LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Environment, Land & Resources Department June 9, 2015 | Number 1842

EPA and Army Corps Issue Final Rule to Govern Federal Clean Water Act Jurisdiction

Those currently or potentially subject to Clean Water Act regulation should plan for expanded federal jurisdiction upon implementation of the Clean Water Rule's broad new definition of "waters of the United States."

Introduction

On May 27, 2015, the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) jointly issued a "Clean Water Rule" (the Final Rule) that defines "waters of the United States" (WOTUS), a threshold term that determines the Clean Water Act's (CWA) scope and application.[1]

EPA and the Corps received over one million comments[2] on the Proposed Rule, which was released on March 25, 2014.[3] A number of affected entities — including landowners and representatives from a variety of industries and business groups — criticized the agencies for overreaching and expanding CWA jurisdiction beyond historical coverage and Supreme Court precedent. In response to those comments, EPA and the Corps revised the Proposed Rule to address some, but not all, of the opponents' concerns, resulting in significant continued controversy.

The Final Rule has broad application — it defines jurisdictional waters not only for Section 404 of the CWA (permitting for dredge and fill operations) but also under: Section 303, addressing water quality standards and maximum daily loads; Section 311, relating to oil spill prevention and response; Section 401, concerning state water quality certifications; and Section 402, establishing the National Pollutant Discharge Elimination System (NPDES) permit program.

Given the Act's broad and varied applications, many different stakeholders have an interest in understanding the Final Rule, which will become effective 60 days following its publication in the Federal Register.

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in the United Kingdom, France, Italy and Singapore and as affiliated partnerships conducting the practice in Hong Kong and Japan. The Law Office of Salman M. Al-Sudairi is Latham & Watkins associated office in the Kingdom of Saudi Arabia. In Qatar, Latham & Watkins LLP is licensed by the Qatar Financial Centre Authority. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Please direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834, Phone: +1.212.906.1200. © Copyright 2015 Latham & Watkins. All Rights Reserved.

Existing Law vs. Proposed Rule vs. Final Rule

Below is a summary of how existing law, the Proposed Rule and the Final Rule address jurisdictional determinations for different categories of waters. Some of the information in this chart is taken directly from the agencies' own characterization of the changes,[4] while additional analysis is based on analysis of both the Proposed and Final Rules.

Subject	Existing Law	Proposed Rule	Final Rule
Traditionally Navigable Waters (TNWs)	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries of TNWs, Interstate Waters, Territorial Seas	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream	Same as proposal except beds, banks and high water marks are not the *sine qua non* of jurisdiction; as explained below, wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency
Adjacent Wetlands/Waters	Wetlands adjacent to jurisdictional waters	All waters either (a) adjacent to jurisdictional waters, including waters, riparian area or floodplain or (b) with surface or shallow subsurface connection to jurisdictional waters	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark. Wetlands and open waters without beds, banks and high water marks will be evaluated for significant nexus
Isolated or "Other" Waters	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea	Includes (i) specific waters (*i.e.*, prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, Texas coastal prairie wetlands) when they have a significant nexus and (ii) waters with a significant nexus that are within either (a) the 100-year floodplain of a jurisdictional water or (b) 4,000 feet of jurisdictional waters

Key Remaining Controversies

The Final Rule remains controversial, as many stakeholders maintain that revisions to the Proposed Rule did little to address its underlying problems. The Rule's critics reject the agencies' claim that the scope of the new rule is "narrower than existing regulations" and results in CWA jurisdiction applying to "fewer waters" than under existing regulations.[5]

To support their argument that the Final Rule will result in expanded federal jurisdiction, opponents to the Rule point to a series of maps that EPA produced in response to Congressional requests.[6] These state-by-state maps depict water resources within the United States and, according to critics, the maps indicate that federal jurisdiction under the Final Rule will expand significantly.

Some of the key criticisms of the rule are as follows:

Landscape Jurisdiction?

