having a significant effect on the chemical, physical, and biological integrity” of WOUS. These are defined broadly to include those waters within a “riparian area” and “flood plain” of navigable water, interstate water, territorial sea, an impoundment of these waters, or an impoundment of a tributary.[10] These “adjacent waters” would include other adjacent water bodies such as ponds and oxbow lakes.

Other Waters

Currently, “other waters” are those considered to have a “significant nexus” with traditional navigable water and can be jurisdictional WOUS based on a case-specific analysis.

The proposed rule defines “significant nexus” to include “water, including wetlands, either alone, or in combination with other similarly situated waters in the region..., [that] significantly affects the chemical, physical, or biological integrity of [WOUS]. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a [WOUS] so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a [navigable water, interstate water, territorial sea].”

“Other waters” could include such things as mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and vernal pools.

Exclusions

In addition to expanding and purporting to clarify the waters considered to be WOUS, the proposed rule identifies bodies of water and features that are specifically excluded from the definition. These exclusions, which

codify the Agencies' existing practice and guidance, include the following: waste treatment systems; prior converted cropland; upland excavated ditches with less than perennial flow; ditches that do not contribute flow to navigable water, interstate water, or territorial seas; artificial pools, ponds, and irrigated areas that would revert to upland absent irrigation; water-filled depressions created incidental to construction activity; groundwater; and gullies, rills, and non-wetland swales.

EPA Draft Connectivity Report

The scientific basis for the expanded definition of tributaries and adjacent waters as well as the method for case-specific evaluation of "other waters" is based on the EPA's Draft Connectivity Report issued in September 2013. This report is still being reviewed by the EPA Science Advisory Board and has not yet been approved by the Board or by the EPA Administrator.

This report concluded that "all tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits...." Similarly, it concluded that all "wetlands and open waters in landscape settings that have bidirectional hydrologic exchange with streams or rivers (e.g., wetlands and open-waters in riparian areas and floodplains) are chemically, physically, and biologically connected with rivers...." The report also concluded that the current literature was insufficient to evaluate or generalize regarding the degree of connectivity or downstream effects on waters of isolated "unidirectional" wetlands not connected through surface or shallow subsurface water such as prairie potholes, vernal pools, and playa lakes.

Implications of the Proposed Rule

If the Agencies proceed to adopt the rule as it is currently drafted, their CWA regulatory jurisdiction over tributaries and adjacent waters will be expanded. Although the EPA maintains that the new rule does not broaden historical CWA coverage,^[19] the Congressional Research Service disagreed, finding that the rule will expand CWA jurisdiction given that the language in the proposed rule is more inclusive than current guidelines.

The scope of the definition of "other waters" and the practical implications of how the Agencies will implement case-specific determinations remain unclear.

An expansion of the Agencies' jurisdiction would increase project compliance requirements associated with: the CWA's section 301 prohibition against point source discharges to WOUS; Oil Spill prevention under CWA section 311; the need to apply for dredge/fill permits under CWA section 404a and the need for CWA section 402 NPDES permits (SPDES permits in New York).

The proposed rule raises concerns that the expanded jurisdiction will cause project delays as regional U.S. Army Corps districts (granting Section 404 permits) and state agencies (administering delegated SPDES permit programs) would have difficulty processing the greater number of permit applications, and that there may be confusion if different districts and states implement the rules at different times or in different manners.

Any unused CWA permit that is expiring may be subject to the proposed rule upon renewal.

An increase in jurisdictional waters may make it more difficult for a project to qualify for coverage under a U.S. Army Corps nationwide permit.

Statutes such as the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and the CWA's Section 401 certification requirements that are triggered through a federal permit application would find increased applicability because of the broadened CWA jurisdiction.

Conclusion

The proposed rule changes, if adopted, will expand the Agencies' CWA jurisdiction.

Some members of Congress and industry groups have already voiced their concerns that the Agencies would be overstepping their statutorily-granted authority should the proposed rule be implemented.

The Agencies are accepting public comment on the proposed rule until October 20, 2014.

Public comments regarding the proposed rule can be submitted via the following:

- Federal eRulemaking Portal: <http://www.regulations.gov>.
- Email: ow-docket@epa.gov. Include EPA-HQ-OW-2011-0880 in the subject line of the message.
- Mail: Send the original and three copies of your comments to Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0880.

This Cullen and Dykman advisory is intended to provide an overview of the major changes associated with the Agencies' proposed rule; it does not address every component of the CWA and should not be construed as providing specific legal advice. For specific advice, or if you have any questions about the CWA or proposed rule or its effect on your particular organization, please contact Joshua Verleun at 516-357-3726 or jverleun@cullenanddykman.com or Brendan Mooney at 516-357-3757 or bmooney@cullenanddykman.com.

[1] 474 U.S. 121 (1985).

[2] 547 U.S. 715 (2006).

[3] 531 U.S. 159 (2001).

[4] EPA and the U.S. Army Corps' Proposed Rule to Define "Waters of the United States," Congressional Research Service (March 27, 2014) at 5.

[5] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed Reg. 22188, 22189 (proposed April 21, 2014).

[6] Id. at 22201.

[7] Id. at 22202.

[8] 33 USC 1344(g)(1).

[9] 79 Fed Reg. 22188 at 22260.

[10] Id. at 22189, 22206-22207.

[11] Id. at 22210.

[12] Id. at 22263.

[13] Id. at 22192.

[14] Id. at 22268.

[15] Updates regarding the current status of the Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report are available

at <http://yosemite.epa.gov/sab/sabproduct.nsf/c91996cd39a82f648525742400690127/7724357376745f48852579e60043e88c>

[16] Environmental Protection Agency Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September 2013 External Review Draft) at 1-3. See also 79 Fed Reg. 22188 at 22223.

[17] Id.

[18] Id. at 1-3, 1-4.

[19] “[T]he scope of the regulatory jurisdiction of the CWA in this proposed rule is narrower than that under existing regulations.” 79 Fed Reg. 22188 at 22192.

[20] EPA and the Army Corps’ Proposed Rule to Define “Waters of the United States,” Congressional Research Service (March 27, 2014) at 5.

[21] See House Committee on Science, Space, and Technology, Full Committee Hearing - Navigating the Clean Water Act: Is Water Wet? (July 9, 2014), archived Webcast available at: <http://science.house.gov/hearing/full-committee-hearing-navigating-clean-water-act-water-wet>.

[22] Definition of “Waters of the United States” Under the Clean Water Act; Extension of Comment Period, 79 Fed Reg. 35712 (proposed June 24, 2014).

Practices

- Corporate
- Environmental

Industries

- Energy and Utilities

Attorneys

- Brendan J. Mooney