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Overview of EPA and the Army Corps' Rule to Define "Waters of the United States"

Overview: What Is It?

On May 2014, the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) finalized revised regulations that define the scope of waters protected under the Clean Water Act (CWA). Discharges to waters under CWA jurisdiction, such as the addition of pollutants from factories or sewage treatment plants and the dredging and filling of spoil material through mining or excavation, require a CWA permit. The legal and policy questions regarding the outer geographic limit of CWA jurisdiction and the consequences of restricting or expanding that scope have challenged regulators, landowners, developers, and policy makers for over 40 years.

What Is the Current Status?

The revised rule will become effective 60 days after publication in the *Federal Register*, which has not yet occurred, to allow time for review under the Congressional Review Act. Legal challenges to the rule can be filed on the date two weeks after publication in the *Federal Register*.

Background of the Rule

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas." Waters need not be truly navigable to be subject to CWA jurisdiction. The act's single definition of "navigable waters" applies to the entire law, including the federal prohibition on pollutant discharges except in compliance with the act (§301), permit requirements (§§402 and 404), and enforcement (§309). The CWA gave the agencies the authority to define the term "waters of the United States" in regulations, which EPA and the Corps have done several times, most recently in 1986.

Revisions to the Corps' and EPA's regulations were proposed in 2014 in light of two Supreme Court rulings (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 716 (2006)) that interpreted the regulatory scope of the CWA more narrowly than previously, and created uncertainty about the appropriate scope of waters that are protected by the CWA.

The agencies issued guidance in 2003 and 2008 to lessen confusion over the Court's rulings. The non-binding guidance sought to identify, in light of those rulings, categories of waters that remain jurisdictional, categories not jurisdictional, and categories that require a case-specific analysis to determine if CWA jurisdiction applies. The Obama Administration proposed revised guidance in 2011; it was not finalized, but it was the substantive basis for the 2014 proposed rule.

What's in the Final Rule?

The final rule retains much of the structure of the agencies' existing definition of "waters of the United States." It focuses particularly on clarifying the regulatory status of waters located in isolated places in a landscape and streams that flow only part of the year, along with nearby wetlands, the types of waters with ambiguous jurisdictional status following the Supreme Court's rulings. Like the 2003 and 2008 guidance documents and the 2014 proposal, it identifies categories of waters that are and are not jurisdictional, as well as categories of waters that require a case-specific evaluation.

- Under the final rule, all tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be jurisdictional *per se*. All of these waters are jurisdictional under existing rules, but the term "tributary" is newly defined in the rule.
- Waters—including wetlands, ponds, lakes, and similar waters—that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be jurisdictional by rule (i.e., no case-specific evaluation would be required). The final rule for the first time puts some boundaries on "adjacency."
- Some waters—but fewer than under current practice—would remain subject to a case-specific evaluation of whether or not they meet the legal standards for federal jurisdiction established by the Supreme Court.
- The final rule identifies a number of types of waters to be excluded from CWA jurisdiction. Some restate exclusions under current rules (e.g., prior converted cropland); some have been excluded by practice and would be expressly excluded by rule for the first time (e.g., groundwater and some ditches). Some are new in the final rule (e.g., stormwater management systems). The rule makes no change and does not affect existing statutory exclusions: exemptions for normal farming, ranching, and silviculture practice and for maintenance of drainage ditches (CWA §404(f)), as well as for agricultural stormwater discharges and irrigation return flows (CWA §402(l)).

Issues and Controversy

The rule has been and remains highly controversial. The agencies' intention in proposing it was to clarify questions

of CWA jurisdiction, in view of the Supreme Court's rulings while reflecting the agencies' scientific and technical expertise. Much of the controversy since the Court's rulings has centered on the many instances that have required applicants for CWA permits to seek a time-consuming case-specific evaluation to determine if CWA jurisdiction applies to their activity, due to uncertainty over the geographic scope of the act. The agencies' stated intention was to clarify jurisdictional questions by clearly articulating categories of waters that are and are not protected by the CWA and thus limiting the types of waters that still require case-specific analysis.