In its prior decisions on the scope of CWA jurisdiction, the Supreme Court has limited agency jurisdiction to waters and lands that are wet — *i.e.*, wetlands.[7] Through various definitions and other technical language, the Final Rule appears ultimately to assert that the agencies have jurisdiction over lands that are dry. Arguably, the Final Rule not only sweeps wetlands into its ambit, but it also covers associated lowlands and transitional zones that occur between open waters and upland areas.

By claiming jurisdiction over dry lands, the Final Rule advances a breathtaking — and arguably unsupported — extension of the Act. In the Proposed Rule, this topic was the subject of intense criticism. While the agencies made changes to address this criticism, those changes seem unlikely to assuage the concerns of affected landowners and business groups whose dry land may become jurisdictional by agency rule.

As reflected in the above table, the Final Rule defines WOTUS to include waters that would not be independently jurisdictional, but become so upon demonstration that they have a significant nexus to otherwise jurisdictional waters and are either (a) within 4,000 feet from the high water mark of a water that is jurisdictional by rule, or (b) within a 100-year floodplain.[8] By introducing these numeric limits, however, the agencies appear to have reinforced concerns that the federal government seeks to establish *de facto* jurisdiction over not only the *waters* within covered areas, but also the *landscape*.

While the agencies maintain that the Final Rule respects state and local land use authority,[9] whether real-world implementation of this approach will erode local authority, including land-use planning authority remains unclear.

- ***"Significant Nexus" as a Regulatory Term.*** Under the Final Rule, the agencies have defined WOTUS to include waters with a "significant nexus" to traditional navigable waters, interstate waters and territorial seas.

The agencies largely base their interpretation of the "significant nexus" standard on scientific reports they claim serve to synthesize published peer-reviewed scientific literature concerning the nature of connectivity and the effects of streams and wetlands on downstream waters.[10] Yet the agencies also acknowledge that the "significant nexus" concept is not purely scientific.[11] The Final Rule broadly authorizes the agencies to rely on their "technical expertise and practical experience" in determining whether a significant nexus exists.[12]

By relying on a list of scientific factors to evaluate the presence of a significant nexus — including factors such as "sediment trapping," "nutrient recycling" and "pollutant trapping"[13] — the regulated community may justifiably fear that each significant-nexus determination will require a detailed and expensive scientific study. Even after such a study, the agencies are poised to apply their discretion, "experience and expertise" to make broad jurisdictional determinations.

- ***Expansion of Jurisdiction Beyond Statutory Mandate?*** As the Final Rule states, the jurisdictional scope of the CWA is "navigable waters," which is defined in the section 502(7) of the CWA to include "waters of the United States, including territorial seas."[14] While the Supreme Court's decisions on the scope of the Clean Water Act hold that navigable waters include some waters that are not navigable in fact,[15] the Supreme Court also has emphasized that the word "navigable" must be given some effect, and that CWA jurisdiction does not lie "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."[16]

By asserting jurisdiction over waters nearly a mile away (4,000 feet) from traditionally navigable waters, the agencies have arguably asserted jurisdiction over just such "remote and insubstantial" waters and exceeded the limits of the CWA.

Agencies' Rationale for the Rule

As described in our prior *Client Alert* on the Proposed Rule,[17] the Proposed Rule provoked considerable controversy. In response, the agencies have asserted that the Final Rule will reduce the scope of federal jurisdiction under the Act, as the term WOTUS will be "narrower than that under the existing regulation." According to the agencies, "fewer waters will be defined as 'waters of the United States' under the rule than under existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries."[18]

Tension appears to exist between the agencies' characterization of the Final Rule as a modest measure that results in less regulation, and their statements that the Final Rule is needed to supplement inadequate state protection of aquatic resources.[19] According to the agencies, the Final Rule will "clearly protect from pollution and degradation the streams and wetlands that form the foundation of the nation's water resources."[20] Such a statement is also in tension with previous claims that the rule was needed because states' regulations were inadequate to protect aquatic resources.[21]

What the Rule Says

The Final Rule creates a duality in the jurisdictional reach of the CWA between WOTUS "by rule" and WOTUS determined by case-specific analyses. Each category is subject to exclusions, meaning that certain specified waters are excluded from regulation even if they otherwise would be included within one of the six categories of jurisdictional waters.

