EPA, Corps Propose Regulations Redefining 'Waters of the U.S.'

Brian G. Glass, *The Legal Intelligencer*

It took them nearly eight years, but the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have finally proposed a rule in response to a U.S. Supreme Court decision that cast serious doubt on the validity of their existing regulations interpreting the scope of their jurisdiction under the Clean Water Act.

Placing the Proposed Rule in Context

The Clean Water Act broadly prohibits the discharge of pollutants except as otherwise provided in the act and establishes a variety of regulatory programs. The act's broad prohibition and programmatic requirements, however, only apply to "navigable waters."

The act defines the term "navigable waters" as "the waters of the United States, including the territorial seas," but it does not define the term "waters of the United States." To fill this gap, the EPA and the Corps have promulgated substantially identical regulations defining that term. Those existing regulations define the term to include: traditional navigable waters; interstate waters; "other waters" whose degradation or destruction could affect interstate or foreign commerce; impoundments; tributaries of all of the above; the territorial sea; and wetlands adjacent to all of the above. The definition expressly excludes certain waste treatment systems and prior converted cropland.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the U.S. Supreme Court considered two consolidated cases that challenged the Corps' jurisdiction over wetlands near ditches whose flows eventually reached traditional navigable waters. Although five justices agreed to overturn the lower court decisions and remand the cases for further consideration, they could not agree on the proper jurisdictional test for the lower courts to apply on remand to determine whether the wetlands at issue were "waters of the United States."

Writing for a plurality of four justices, Justice Antonin Scalia focused on the plain language of the act and found that it had been the "inherent ambiguity" in determining the "point at which water ends and land begins" that had animated the court's earlier decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). As such, he concluded that jurisdiction should only extend to "wetlands with a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water" connected to "traditional interstate navigable waters."

In contrast, in a solo concurring opinion, Justice Anthony Kennedy found that the court had subsequently observed that "it was the significant nexus between wetlands and 'navigable waters' ... that informed our reading of the [act] in *Riverside Bayview Homes*." As such, he concluded that "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense," which he found exists only where "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.'"

Likely in anticipation of the uncertainty the *Rapanos* decision would sow, two opposing justices were able to find common ground on the need for the agencies to update their regulations, with Chief Justice John Roberts Jr. lamenting that the agencies had not already done so and Justice Stephen Breyer urging the agencies to "write new regulations, and speedily so." The agencies for a number of years tried to address the questions raised by *Rapanos* through informal guidance documents.

The Proposed Rule

On Sept. 17, 2013, the EPA released for public comment a draft scientific report that it indicated would "serve as a basis for a joint EPA and [Corps] rulemaking aimed at clarifying the jurisdiction of the Clean Water Act." The report drew three main conclusions: first, that all streams are physically, chemically and biologically connected to larger downstream waters; second, that all wetlands and open waters in riparian areas and floodplains share those same connections with those downstream waters; and finally, that it is difficult to generalize about the effects of all other wetlands and open waters on those downstream waters, but that evaluations of such wetlands and waters could be possible through case-by-case analysis.

On March 25, the agencies released their proposed rule redefining the term "waters of the United States." The agencies provided that its purposes are to "ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient." It is worth considering whether the proposed rule succeeds in these purposes only by taking an expansive view of our nation's aquatic resources (i.e., by being overinclusive in the resources that it proposes to regulate).

• **Traditional navigable waters, interstate waters, impoundments and the territorial seas:** The agencies propose to continue to define "waters of the United States" to include all of these waters and don't propose any material changes to these categories.

