Waters, waters everywhere: Does the proposed definition of waters of the United States expand the Clean Water Act's reach?

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In April 2014, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (EPA and the Corps, collectively, the Agencies) jointly released the long-awaited proposed rule defining "waters of the United States" (WOTUS) under the Clean Water Act (Act). 79 Fed. Reg. 22,188 (Apr. 21, 2014) (Notice). This article identifies key features of the proposed rule and discusses some points of contention that the Agencies and courts will be addressing.

Background and rationale for the proposal

According to the Agencies, the proposed rule does not change current practice or expand coverage of the Act. WATERSHED ACADEMY, EPA, WATERS OF THE U.S. PROPOSED RULE 26 (2014) (EPA PowerPoint). Some stakeholders warn, however, that application of new or revised definitions of key terms may unreasonably expand the government's jurisdiction beyond the scope of the Act and that the proposed rule will increase land restrictions and permitting and mitigation. Advocates of the proposed rule support the broad inclusion of waters within the jurisdiction of the Act.

Describing their rationale for the proposed rule, the Agencies suggest that it protects water quality and, therefore, protects human health, reduces confusion over how the term "WOTUS" is defined, is based on Supreme Court precedent, is based on scientific evidence establishing the connectivity of upland and downstream waters, and that its benefits to the public outweigh its expected costs. Throughout the Notice, the Agencies maintain that the proposed rule will protect the nation's waters. They describe the current difficulties in determining the scope of the Act's jurisdiction and explain how those difficulties have hampered enforcement actions. The Agencies also explain that the methodology for defining WOTUS after *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) caused confusion and often required agencies to evaluate the jurisdiction of particular water bodies on a case-by-case basis.

In *Rapanos*, Justice Kennedy explained that a "significant nexus" exists if wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of navigable waters. 547 U.S. at 780. Although the *Rapanos* plurality opinion disagreed with Justice Kennedy's application of the significant nexus analysis to adjacent wetlands, the

proposed rule applies the significant nexus approach beyond adjacent wetlands to *adjacent and other* waters. The Agencies relied on scientific studies evaluating evidence of impacts on the chemical, physical, and biological characteristics of traditional navigable waters and EPA's "Connectivity Report" that synthesized peer-reviewed scientific literature and research on the impacts that upland streams and wetlands have on downstream waters.

For anyone familiar with the concept of "we all live downstream," the Connectivity Report's primary conclusions are not surprising: "streams, individually or cumulatively, exert a strong influence on the character and functioning of downstream waters" and "[w]etlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers . . . are physically, chemically, and biologically connected with rivers." 79 Fed. Reg. at 22,222–223. The Agencies rely on these conclusions to justify identifying broad categories of waters as jurisdictional waters.

Bright-line categories: The devil is in the definitions

The proposed rule establishes six so-called "bright-line" categories of jurisdictional waters:

- traditional navigable waters,
- interstate waters,
- territorial seas,
- impoundments of these waters,
- tributaries of these waters, and
- all waters adjacent to these waters.

The proposal includes a "case-by-case" seventh category that looks to the existence of a significant nexus to WOTUS. The first three categories are relatively noncontroversial. The other four categories are more so, due in part to new and revised definitions of key terms, including "adjacent," "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus."

The proposal defines a "tributary" as a natural or man-made connector "which contributes flow, either directly or through another water, to" some other jurisdictional water. In addition, the proposal revises "adjacent" to include "neighboring" waters ("located within the riparian area or floodplain"). Relying on the Connectivity Report, the Agencies determined that tributaries and adjacent waters *always* significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas, and therefore a significant nexus exists. Because of that significant nexus, the tributaries and adjacent waters are jurisdictional WOTUS. In addition, *other waters* may be WOTUS if they, either alone or with other similarly situated waters, have a significant nexus to WOTUS. Under the proposed rule's definitions, then, the Act's jurisdiction extends to any area where water is found at any time so long as that water flows on the surface or below the surface to an otherwise recognized WOTUS.

Exceptions from Clean Water Act jurisdiction

The proposed rule identifies excluded waters that cannot be considered WOTUS under the "other waters" analysis even if they have a significant nexus to categorical waters:

- waste treatment systems
- prior converted cropland
- ditches that are constructed in uplands, that drain only uplands, and that do not have perennial flow
- ditches that do not flow, either directly or through another water, into a traditional navigable water
- artificially irrigated areas that would revert to upland without irrigation
- artificial structures (e.g., ponds and lakes) constructed in dry uplands
- groundwater
- gullies, rills, and non-wetland swales

These excluded waters could, however, serve as the hydrologic connection for the purposes of determining the adjacency or significant nexus of another water to a jurisdictional water.

The proposed rule clearly states that it does not affect the Act's express exemptions for specified activities such as farming, silviculture, and ranching. The agricultural community expressed concerns about the proposed rule, and despite assurances by the Agencies that these exemptions remain in place, the jurisdictional breadth of the proposed rule continues to be a source of hot debate.