"Waters of the United States" by Rule

Under existing law, the term "waters of the United States" includes seven categories of waterbodies.[22] Six of those categories — traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, and wetlands adjacent to jurisdictional waters — would be retained as WOTUS by rule (*i.e.*, *per se* jurisdictional waters), and would fall under the jurisdiction of the CWA with no additional required analysis. The six *per se* jurisdictional waters in the Final Rule are:

- ***Traditional navigable waters*** - All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

- ***Interstate waters*** - All interstate waters, including interstate wetlands.

- ***The territorial seas***.

- ***Impoundments*** - All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary.

- ***Tributaries*** - All tributaries of a traditional navigable water, interstate water or the territorial seas.

- ***Adjacent waters*** - All waters adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary, including wetlands, ponds, lakes, oxbows, impoundments or similar waters.

"Tributaries" and "Adjacent Waters" Are Per Se Jurisdictional Under the Final Rule.

The Final Rule provides that certain types of waters share a "significant nexus" to the "waters of the United States" by definition and are thus jurisdictional by rule. These include "tributaries" and "adjacent waters." [23]

Tributaries

The Proposed and Final Rules define the term "tributary" for the first time.[24] Under both versions, "tributaries" are small, intermittent, and ephemeral tributaries, tributary lakes, ponds, and wetlands, manmade and man-altered tributaries.[25]

Tributary status is not lost by manmade or natural breaks, so long as the bed, bank and ordinary high water mark can be identified upstream of the break.[26] Thus, the Proposed and Final Rules remove a distinction in the 2008 Guidance between permanent and intermittent tributaries.[27] Instead of assessing the duration of a given flow's presence, the Final Rule requires analysis regarding whether evidence indicates that the flow travels into "waters of the United States."[28] The origin of the water — whether natural, man-altered or manmade — expressly does not matter.

The Final Rule includes additional exclusions for certain kinds of manmade ditches, such as those that flow only after precipitation and those with only ephemeral or intermittent flow (so long as they are not relocated or excavated natural tributaries and do not drain wetlands). The Final Rule clarifies that gullies, rills and ephemeral streams that fail to meet the definition of tributary are explicitly excluded from regulation.[29]

Adjacent Waters

The term "adjacent" is defined to mean "bordering, contiguous or neighboring,"[30] and thus remains unchanged from existing regulations.[31] But the term "neighboring" has now been defined to include waters located, in whole or in part in either of the following:

- Within 100 feet of the ordinary high water mark or within the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment or tributary

- Within 1,500 feet of the high tide line of a traditional navigable water or territorial sea or the ordinary high water mark of the Great Lakes[32]

This represents a change from existing law and the 2008 Guidance, which referred to "adjacent wetlands" (instead of the new rule's broader "adjacent waters") and left much of the jurisdictional analysis to case-by-case determinations.[33]

Wetlands, ponds and lakes that lack a bed, banks or ordinary high water mark would qualify as "adjacent waters" rather than tributaries. To the extent they contribute flow — either directly or through another water — to traditional navigable water, interstate waters or territorial seas, they would remain subject to federal jurisdiction.[34]

The Final Rule has eliminated the concept of "riparian area," which was in the Proposed Rule. And the Final Rule does not attempt to bring waters with a shallow, subsurface hydrologic connection or a confined, surface hydrologic connection to jurisdictional waters or tributaries within the term "neighboring." Waters that are connected to jurisdictional waters or tributaries, by way of shallow-subsurface-hydrologic or confined-surface-hydrologic connections, may still be WOTUS, however. Such connections are factors in evaluating a case-specific significant nexus.[35] Therefore, while shallow subsurface connections have been eliminated, this may still be a factor in making case-specific determinations.

