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EPA and the Corps Issue Clean Water Act Rule Defining "Waters of the United States"

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On May 27, 2015, EPA and the U.S. Army Corps of Engineers jointly released their long-expected and controversial rule defining which waters are protected by the federal Clean Water Act (CWA). *Clean Water Rule: Definition of "Waters of the United States," available at* http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf (prepublication version). In announcing the rule, President Obama said that it is needed because "[o]ne in three Americans now gets drinking water from streams lacking clear protection." The New York Times, *Obama Announces New Rule Limiting Water Pollution* (May 27, 2015). The executive director of an environmental advocacy group described the rule as "the biggest victory for clean water in a decade." *Id.* On the other hand, industry and agricultural trade associations vehemently oppose the rule, and U.S. House of Representatives Speaker John Boehner called it "a raw and tyrannical power grab that will crush jobs." *Id.* Indeed, the House, just two weeks before, passed the latest in a series of bills that would require EPA and the Corps to withdraw the rule—albeit without a veto-proof majority. H.R. 1732, 114th Cong. (as passed by House, May 12, 2015).

Given the uproar surrounding the rule, one would expect that it would result in more extensive or stringent regulations and perhaps even cleaner water. But for almost all entities and waterbodies, the rule is unlikely to change the regulatory *status quo*, although it would in many cases make enforcement actions easier. Notwithstanding the rhetoric about restoring protection to streams and job-killing tyrannical power

grabs, the reason that business groups generally oppose the rule and environmental advocacy groups support it is that it does not substantially *reduce* the very broad scope of waters that EPA and the Corps currently protect and have historically protected under the CWA. Business groups are already preparing legal challenges to the rule, which will almost certainly reach the U.S. Supreme Court. If those challenges are successful, many small or isolated waterbodies and wetlands might no longer be protected by the CWA. But in the meantime, the rule will not dramatically change the extent to which most entities and waterbodies are regulated.

Background

At the heart of the CWA is its prohibition against the "discharge of any pollutant" without a permit from EPA, the Corps, or a delegated state or tribal government. *See* 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12), 1377(e). Under the CWA, the "discharge of a pollutant" is "any addition of any pollutant to *navigable waters* from any point source" (as well as certain discharges to ocean waters). *Id.*, § 1362(12) (emphasis added). Thus, apart from the ocean, only "navigable waters" are protected by the CWA.

The CWA defines "navigable waters" as "waters of the United States" (WOTUS), 33 U.S.C. § 1362(7), but it does not define WOTUS. Soon after the CWA was enacted in 1972, EPA adopted a rule that defined WOTUS broadly to include most surface waters, regardless of navigability, *see* 38 Fed. Reg. 13528, 13529 (May 22, 1973), while the Corps defined WOTUS much more narrowly as waters that are, were, or could be actually navigable (so-called "traditionally navigable waters"), *see* 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974); 33 C.F.R. § 209.260 (1973). In 1975, a federal district court invalidated the Corps' definition, holding that it was too narrow because Congress, by defining "navigable waters" as WOTUS, had not intended to limit the waters protected by the CWA to traditionally navigable waters. *Natural Resources Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *see also* S. Conf. Rep. No. 92-1236 at 144 (1972) (statement that Congress intended the term WOTUS to "be given the broadest possible constitutional interpretation"). In response to the court's decision, the Corps adopted a definition similar to EPA's. With a few further revisions, the agencies' regulatory definitions of WOTUS have remained essentially unchanged since 1986. *Compare* 45 Fed. Reg. 33290, 33298, 33424 (May 19, 1980) (EPA's 1980 definition), 51 Fed. Reg. 41206, 41216-17, 41232, 41250-51 (Nov. 13, 1986) (the Corps' 1986 definition), *with* 40 C.F.R. § 122.2 (2014) (EPA), 33 C.F.R. § 328.3 (2014) (the Corps).

For example, EPA's current definition of WOTUS, which remains in effect until the new rule announced on May 27 takes effect, includes the following waterbodies:

- All traditionally navigable waters;

- All "interstate waters";
- The "territorial sea" [the sea within 3 nautical miles of shore];
- All "other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce";
- All "[t]ributaries" of WOTUS; and
- All wetlands "adjacent" to WOTUS.