Sources of controversy and uncertainty with the proposed rule

Numerous outside commentators disagree with the Agencies' statements that the proposed rule does not expand WOTUS beyond application of the current law. Detractors argue that the proposed definitions unreasonably expand the Act's jurisdiction. Others complain about increased land restrictions and permitting and mitigation costs accompanying a classification as WOTUS. Common areas of concern include the exclusion of ditches and the potential jurisdictional reach of tributaries and "adjacent" waters.

Application of the newly defined terms may be difficult when applied in different regions of the country. For example, the proposed rule generally excludes ditches and excludes upland ditches with "less than perennial flow" but does not extend to ditches that contribute flow "either directly or through another water" to a WOTUS. Because the proposed rule does not define "upland" or "contribute flow," any application is uncertain. The widely different physiographic and climatic conditions across the country add further uncertainty. For example, how can these terms be applied consistently across very different circumstances such as are found in "wet" states that receive 50 or more inches of precipitation annually compared to "dry" states that may receive less than 15 inches?

Some stakeholders are concerned that virtually any ditch that carries water that ends up in a navigable water will be considered a WOTUS, including county-owned ditches along roads and the green infrastructure components of municipal separate storm sewer systems (MS4s). Others argue that because farm ponds tend to be built in low spots, the dry upland exclusion for ponds is a dead letter. Still other groups warn that because the definition of "neighboring" includes "floodplains" and because floodplains can extend for miles from traditional navigable waters, the proposed rule could greatly expand the Act's jurisdiction.

The scope of WOTUS under the proposed rule also affects the cost-benefit analysis. EPA estimates that the public would benefit by up to $514 million by "reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater." EPA PowerPoint at 58.

EPA estimates the proposed rule's cost to be $279 million, based on increases in the number of permits that entities must file, the costs of mitigating impacts to streams and wetlands, and the costs to reduce pollution to waterways. Based on these numbers, EPA concludes that the benefits outweigh the costs. Dr. David Sunding, a professor of economics at the University of California, Berkeley, however, argues that EPA underestimated the costs because it relied on a flawed methodology to determine the extent of acreage that the proposed rule will regulate and did not accurately consider the costs and increased number of required permitting actions. D. Sunding, The Waters Advocacy Coalition, *Review of 2014 EPA Economic Analysis of Proposed Definition of Waters of the United States* (May 15, 2014).

Others believe that the proposed rule appropriately defines WOTUS or even suggest that the Agencies have not gone far enough. In 2011, Jon Devine of the Natural Resources Defense Council and others decried the Agencies' failures to push the Act's jurisdictional limits to the full extent that Congress intended. *See, e.g.*, J. Devine et al., *The Intended Scope of Clean Water Act Jurisdiction*, 41 ENVTL. L. REP. NEWS & ANALYSIS 11,118 (2011). In response to the critique by the Farm Bureau Federation of the proposed rule and the Stoner Blog, Mr. Devine countered each criticism, point-by-point.

Although much of the initial concern expressed about the proposed rule has been about understanding or predicting the scope of WOTUS for purposes of section 404 dredge and fill operations, the Agencies' cost-benefit analysis of sections 303, 311, 401, 402, and 404 shows that the Agencies do not consider this proposed rule solely a dredge and fill-related issue. EPA PowerPoint at 57–60. The rule's impact on these other aspects of the Act raises many questions. For example:

- How will consideration of certain ditches, other waters, neighboring waters, and tributaries affect the determination of designated uses and related water quality criteria under section 303?
- Do existing designated uses and water quality criteria reflect the diverse physical, biological, and chemical realities of jurisdictional WOTUS under the proposed rule? For example, is the same designated use for the protection of propagation of fish and wildlife (and its water quality criteria) that is appropriate for a perennial stream also appropriate for a tributary to that stream when the tributary is ephemeral and is connected by a shallow subsurface hydrologic connection?
- Under section 402 permitting, at what point along the water body will an effluent limit be evaluated as protecting the designated use?

Perhaps even more important than the text of proposed rule are the legal questions regarding statutory construction of the Act and the permissible scope of regulation under the Commerce Clause. In *United States v. Riverside Bayview Homes,* the Supreme Court focused on statutory and regulatory construction but in doing so observed that Congress had intended to exercise its powers under the Commerce Clause. 474 U.S. 121, 126, 133 (1985). In *SWANCC*, the Court recognized the potential constitutional questions but chose to interpret the statute to avoid those issues and expressly declined to address the Commerce Clause. Finally, in *Rapanos*, the plurality opinion recited concerns about Congress's commerce power and the Corps' intent to push the limits of that power and stated: "Even if the term [WOTUS] were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." 547 U.S. 738. Justice Kennedy acknowledged that the Commerce Clause was not limitless and observed: "To be sure, the significant-nexus require-

ment may not align perfectly with the traditional extent of federal authority." *Id.* at 782. Justice Kennedy's statement could well be the opening line of many an argument about the scope of the proposed rule.

Despite the controversies, Congress has not helped resolve the jurisdictional reach of the Clean Water Act. The Agencies expect that the proposed rule will protect the water quality by defining WOTUS with broad and inclusive language that encompasses waters with a significant nexus to traditional WOTUS. The final rule, regardless of its form, will be appealed and the Supreme Court will again be asked to rule on the scope of WOTUS.