Case-specific "Significant Nexus" Analysis

Two additional categories, which were defined more broadly in the Proposed Rule as "other waters,"[36] consist of waterbodies not covered by the first six categories. To qualify as WOTUS, these waters must undergo a case-by-case analysis and may be regulated if alone — or in combination with other "similarly situated waters" located in the same region — they share a "significant nexus" to a traditional navigable water, interstate water or the territorial seas.[37]

New Treatment of What Existing Law Categorized as "Other Waters"

Existing law categorizes the following waterbodies as "other waters" if those waters could affect interstate or foreign commerce: intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds.[38]

The Final Rule abandons the "other waters" concept and replaces it with two different mechanisms for evaluating such waters. *First*, the Final Rule establishes five explicit categories of waters that are presumptively "similarly situated," and must therefore be considered in combination with other similar waters as a system that may have a "significant nexus" to other jurisdictional waters in the aggregate.[39] These five categories include: prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands.[40]

- "Similarly situated waters" are those that perform common or similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated with respect to their effect on the chemical, physical or biological integrity of a traditional navigable water, interstate water or territorial sea.[41]

- The "region" is the watershed that drains to the nearest traditional navigable water, interstate water or territorial sea.[42]

Second, waters (a) within the 100-year floodplain of a traditional navigable water, interstate water or the territorial seas, or (b) within 4,000 feet of the high-tide line or ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment or tributary are subject to case-specific

significant-nexus analysis.[43] The agencies intended this limitation to respond to comments that the "other waters" category was excessively broad. Nevertheless, many commenters have suggested that the agencies' authority with respect to these waters remains overly broad under the Final Rule.[44]

Significant Nexus

The agencies' existing regulations do not define the term "significant nexus," which derives from Justice Kennedy's concurring opinion in *Rapanos*.[45] In 2008, however, EPA issued a guidance document that generally explains how the agencies have since interpreted and applied this concept.[46]

Under the Final Rule, "significant nexus" is defined for the first time by regulation to mean that the water at issue significantly affects the chemical, physical or biological integrity of a traditional navigable, interstate water or territorial sea.[47] "Significant effects" must be more than speculative or insubstantial.[48]

The Final Rule adds a list of factors that regulators consider when deciding whether a significant nexus exists. These factors include sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning or use as a nursery area) for species located in a traditional navigable water, interstate water or the territorial seas.[49]

Technical Basis for "Significant Nexus"

In describing the "significant nexus" concept, the Final Rule relies heavily on a "peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters" prepared by EPA's Office of Research and Development (Science Study).[50] Released in a Federal Register Notice on January 14, 2015, the Final Science Study makes several significant findings that inform the definition of "significant nexus" in the Final Rule. According to the Science Study:

- Streams, regardless of size or flow frequency, are connected to downstream waters and influence their function.
- Wetlands and open waters in riparian areas and floodplains are physically, chemically and biologically integrated with rivers.
- Many wetlands and open waters located outside of riparian areas and floodplains — even when lacking surface water connections — provide physical, chemical and biological connections that could affect the integrity of downstream waters. Potential benefits of these wetlands are due to their isolation rather than their connectivity.
- Variations in the degree of connectivity are determined by the physical, chemical and biological environment, as well as by human activities, and these variations support a range of stream and wetland functions that affect the integrity and sustainability of downstream waters.
- The literature supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, so their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.[51]

Critics challenge many of these conclusions and have argued that CWA jurisdiction never was meant to extend to isolated waters and wetlands lacking surface connections to WOTUS.

