Water Quality Standards

EPA, Corps Propose to Assert Jurisdiction Over Tributaries Affecting Navigable Waters

Proposed Clean Water Act Jurisdiction Rule

Key Development: The EPA and Army Corps of Engineers propose asserting Clean Water Act jurisdiction over all tributaries of streams, lakes, ponds and wetlands that affect the chemical, physical and biological integrity of larger, navigable downstream waters.

Potential Impact: Any expansion in jurisdiction means more waters and wetlands could be subject to Clean Water Act permitting requirements.

By Amena H. Saiyid

Nov. 7 --The Environmental Protection Agency and the U.S. Army Corps of Engineers would assert Clean Water Act jurisdiction over all natural and artificial tributary streams, lakes, ponds and wetlands in floodplains and riparian areas that affect the chemical, physical and biological integrity of larger, downstream navigable waters under a proposed rule obtained by Bloomberg BNA Nov. 7.

The proposed rule also would allow the agencies to exercise Clean Water Act jurisdiction over wetlands and streams that are adjacent, neighbor or are separated from jurisdictional wetlands or waters by man-made berms.

Moreover, the proposed rule would allow the agencies to determine on a case-by-case basis whether geographically isolated wetlands and certain other waters in the uplands have a significant nexus to the chemical, physical and biological integrity of downstream waters and should be considered jurisdictional

The agencies said "tributaries, as defined in the proposed regulation, in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries to the chemical, physical or biological integrity of traditional navigable waters, interstate waters or the territorial seas."

The so-called significant nexus test was articulated by the U.S. Supreme Court Justice Anthony Kennedy in *Rapanos v. United States,* 547 U.S. 715, 62 ERC 1481 (2006). The purpose of Kennedy's test was to identify which waters fell under the Clean Water Act jurisdiction based on a significant nexus between the water in question and downstream navigable waters and wetlands.

As written, the agencies said the proposed rule would eliminate the need to make a case-specific significant nexus determination for tributaries or for their adjacent waters because scientific studies have determined that as a category, these waters have "significant nexus" to downstream larger, navigable waters.

Draft Rule at White House.

The EPA and the corps sent the draft rule asserting Clean Water Act jurisdiction in September to the White House Office of Management and Budget. That same day, the EPA released the scientific study

that the agencies are using as a rationale for asserting jurisdiction in the proposed rule. The agencies said they wouldn't release the proposed rule until the advisers had completed the peer review of the study.

This scientific study said intermittent and ephemeral streams, wetlands and open waters in floodplains are connected to downstream waterways and could be subject to EPA regulations .

The agencies said the purposes of the proposed rule are to ensure protection of aquatic resources and make the process of identifying which are federally protected waters, or "waters of the United States," less complicated, more efficient, and less prone to litigation.

Significance of Jurisdiction.

The issue of jurisdiction carries a great deal of significance. The fact that a water is covered by the Clean Water Act has implications for permitting of pollution discharges, filling of wetlands and streams, certifications by states that activities such as dam-building or other federally permitted activities don't harm water quality and cleanup of oil spills.

Under the Clean Water Act, the EPA or responsible state authorities issue permits under the Section 402 National Pollutant Discharge Elimination System program, while the corps issues Section 404 dredge-and-fill permits for construction and other development projects. The EPA oversees the Section 404 program.

Among other terms, the rule would revise the existing over-arching definition of "waters of the United States" that now includes new regulatory definition for tributaries, with the agencies proposing that only those waters that meet the regulatory definition would be considered jurisdictional.

It also defines significant nexus, "neighboring" waters, floodplains, riparian areas and wetlands.

As defined under the proposed rule, a tributary of an interstate river, territorial seas and navigable waters would have a bed, a channel and an ordinary high water mark.

It would include tributaries that run through wetlands and bridges, culverts and dams without losing its characteristics. Tributaries would include lakes, streams, impoundments, canals and ditches, excluding those ditches that don't contribute flow or have an ephemeral flow or are found in uplands.

Clarifications Provided.

The proposed rule also would clarify that ponds, lakes and similar water bodies that are adjacent to or neighbor traditionally navigable and jurisdictional waters would now be considered jurisdictional. The agencies further clarify that adjacent waters and wetlands that are separated from jurisdictional waters by artificial dikes or barriers, natural river berms and beach dunes would be considered jurisdictional under this proposed rule.

The Supreme Court in Rapanos was split over the jurisdictional status of wetlands that either are separated by man-made berms or lie near smaller tributaries, such as drainage ditches, that flow into larger water bodies used for navigation. In the absence of rulemaking defining significant nexus, Kennedy at the time said the corps would have yo decide whether a discharge into a wetlands has a "significant nexus" with water quality in adjoining wetlands.

For the purposes of this rule, these adjacent waters and wetlands would be considered jurisdictional if they are bordering, or located contiguous to, or are neighbor to traditional navigable waters.

The agencies go one step further in adding a new definition of "neighboring" to include those waters located in a riparian area or flood plain area that have a significant chemical, biological and physical connection to a jurisdictional water.

