Legal Backgrounder

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Are EPA and the Army Corps Navigating New Waters with their Controversial Proposal?

by Sarah A. Slack and Catherine M. Basic

On April 21, 2014, the United States Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") jointly published a proposed rule that would redefine "waters of the United States" under the Clean Water Act ("CWA" or "Act").[1] Although EPA and the Corps contend that this revision is meant to resolve a decades-long debate over which waters are regulated under the Act, opponents see this as an effort to extend federal authority beyond the agencies' statutory mandate. Regardless of one's opinion of the revised definition, additional clarity regarding some of the newly proposed terms and the expanded scope of the definition would benefit all sides and minimize potential challenges.

Who Cares about "Navigable Waters?" The CWA grants EPA and the Corps jurisdiction to regulate "navigable waters." The statute broadly defines navigable waters as "waters of the United States, including the territorial seas."[2] Whether a water is a "water of the United States" is extremely important because it determines which statutory programs apply to a site.[3]

The vigorous debate that the proposed rule has inspired reflects a high level of concern over how "navigable waters" are defined. The use to which commercial, industrial, agricultural, and residential property can be put could be significantly restricted—and some uses could even be prohibited.

Existing Definition of "Waters of the United States." In 1980, EPA and the Corps adopted identical federal regulations defining "waters of the United States" that have largely remained unchanged.[4] The existing regulations define "waters of the United States" to include all interstate waters and wetlands, all intrastate water that affect interstate waters, impoundments of such waters, the territorial seas, all tributaries of otherwise jurisdictional waters, and wetlands adjacent to the above-described waters (other than waters that are themselves wetlands).

Judicial Interpretations. The U.S. Supreme Court has interpreted "Waters of the United States" three times since 1985. In the first landmark case, *United States v. Riverside Bayview Homes, Inc.* ("*Bayview*"),[5] the Court held unanimously that the CWA encompasses wetlands adjacent to a navigable waterway. In doing so, the Court explained that Congress' decision to define "navigable waters" as "the waters of the United States" makes clear that the term includes "at least some waters that would not be deemed 'navigable' under the classical meaning of the term."[6] Taking into account the regulatory authority contemplated under the Act and the inherent difficulties

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[1] *Definition of "Waters of the United States" Under the Clean Water Act*, 79 Fed. Reg. 22188 (Apr. 21, 2014).
[2] 33 U.S.C. § 1362(7).
[3] Those programs might include Section 404 (the wetland dredge and fill program), Section 402 (the National Pollutant Elimination Discharge Program), Section 311 (Oil Spill Program), and Section 401 (Water Quality Certification Process).
[4] 40 C.F.R. § 230.3(s) (EPA), 33 C.F.R. § 328.3(a) (Corps).
[5] 474 U.S. 121 (1985).
[6] *Id.* at 133.

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of defining the precise bounds to regulated waters, the Court concluded it was reasonable for wetlands adjacent to other jurisdictional bodies of water to be included in the definition of "waters of the United States."

Fifteen years later in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"),[7] the Court reined in EPA's and the Corps' expansive interpretation of "waters of the United States" under the Migratory Bird Rule. Under that rule, the Corps asserted jurisdiction over *all* waters, including non-navigable, isolated, and intrastate waters, to the extent the waters were used by migratory birds. At issue in *SWANCC* was whether an abandoned, water-filled, sand and gravel pit constituted a "water of the United States" simply because of visits by migratory birds.[8] The Court held that federal jurisdiction did not extend to such non-navigable, isolated, intrastate waters.

In *Rapanos v. United States*,[9] the Supreme Court construed the term "navigable waters" for the third time. The case challenged the CWA's applicability to covered wetlands that lie near ditches or man-made drains that eventually empty into traditional navigable waters. The Court held in a split decision that the Corps did not have jurisdiction over such waters. The justices issued five separate opinions, with no opinion commanding a majority. Justice Scalia wrote the plurality opinion that concluded "navigable waters" means "relatively permanent, standing or flowing bodies of water."[10] The plurality then described a two-part test to determine whether a wetland was covered by the Act. First, there must be a finding that the "adjacent channel contains a 'water of the United States' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters)"; second, the wetland must have a "continuous surface connection to that water, making it difficult to determine where 'water' ends and the 'wetland' begins."[11]