See 40 C.F.R. § 122.2 (2014).

These are very broad categories that, at least potentially, encompass all surface waters. Not only do they include all traditionally navigable waters and interstate waters, but also all waters that the use, degradation, or destruction of which "would affect or could affect" interstate or foreign commerce. Because courts have held that even relatively minor and seemingly local actions may affect interstate or foreign commerce, this last category might include, for example, any waterbody that is visited or that could be visited by an interstate traveler for recreation, such as birdwatching. *Cf. Gonzales v. Raich*, 545 U.S. 1 (2005) (growing marijuana for personal use affects interstate commerce). Moreover, the definition includes all tributaries and impoundments of any of these waters, as well as all "adjacent" wetlands.

But in cases decided in 2001 and 2006, the U.S. Supreme Court held that the Corps had interpreted the statutory term WOTUS too expansively. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The Court did not invalidate any portion of the Corps' rule defining WOTUS, and no member of the Court argued that a WOTUS is limited to traditionally navigable waters. In each case, however, a five-member majority of the Court reasoned that Congress' use of the term "navigable waters" requires that waters protected by the CWA must either be traditionally navigable waters or have some substantial relationship to traditionally navigable waters, although a majority of the Court has not yet agreed on what that relationship must be.

In the most recent decision, *Rapanos v. United States*, a plurality of four of the nine justices concluded that WOTUS include only traditionally navigable waters, "relatively permanent" bodies of water that are "connected to" traditionally navigable waters, and wetlands that have a "continuous surface connection" to these waters. *Rapanos*, 547 U.S. at 742, 757. A fifth justice, Justice Kennedy, joined these justices in the Court's decision

to remand the case, but he argued that any waterbody with a "significant nexus" to a traditionally navigable water is also a WOTUS, regardless whether it is "relatively permanent" or has a continuous surface connection to a traditionally navigable water. *Id.*, 547 U.S. at 759, 767-78 (Kennedy, J., concurring). By "significant nexus," he meant that the water "either alone or in combination with similarly situated [waters] in the region significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Because the four dissenting justices would have agreed that any waterbody that satisfies either the plurality's generally narrower standard or Justice Kennedy's generally broader standard is a WOTUS, *id.* at 810 (Stevens, J., dissenting), a majority of five justices would agree that at least any waterbody with a "significant nexus" is a WOTUS. Accordingly, most lower federal courts have applied Justice Kennedy's "significant nexus" standard when ruling on WOTUS arguments. *See, e.g., Northern Calif. River Watch v. Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007).

In practice, the Corps' and EPA's application of the nebulous "significant nexus" standard since *Rapanos* has not resulted in a substantial contraction of the scope of WOTUS, and the lower federal courts have generally upheld the Corps' and EPA's WOTUS determinations. For example, a federal appellate court recently upheld the Corps' determination that a 4.8-acre wetland was a WOTUS. *See Precon Development Corp. v. U.S. Army Corps of Engineers*, No. 13-2499 (4th Cir., Mar. 10, 2015). The wetland was separated by a berm from a drainage ditch, which in turn was connected to a traditionally navigable water (a river) only through a series of seven miles of other drainage ditches and tributaries. *Id.* Nonetheless, the Corps found that the wetland, considered in combination with other similarly situated waters in the region, had a "significant nexus" to the traditionally navigable river. *Id.*

EPA and the Corps' New Rule Defining WOTUS

In light of EPA's and the Corps' current definitions of WOTUS, as well as how they have applied Justice Kennedy's "significant nexus" standard since *Rapanos*, it is difficult to accept assertions that the new WOTUS rule will substantially expand the scope of waters protected by the CWA. In fact, the new rule is, on its face, narrower than the currently effective rule because the new rule excludes several types of waters—for example, groundwater and swimming pools—that EPA and the Corps have never considered WOTUS but that were not expressly excluded from their regulatory definitions.

How does the new rule compare to the old rule?

First, the new rule retains the following WOTUS categories without any substantial change:

- Traditionally navigable waters;
- Interstate waters;
- The territorial sea; and
- Impoundments of waters that are otherwise WOTUS.