The rule also proposes on a case-by-case basis to allow the agencies to determine whether certain "other waters," such as playa lakes, mudflats, sandflats and prairie potholes, "alone or in combination with similarly situated waters, including wetlands" have a significant nexus to traditional navigable waters, interstate waters or the territorial seas.

The proposed rule said the revised definition of the waters of the U.S. would be consistent with the science and clarify the confusion that has resulted from the U.S. Supreme Court decisions in *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs.*, 531 U.S. 159, 51 ERC 1833 (2001), and *Rapanos v. United States*.

Concurring, Plurality Opinions.

In particular, the two agencies have chosen to use Justice Anthony Kennedy's concurring opinion and Justice Antonin Scalia's plurality opinion in *Rapanos* as the bookends for asserting jurisdiction, first through the 2008 guidance document and then through the draft guidance in 2011.

In *Rapanos*, Kennedy issued a concurring opinion, which said the agencies must prove on a case-by-case basis that a particular water or wetland has a "significant nexus" to a navigable water. Meanwhile, Scalia's plurality opinion said the Clean Water Act should apply to waters and wetlands with a "continuous surface" connection to navigable waters.

Jan Goldman-Carter, senior manager for wetlands and water resources at the National Wildlife Federation, told Bloomberg BNA in a Nov. 7 e-mail, "This proposed rule is well-supported both legally and scientifically. It is very consistent with the pivotal Kennedy opinion in *Rapanos*, the scientific evidence in the EPA Connectivity Report, and the extremely well-vetted 2011 draft Waters of the US Guidance."

Patrick Parenteau, a Vermont Law School professor specializing in Clean Water Act issues, told Bloomberg BNA Nov. 7 that "EPA has compiled a solid record grounded in science and law to support this much needed clarification of the scope of the term "waters of the U.S."

Though the assertion of jurisdiction over "all" tributaries would be controversial, Parenteau said, "It's important to note that this has been the law long before *SWANCC* and *Rapanos*. In *United States v. Deaton*, 332 F.3d 698, 708, 56 ERC 1641 (4th Cir. 2003), Parenteau said, "a very conservative panel of the U.S. Court of Appeals for the Fourth Circuit said the term "waters of the United States" applied to the "entire tributary system of navigable waters" and that the regulation of tributaries of navigable waters through the Clean Water Act prevents injurious uses of the channels of interstate commerce and is not an unconstitutional abuse of congressional power."

Brian Glass, of Bryn Mawr, Pa.-based Warren Glass LLP, told Bloomberg BNA in an email that both agencies are likely to hear from critics on either side. One side will accuse the agencies of being "overinclusive" of the waters over which it asserts jurisdiction, while "opponents will also likely

complain that there is still a sizeable universe of waters for which the rule only prolongs the existing uncertainty."

"Those who seek to challenge the breadth of the rule and its asserted jurisdiction over tributaries and wetlands in floodplains and riparian areas will be swimming against the considerable tide of scientific studies that the agency has amassed to support the rule and that it synthesized in its recent connectivity report. And reviewing courts will be hard pressed to take issue with the rule's case-by-case approach to all other waters and wetlands given that it tracks the language in Justice Kennedy's concurring opinion in Rapanos almost word for word," Glass said.

Republicans, home builders, farmers, ranchers and miners have criticized moves by the EPA to expand the scope of its authority to regulate the smaller, upstream areas, saying new rules could be intrusive and unwarranted.

The House Science, Space and Technology Committee wrote to OMB, after failing to hear from the EPA, to ensure that the proposed rule was peer-reviewed by the panel of scientists charged with reviewing the connectivity study .

Farm Bureau's Concerns.

Don Parrish, who is the senior regulatory relations director for the American Farm Bureau Federation, told Bloomberg BNA Nov. 7, "It is very difficult for me to see any federal jurisdictional limit here except for what they call out as exemptions."

Moreover, Parrish said the proposed rule has obviated the concept of "state waters" and trampled over state authority to regulate their own waters. The agencies, however, said that the proposed rule would lessen the burden by already identifying waters that are jurisdictional.

Virginia Albrecht, a Hunton & Williams attorney who specializes in the Clean Water Act, told Bloomberg BNA that "without a doubt" the proposed rule expands Clean Water Act jurisdiction by writing what she terms is "a broad definition of tributaries and adjacent waters."

"Anything that slips through these two categories of tributaries and adjacent waters would be subject to the significant nexus test," Albrecht told Bloomberg BNA.

In the proposed rule, the agencies justified their rationale for using a case-by-case basis, saying, "The relationship is an all or nothing situation. There is a gradient in the relation of waters to each other."

The agencies said the proposed "case specific analysis" in establishing jurisdiction over these "other waters" is consistent with current science, the Clean Water Act and the U.S. Supreme Court decisions, and it allows for a determination of jurisdiction where the gradient in a relationship becomes significant.

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The draft Clean Water Act jurisdiction rule is available at http://op.bna.com/itr.nsf/r?Open=rran-9d8qx7