Justice Kennedy concurred, finding that wetlands adjacent to navigable-in-fact waters are within the Corps' jurisdiction because there is a "reasonable inference of ecological interconnection."[12] For isolated wetlands or wetlands adjacent to non-navigable waters, Justice Kennedy held that the Corps must establish a "significant nexus" to navigable waters to qualify as an "adjacent" wetland.[13] He explained that a significant nexus exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as navigable."[14] However, it does not exist when "wetlands' effects on water quality are speculative and insubstantial."[15]

***The Circuits Split Post*-Rapanos**. Despite the thorough *Rapanos* opinions, the lack of a majority opinion created disarray in the lower federal courts. The federal circuit courts are profoundly split over whether Justice Kennedy's significant nexus test or Justice Scalia's two-part test controls. The U.S. Courts of Appeals for the First, Third, and Eighth Circuits have expressed that they would apply either test, while the Seventh and Eleventh Circuits have indicated that the plurality test is what should apply.

Post*-Rapanos *Agency Guidance. In 2008, the Corps and EPA adopted guidance that describes how the agencies would assess waters. Specifically, the waters that are categorically jurisdictional under the 2008 guidance include traditional navigable interstate waters, wetlands adjacent to these waters, non-navigable tributaries of these waters that are relatively permanent, and wetlands that are directly adjacent to tributaries. Meanwhile, the guidance requires a case-by-case significant nexus analysis of "other waters," including non-navigable, non-relatively permanent tributaries and adjacent wetlands, and wetlands near but not directly abutting relatively permanent non-navigable tributaries. Finally, the agencies categorically excluded some waters from their jurisdiction, including drainage swales and similar erosional features, and ditches excavated to drain uplands.

[7] 531 U.S. 159 (2001).
[8] *Id.* at 162.
[9] 547 U.S. 715 (2006).
[10] *Id.* at 732, 734.
[11] *Id.* at 742.
[12] *Id.* at 780.
[13] *Id.* at 782.
[14] *Id.* at 780.
[15] *Id.*

In 2011, EPA and the Corps sought to provide clarification to the regulated community by replacing the 2008 guidance with new draft guidance. However, the 2011 draft guidance led to an outpouring of public comments. The overwhelming response prompted the agencies to withdraw the draft guidance in September 2013 and focused on promulgating a rule instead.

The 2014 Proposed Rule. The proposed rule starts off by confirming four categories of jurisdictional waters that are, and have been considered, jurisdictional: waters currently, previously, or potentially used in interstate commerce; interstate waters, including wetlands; all impoundments of waters otherwise defined as waters of the United States; and the territorial seas.[16] However, the remaining provisions of the proposed rule would expand the reach of the existing rule. We discuss three of the major proposed revisions below.

Tributaries. On its face, the proposed rule seems to make no change to the existing regulation when it comes to tributaries: the language remains the same,[17] and tributaries to traditional navigable and interstate waters, *i.e.*, "relatively permanent" tributaries, remain *per se* jurisdictional. However, the proposed rule changes current agency practice and guidance that requires a case-by-case determination for tributaries that are *not* relatively permanent.[18] This shift in approach stems from the proposed definition of the previously undefined term "tributary."

Under existing guidance, the agencies perform a case-by-case analysis to determine whether a non-relatively permanent tributary has a significant nexus to a traditional, navigable and/or interstate water. If so, it is under the CWA's jurisdiction; if not, it escapes regulation under the Act. The mere existence of such an analysis suggests that some non-relatively permanent tributaries do not pass the case-by-case significant nexus test, and thus, are not jurisdictional. Therefore, under current agency practice it is unlikely that all tributaries are within the CWA's jurisdiction.

However, this status changes dramatically under the proposed rule. The proposed rule includes a definition for the term "tributary" for the first time.[19] If a water meets that proposed definition, it would automatically be a jurisdictional water, effectively eliminating the requirement to perform a case-by-case significant nexus analysis for certain tributaries. Even more, the wording of the proposed definition is broader than what is currently considered a "tributary" for jurisdictional purposes (*i.e.*, it includes most dikes and man-made ditches). Hence, taken together, these proposed changes exceed the jurisdictional authority under *either* test set forth by the Court in *Rapanos*.

"Adjacent Wetlands" to "Adjacent Waters." The proposed rule also explicitly revises the provision related to "adjacent wetlands" to reference "adjacent waters," of which wetlands is just one type of water.[20] This is a clear expansion of the current rule. "Adjacent" has the same definition under the existing and proposed regulation: "bordering, contiguous, or neighboring."[21] Yet the proposed rule goes on to define "neighboring," "riparian area" and "floodplains," terms currently undefined in the existing regulation.