Industries that are the primary applicants for CWA permits and agriculture groups (although farms are exempt from most permitting) raised numerous objections over how broadly they fear that the proposed rule would be interpreted. Many urged that it be withdrawn. Because definitions often are key to interpreting statutory law and regulations, critics contended that the proposed new definitions were ambiguous and would enable broader assertion of CWA jurisdiction than is consistent with law and science. The final rule adds new definitions of key terms, such as "tributary" and "significant nexus," and modifies parts of the proposal in an effort to provide more clarity. Agriculture has been concerned that the rule would modify existing CWA exemptions for agricultural practices. The rule does not affect or alter these exclusions.

Some local governments also criticized the rule. They point out that localities own and maintain public infrastructure including roadside ditches, flood control channels, and stormwater management structures. Because the rule would define some ditches as "waters of the United States" if they meet certain conditions, while excluding other ditches, these local governments contend that the proposal potentially increased the number of locally-owned ditches under federal jurisdiction. EPA and Corps officials believed that the proposed exclusion of most ditches actually decreases federal jurisdiction, but the issue remained controversial. The final rule expressly excludes stormwater management systems and structures from jurisdiction.

Many states and state environmental agencies have expressed support for a rule to clarify the scope of CWA jurisdiction, but there was no state consensus on the Corps-EPA proposal or on whether it should be withdrawn. Some were generally supportive, but others believed that the agencies did insufficient consultation with the states prior to proposing the rule. States, they point out, are co-regulators of the CWA with EPA, making determinations of federal jurisdiction equally important to states as to industry.

Environmental groups defend the agencies' efforts to protect U.S. waters and reduce frustration resulting from unclear jurisdiction of the CWA. Still, some of them argued that the proposed rule should be strengthened, for example by designating additional categories of waters and wetlands such as prairie potholes as categorically jurisdictional. The final rule did not do so; instead, such waters will require case-specific analysis to determine if jurisdiction applies.

Officials of the Corps and EPA have vigorously defended the proposed rule. But they acknowledged that it raised questions that required clarification in the final rule. They believe that the rule announced on May 27 does not protect any new types of waters that have not been protected historically, that it does not exceed the CWA's coverage and that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's current reading of jurisdiction and consistent with scientific understanding of connections between small streams and downstream waters. If the proposed rule were withdrawn or adoption of a new rule were delayed, they note, the confusing status quo would remain in place, although some critics of the proposed rule said that they preferred the status quo. EPA and the Corps assert that the final rule addresses criticisms of the proposal, such as: defining tributaries more clearly, better defining how protected waters are significant, and preserving CWA exclusions and exemptions for agriculture. Based on press reports of stakeholders' early reactions to the final rule, some believe that the agencies largely succeeded in their objective to clarify the rule, while others believe that they did not.

Congressional Interest

Congressional interest in the rule has been strong. On February 4, 2015, the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee held a joint hearing on impacts of the proposed rule on state and local governments, hearing from agency and public witnesses, and other Senate and House committee hearings also have been held.

On May 12, the House passed legislation to require EPA and the Corps to start a new rulemaking (H.R. 1732). A related bill in the 114th Congresss is S. 1140; it would provide principles to be included in a new rule. Other bills also have been introduced. The 113th Congress took one legislative action, enacting a provision in the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235) directing EPA and the Corps to withdraw an interpretive rule on agriculture exemptions from CWA permitting that is related to but separate from the proposed "waters of the United States" rule, which had confused and been controversial with the agriculture sector. The agencies did withdraw the interpretive rule on January 29, 2015. P.L. 113-235 did not include any policy provision on the "waters of the United States" proposal itself.

For additional information, see CRS Report R43455, *EPA and the Army Corps' Rule to Define "Waters of the United States"*; CRS Report R43943, *EPA and the Army Corps' Proposed "Waters of the United States" Rule: Congressional Response and Options*; and CRS Report IN10212, *Withdrawal of the EPA-Army Corps Interpretive Rule for Agriculture*.

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