



Clarification or More Regulation? Agencies Issue Proposed Waters of the United States Rulemaking

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The United States Environmental Protection Agency (“EPA”) and United States Army Corps of Engineers (the “Corps”) on March 25, 2014 jointly issued a proposed rulemaking (Docket No. EPA-HQ-OW- 2011-0880) intended to clarify and define “Waters of the United States” (“WOUS”) under the Federal Clean Water Act (“CWA”). The 371 page document (including an approximately 45 page-long rule plus a lengthy preamble) will be subject to a 90 day public comment period once officially published in the Federal Register. There is much to comment on.

Determining CWA jurisdiction over streams and wetlands has always been challenging, and decisions by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, [531 U.S. 159](#) (2001), and *Rapanos v. United States*, [547 U.S. 715](#) (2006), have only added to the opaqueness of the law. For nearly a decade, lawmakers, regulators, industry, agriculture and the public have requested that EPA and the Corps issue a rulemaking to provide clarity; whether the proposed rulemaking does so remains to be seen.

The proposed rule relies upon general scientific evidence of the connectivity between streams and wetlands with downstream waters to establish a very broad jurisdictional delineation. Under the proposed rule, no additional analysis is required to determine that there is a significant nexus between the following categories of WOUS and navigable waters: “traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters or the territorial seas; and adjacent waters, including adjacent wetlands.” In addition, the agencies propose that “other waters” (those not fitting in any of the above categories) could be determined to be WOUS through a case-specific showing that, either alone or in combination with similarly situated “other waters” in the region, they have a “significant nexus” to traditional navigable waters, interstate waters, or the territorial seas.

The proposed rulemaking expressly excludes from WOUS the following: waste treatment systems

(including treatment ponds or lagoons); prior converted cropland; ditches excavated wholly in uplands that drain only uplands and have less than perennial flow; ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas, or an impoundment of the aforementioned waters; and water bodies that possess one or more of the following features—artificially irrigated areas that would revert to upland should application of irrigation water to that area cease; artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting pools or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; water-filled depressions created incidental to construction activity; groundwater, including groundwater drained through subsurface drainage systems; and gullies, rills, and non-wetland swales.

In response to concerns voiced by the agricultural community about expansion of the jurisdictional reach of regulatory agencies under the CWA, EPA and the Corps (in cooperation with the USDA) also issued an interpretive rule in conjunction with the proposed WOUS rule which clarifies that 53 specific conservation practices identified by the USDA's Natural Resources Conservation Service to protect or improve water quality will not be subject to dredge-and-fill permits under Section 404 of the CWA.

“We are clarifying protection for the upstream waters that are absolutely vital to downstream communities,” said EPA Administrator Gina McCarthy. “Clean water is essential to every single American. . .” Judging by the number of blog entries, alerts and discussion already generated by the proposed rule, not everyone agrees that the changes are positive. The greatest concern by the regulated community is that the proposed WOUS definition expands the scope of CWA jurisdiction over wetlands and seasonal streams that are upstream from navigable waters. The 90 day public comment period on the proposed rule undoubtedly will generate much continued discussion.

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