In particular, "neighboring" in the proposed rule means (1) waters within the riparian area, (2) waters within the floodplain, and (3) waters with a shallow subsurface hydrologic connection or confined surface hydrological connection to a jurisdictional water.[22]

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[16] *Compare* 79 Fed. Reg. at 22,262 *to* 33 CFR § 328.3(a)(1), (2), (4), and (6).
[17] *Compare* 79 Fed. Reg. at 22,262 *to* 33 CFR § 328.3(a)(5).
[18] The Environmental Council of States, *Memorandum for ECOS Concerning Waters of the United States*, dated September 11, 2014, page 40-41.
[19] 79 Fed. Reg. at 22,262.
[20] *Compare existing regulation, e.g.,* 33 CFR § 328.3(a)(7) ("**Wetlands adjacent** to waters (other than waters themselves that are wetlands) identified in paragraphs (a)(1) through (6)…") *to proposed rule,* 79 Fed. Reg. at 22,263 ("**All waters**, including wetlands, adjacent to waters identified in paragraphs (a)(1) through (5)…") (emphasis added).
[21] 79 Fed. Reg. at 22,263; 40 C.F.R. § 122.2.
[22] 79 Fed. Reg. at 22,263.

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Therefore, considering these proposed changes together, waters located within a riparian area or floodplain would be "adjacent" and consequently *per se* jurisdictional.[23] This is a significant shift from the current regulation and practice, which requires a case-by-case determination in many instances. For example, not all wetlands are *per se* jurisdictional today. This is because EPA and the Corps treat wetlands that abut traditional navigable/interstate waters or tributaries to such waters differently than wetlands that are near a water body but that do not directly abut it; for the latter wetlands, the agencies must perform a case-by-case analysis.[24] Under the proposed rule, however, the expansive definition of adjacent would nullify any need to do an individualized analysis. Again, this approach in the proposed rule expands the CWA's jurisdiction to a point beyond what may be derived from prior Supreme Court cases.

Moreover, the proposed rule deletes the parenthetical in the existing rule, which prohibits finding wetlands that are adjacent to other wetlands as *per se* jurisdictional. By deleting the parenthetical, the proposed rule requires the same "adjacency" analysis described above—whether the other wetland is within a riparian area or floodplain, or has a hydrologic connection.[25]

"Other Waters." Finally, another significant change to the definition of "waters of the United States" relates to the "other waters" provision. The existing regulation provides that all "other waters . . . the use degradation or destruction of which could affect interstate or foreign commerce" are waters of the United States.[26] The proposed rule provides that "other waters" are jurisdictional if they, by themselves, or in combination with similarly situated waters in the same region, have a significant nexus.[27]

Accordingly, the proposed rule changes the approach to "other waters." It no longer discusses other waters in terms of the jurisdiction allowed under the Commerce Clause, but rather in terms of a significant nexus analysis. This change leaves the door open for jurisdictional determinations over "other waters" that would otherwise considered isolated wetlands or waters under *SWANCC*. It is conceivable that EPA and the Corps, whether intentional or not, could use this provision to assert jurisdiction over waters currently considered beyond the scope of the CWA.

What Can the Regulated Community Do? The agencies' proposed definition is as adored as it is abhorred. EPA and the Corps recently extended the comment period to November 14, 2014. Considering that the electronic docket contains nearly 7,500 comments already, the agencies may become bogged down in responding to comments, and a final rule may still be years away.

Meanwhile, debate over the proposed rule has intensified outside the confines of the notice-and-comment process. Many States and industry groups have taken their concerns to Congress, where supportive members have introduced legislation to bar promulgation of the rule. Conversely, many environmental organizations have urged their members to support the rule and have devoted considerable resources to shape public opinion. Even EPA itself is aggressively defending its rule, including high-profile speeches by senior officials and a social media campaign[28] aimed at refuting one industry group's opposition to the rule.[29]

The lack of clarity regarding certain newly defined terms is problematic for the regulated community and for environmentalists alike. And the expanded scope of jurisdictional waters is equally frustrating to stakeholders. While the finalized version of the rule will certainly be challenged in federal courts, the more clarity the agencies can incorporate prior to finalization the more likely a workable rule will result.

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[23] *See supra* n. 19 at 42.
[24] *Id.*
[25] *Id.* at 43.
[26] 33 CFR § 328.3(a)(3).
[27] 79 Fed. Reg. at 22,263.
[28] http://www2.epa.gov/uswaters/ditch-myth
[29] http://ditchtherule.fb.org/

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