Expanded Exclusions for Ditches

The Proposed Rule added two types of ditches to the list of excluded waters: (1) ditches that are excavated wholly in uplands, drain only in uplands, and have ephemeral or intermittent flow; and (2) ditches that do not contribute flow — either directly or through another water — to a traditional navigable water, interstate water, territorial sea or an impoundment of a jurisdiction water.[52] The Final Rule maintains these exclusions and adds an additional excluded category: (3) ditches with intermittent or ephemeral flow that are not a relocated tributary, excavated tributary or drain for a wetland.[53]

Ditches not meeting these criteria could still be considered "waters of the United States" if they qualify as "manmade tributaries."[54] Furthermore, even if a ditch is itself excluded by virtue of meeting one of the three criteria, an upstream body of water that drains through that excluded ditch could still qualify as a jurisdictional tributary.

New Exceptions for Storm Water and Other Features

Commenters argued that by allowing the agencies to treat certain categories of waters as WOTUS — including storm water drainages and municipal separate storm sewer systems (MS4s) — the Proposed Rule would have created significant problems. In response, the Final Rule explicitly exempts certain categories of other waters.[55] Notably, storm water control features for conveying, treating or storing storm water have been exempted, so long as they are built outside the flow of an existing water.[56]

Similar exemptions also extend to other waters that now are explicitly outside CWA purview. These include mining and construction pits, irrigation, livestock watering, and cooling ponds, and flooded or irrigated fields that would be dry land in the absence of cultivation.[57] Still unclear at this point, however, is whether these express exemptions will actually provide landowners and municipalities the clarity they need to appropriately manage these other waters.

Grandfathering Preexisting Jurisdictional Determinations/Authorizations?

In the Preamble, the agencies address how the Final Rule will affect preexisting jurisdictional determinations, including approved determinations that are associated with issued permits and authorizations.[58]

The Preamble provides that "approved jurisdictional determinations generally are valid for five years."[59] Although the agencies say they "will not reopen existing approved jurisdictional determinations," thereby suggesting that those determinations will be grandfathered and remain unaffected by the Final Rule, the Preamble expressly contemplates two potentially significant exceptions.[60] Specifically, if (a) "new information warrants revision of the determination before the [five-year] expiration period," or if (b) the applicant requests a new determination, the agencies may revisit their prior determination.[61]

By articulating exceptions that the agencies claim are "consistent with existing Corps' guidance," the agencies appear to threaten those in the regulated community that have already obtained — and are currently relying upon — favorable agency determinations. In the event some individual or entity (*e.g.*, an environmental organization) presents "new information" that the agencies decide "warrants revision" of the jurisdictional determination before the six-year period expires, the Preamble suggests that the agencies may exercise discretion to review and revise the prior determination.

Because "the agencies' actions are governed by the rule in effect at the time the agency issues a jurisdictional determination or permit authorization," — *i.e.*, as opposed to by the rule that is in effect at the date of a permit application, request for authorization, or request for a jurisdictional determination — the agencies presumably would apply the Final Rule (as opposed to existing law) when revisiting their

prior determinations/authorizations. To the extent that CWA jurisdiction under the Final Rule is broader than federal jurisdiction under existing law, it seems likely that if the agencies revisit prior determinations and authorizations they may often end up imposing additional regulatory requirements.

Potential Challenges and Path Forward

Since the agencies issued the Proposed Rule in April 2014, the Clean Waters Rule has been surrounded by significant controversy. For example, the U.S. Chamber of Commerce stated that the Rule would effectively authorize EPA to zone the entire country and would more than double the miles of waterway EPA regulates, which would have serious economic consequences.[62] The Chamber submits that the rule would increase costly and time-consuming permitting procedures, and would increase storm water management requirements.[63] A number of groups, including the Small Business Administration have gone further by urging EPA to withdraw the proposed rule in its entirety, citing its "direct and potentially costly impact on small businesses."[64]

Industry concern has been widespread. For example, the energy sector — particularly oil and gas producers — have asserted the Rule will impose significant operational and permitting costs, including requiring new Spill Prevention Control and Countermeasures Plans and new NPDES permits.[65] Similarly, agriculture interests claim that the Rule will impose a significant economic burden and interfere with farmers' private property rights.[66]