• **Tributaries:** Although they continue to include tributaries under "waters of the United States," the agencies now propose a new definition for "tributary." Under the new definition, waters qualify as a tributary if they are "physically characterized by the presence of a bed and banks and ordinary high-water mark" and contribute flow to a traditional navigable water, interstate water, impoundment, or territorial sea. According to the new definition, tributaries do not need to contribute flow directly to one of these waters so long as their flow eventually reaches one of them, and, according to the preamble, such flow may be ephemeral, intermittent or perennial. Tributaries can also be natural, man-made or man-altered and can take nearly any form, including a river, stream, impoundment, canal or non-excluded ditch; they can also take the form of a wetland, lake or pond, in which case they do not even require a bed and banks or an ordinary high-water mark. Under the new rule, waters qualifying as a tributary do not forfeit that status even if there are one or more natural or man-made breaks along their length so long as it is possible to identify a bed and banks and an ordinary high-water mark upstream of such breaks. The agencies note that "five justices did not reject the current regulations that assert jurisdiction over non-navigable tributaries of traditional navigable waters and interstate waters," underscoring the extent to which the agencies are tailoring their proposed rule to the composition of the court, both as it existed at the time that it decided *Rapanos* and as it exists today.

• **Adjacent waters:** Although they propose to continue to define "waters of the United States" to include adjacent wetlands, the agencies propose to expand this category to include other types of adjacent waters. While they propose to continue to define "adjacent" to mean "bordering, contiguous, or neighboring," they now propose a new definition for the term "neighboring." The new definition includes "waters located within the riparian area or floodplain" of traditional navigable waters, interstate waters, impoundments, the territorial seas and tributaries of any of the above, as well as "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." The agencies also propose new definitions for the terms "riparian area" and "floodplain." Even so, the agencies acknowledge that certain determinations "would be based in part on best professional judgment and experience." The agencies also acknowledge, in an apparent nod to Kennedy who made a similar observation in *Rapanos*, that the "distance between water bodies may be sufficiently great that even the presence of an apparent hydrologic connection may not support an adjacency determination."

• **"Other waters":** The agencies no longer propose to define "waters of the United States" categorically to include all "other waters." Instead, they propose to define the term to include such waters only "on a case-specific basis" when those waters "alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to" a traditional navigable water, interstate water or territorial sea. Essentially, the agencies propose to replace the formulation of "other waters" that appears in the existing regulations with the standard that Kennedy formulated in *Rapanos*. By proposing a new definition for the term "significant nexus," however, the agencies also attempt to answer some of the questions that Kennedy left unresolved in his formulation. The new definition provides that the applicable "region" for a significant nexus analysis is "the watershed that drains to the nearest" traditional navigable water, interstate water or territorial sea, and that waters are "similarly situated" when they "perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States'" to be evaluated as a "single landscape unit with regard to their" downstream effects. When "other waters" located in the same

watershed meet these functionality and proximity criteria, they may be aggregated for purposes of determining jurisdiction, making it far more likely that such jurisdiction would be found. Presumably, once this determination is made for one type of water in connection with a project in a given watershed, it would apply to all projects involving that same type of water falling within that same watershed, which should raise interesting questions about when a project sponsor may (or must) challenge such a determination to preserve its rights.

• **Exclusions:** The agencies propose to add a number of exclusions for waters and features that they generally have not considered to be "waters of the United States." These waters and features include certain: artificially irrigated areas; artificial lakes and ponds; artificial reflecting and swimming pools; small ornamental waters; water-filled depressions; groundwaters; and gullies, rills and non-wetland swales. The agencies also propose to exclude two types of ditches: ones "that are excavated wholly in uplands, drain only uplands, and have less than perennial flow"; and ones "that do not contribute flow, either directly or through another water," to a traditional navigable water, interstate water, territorial sea, or impoundment.

Submitting comments

Throughout the preamble, the agencies solicit comments on a range of issues, but many of these appear to be designed to reduce the number of "other waters" that would require a case-specific significant nexus analysis. Although the agencies pay lip service to the notion that some of these "other waters" could be added to their new list of exclusions, if past experience is any indication, it seems far more likely that the agencies have a greater interest in adding more of these "other waters" to their list of jurisdictional categories. For this reason and others, stakeholders should give serious consideration to submitting comments on the proposed rule, which the agencies will accept for up to 90 days after it is published in the Federal Register.

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