Second, the new rule deletes the WOTUS category of "other waters" that the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce. This is consistent with the views of a majority of the Supreme Court justices, who have stated that a WOTUS must have some connection to a traditionally navigable water, regardless of any potential effect on interstate or foreign commerce.

Third, the new rule replaces the "other waters" category with a new "significant nexus" category, and it modifies the "tributaries" and "adjacent wetlands" categories in an effort to ensure that waters within these categories have a "significant nexus" to traditionally navigable waters.

- ***Tributaries.*** The category of tributaries is not defined in the current rule. The new rule limits tributaries to tributaries (directly or through another tributary) of traditionally navigable waters, interstate waters, or the territorial sea (rather than of any WOTUS, as under the current rule). In addition, the new rule defines a tributary as a water that "is characterized by the presence of the physical indicators of bed and banks and an ordinary high water mark."

- ***Adjacent waters.*** The current rule includes a category for *wetlands* adjacent to other WOTUS. The new rule expands this category to include all waters (not just wetlands) adjacent to traditionally navigable waters, interstate waters, the territorial sea, impoundments, and tributaries. In addition, the rule defines "adjacent" to mean "bordering, contiguous, or neighboring," which it further defines to include:
    - Waters separated from a WOTUS to which this category applies only by "constructed dikes or barriers, natural river berms, beach dunes, and the like."
    - Waters for which any portion is within 100 feet of the ordinary high water mark of a WOTUS to which this category applies.

- Waters located within the 100-year floodplain, and not more than 1500 feet from the ordinary high water mark, of a WOTUS to which this category applies.
- Waters for which any portion is within 1500 feet of the high tide line of a traditionally navigable water, interstate water, or the territorial sea, or within 1500 feet of the ordinary high water mark of the Great Lakes.

- ***"Significant nexus" waters.*** To replace the "other waters" category of the current rule, the new rule includes a new category of waters determined to have a "significant nexus" to a traditionally navigable water, interstate water, or the territorial sea. The rule includes a more elaborate definition of "significant nexus" than EPA and the Corps' proposed rule from 2014. *See* 79 Fed. Reg. 22187, 22268 (Apr. 21, 2014). In addition, the rule limits the waters for which a "significant nexus" may be determined to:
  - Waters that are in one of five categories: "prairie potholes," "Carolina bays and Delmarva bays," "Pocosins," "Western vernal pools," and "Texas coastal prairie wetlands";
  - Waters within the 100-year floodplain of a traditionally navigable water, interstate water, or the territorial sea; or
  - Waters within 4000 feet of the high tide line or ordinary high water mark of a traditionally navigable water, interstate water, the territorial sea, or a WOTUS that is an impoundment or tributary.

Fourth, the new rule retains the current rule's exclusions from WOTUS for wastewater treatment systems and "prior converted cropland," and adds the following exclusions (which, again, largely reflect existing, informal exclusions):

- The following ditches:
  - Those with ephemeral flow that are not a relocated tributary or excavated in a tributary;
  - Those with intermittent flow that are not a relocated tributary or excavated in a tributary, and that do not drain wetlands; and
  - Those that do not flow, either directly or indirectly, into a traditionally navigable water, interstate water, or the territorial sea (*i.e.* that are not a "tributary").

- Artificially irrigated areas that would revert to dry land should application of water to the area cease.
- Artificial lakes and ponds created in dry land, such as farm and stock ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, and cooling ponds.
- Artificial reflecting pools, swimming pools, and small ornamental waters created in dry land.
- Water-filled depressions created in dry land incidental to mining or construction activities.
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary (for example, because they do not possess a "bed and banks"), as well as non-wetland swales, and "lawfully constructed grassed waterways."
- Puddles.
- Groundwater, included groundwater drained through subsurface drainage systems.
- "Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land."
- Wastewater recycling structures constructed in dry land, detention and retention basins built for wastewater recycling, groundwater recharge basins, percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

These exclusions apply regardless of whether the excluded waters would otherwise be a WOTUS.

In substance, the new rule leaves the definition of WOTUS essentially as it has been since the Supreme Court's 2006 decision in *Rapanos*, and not substantially narrower than it was applied before *Rapanos*. The "significant nexus" standard has replaced the "could affect interstate commerce" standard, and it has also, in theory, circumscribed the application of the "tributary" and "adjacent waters" categories. But the vagueness of the standard has allowed EPA and the Corps to include within the definition of WOTUS almost all waterbodies that would have been included in the definition before *Rapanos* and the Supreme Court's 2001 decision in *SWANCC*.

What the new rule does do, however, is simplify enforcement actions, including citizen suits, for discharging without a permit. Without the new rule, the agencies (or a citizen suit plaintiff) would need to establish that the waterbody at issue is a traditionally navigable water or that it has a "significant nexus" to a traditionally navigable water. For most waterbodies, this is not difficult, but for smaller waterbodies and wetlands that are far from the nearest traditionally navigable water, this can require substantial technical information and analysis. *See, e.g.*, *Precon Development Corp. v. U.S. Army Corps of Engineers*, No. 13-2499 (4th Cir., Mar. 10, 2015). Although ultimately a court is apt to defer to the agency's determination of a "significant nexus"—but not to the determination of a plaintiff in a citizen suit—the need to establish such a record could dissuade the agency or citizen from bringing the action. For "tributaries" and "adjacent waters" under the new rule, however, the rule itself categorically determines that these waterbodies have a "significant nexus." There will no longer be a need to establish the nexus in each case. This could have the effect of increasing enforcement actions, even if it does not substantially alter the scope of waterbodies that EPA and the Corps have historically considered to be WOTUS.

Judicial Challenges to the New Rule

Industrial and agricultural organizations will almost certainly challenge the new WOTUS rule. If Justice Kennedy's "significant nexus" standard remains the controlling standard, they will argue that the new rule's WOTUS categories include waterbodies that do not have a "significant nexus" to a traditionally navigable water. Justice Kennedy's concurring opinion in *Rapanos* suggested that EPA and the Corps could protect categories of waterbodies as long as the categories "are likely, in the majority of cases" to include waters with a "significant nexus." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring). The Court, however, might find that some of the new rule's categories include too many waterbodies that are unlikely to have a "significant nexus." Most vulnerable may be the "tributaries" category, which could include small, ephemeral and intermittent streams (as well as adjacent wetlands and other waters) that are hundreds of miles upstream of the nearest traditionally navigable water. The rule may also be challenged on the ground that, even if it is consistent with EPA's and the Corps' authority under the CWA, the CWA itself exceeds Congress' authority under the Constitution's Commerce Clause by regulating activities that arguably have no effect on interstate commerce—such as filling a small, ephemeral stream that is hundreds of miles from the nearest traditionally navigable water. Any ruling on constitutional grounds, which the Court would likely try to avoid, could have far-reaching effects not only on the CWA, but on other federal environmental statutes, which are also based on the Commerce Clause.

A challenge to the rule by environmental advocacy organizations is much less likely, although not inconceivable. A potential argument from this quarter may be that the rule is too narrow because it excludes some waterbodies even if they are determined to have a "significant nexus." For example, a large wetland or other waterbody that is not itself a traditionally navigable or interstate water, that is not a tributary to or adjacent to such a water, and that does not fit into any of the subcategories for which a "significant nexus" determination may be made under the new rule, would not be a WOTUS regardless of the extent of its "nexus" to a traditionally navigable water. But the chances of successfully making such an argument to the current Supreme Court are probably remote.

In the meantime, because the new rule largely reflects EPA's and the Corps' current interpretation of WOTUS, it is unlikely to result in any change in the regulatory *status quo* for most businesses and other entities that are regulated or potentially regulated under the CWA. The only significant caveat is that it could increase the risk of enforcement actions for discharging without a permit into waterbodies that fall within the new tributary and adjacent waters categories because the rule eliminates the need to establish a "significant nexus" for these waterbodies on a case-by-case basis. Pending a successful legal challenge to the new rule, or a substantial political shift at the federal level, the rule is likely to continue the broad interpretation of WOTUS that has generally prevailed for the last three decades.

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