In light of the controversy surrounding the Rule, the Final Rule faces a number of political and legal challenges. On May 12, 2015, the House of Representatives passed the Regulatory Integrity Protection Act, which would require EPA and the Corps to withdraw the regulation within 30 days and draft a new rule.[67] In the Senate, Senator Rand Paul (R-Ky.) previously introduced the Defense of Environment and Property Act in April 2015, which also would block the Final Rule.[68] Separately, Senator John Barrasso (R-WY) — with bipartisan support from Democratic Senators — introduced a bill that would require EPA to issue a revised rule that would exclude from the WOTUS definition categories of waters that are covered by the Final Rule.[69] The future of this pending legislation is uncertain, however, especially the likelihood of a Presidential veto.

The Final Rule will likely face a number of legal challenges as well. Legal challenges are likely to attack the Final Rule from a number of perspectives, including, among others, that (1) the Final Rule exceeds the bounds of the Constitution's Commerce Clause because it regulates activities with little or no effect on interstate commerce; (2) the Final Rule's regulation of isolated waters reads "navigable" out of "navigable waters," and thus exceeds the limits of the CWA and is inconsistent with the Supreme Court's interpretation of the CWA; (3) the Final Rule's reliance on the "significant nexus" concept is improper given its underpinning comes from the concurrence of only one Supreme Court Justice (Justice Kennedy in *Rapanos v. United States*); (4) the Final Rule improperly asserts jurisdiction over dry land, when the Supreme Court previously has limited CWA jurisdiction to, in addition to waters themselves, only wet lands adjacent to waters; and (5) various other challenges to the Final Rule under the Administrative Procedure Act alleging that the Final Rule is arbitrary and capricious.

Conclusion

The Final Rule will become effective 60 days following its publication in the Federal Register. Publication had not occurred as of the date of this *Client Alert*, but is expected shortly. Whether Congressional opponents will be successful in blocking or further delaying the Rule's implementation remains to be seen. Property owners and users — including farmers and ranchers, mining and energy companies, real estate developers, utilities and others — should begin to prepare now to anticipate how the Final Rule might affect them. Latham & Watkins will continue to track implementation of the Clean Water Rule.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Andrea M. Hogan
andrea.hogan@lw.com
+1.415.395.8809
San Francisco

Paul N. Singarella
paul.singarella@lw.com
+1.714.540.1235
Orange County

Daniel P. Brunton
daniel.brunton@lw.com
+1.858.523.5421
San Diego

David B. Amerikaner
david.amerikaner@lw.com
+1.212.906.1697
New York

Max M. Friedman
max.friedman@lw.com
+1.714.755.8286
Orange County

John C. Heintz
john.heintz@lw.com
+1.213.891.7395
+1.520.270.7891
Los Angeles

Garrett L Jansma
garrett.jansma@lw.com
+1.714.755.8243
Orange County

Lucas I. Quass
lucas.quass@lw.com
+1.213.891.8532
Los Angeles

You Might Also Be Interested In

Governor Brown Orders California's First Mandatory Water Restrictions

Legislature Approves $1 Billion Drought Relief Legislation; Governor Brown Expected to Sign

BLM Issues Final Rule on Hydraulic Fracturing on Federal and Tribal Lands

EPA's Fiscal Year 2014 Civil Enforcement Results Reveal Agency's Shifting Focus

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit http://events.lw.com/reaction/subscriptionpage.html to subscribe to the firm's global client mailings program.

Endnotes

1 EPA and Department of the Army, Corps of Engineers, Clean Water Rule: Definition of "Waters of the United States" (Final Rule), *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf. Relevant excerpts from the Final Rule are available at Appendix A.

2 *See* White House Blog, "Reasons We Need the Clean Water Rule," available at https://www.whitehouse.gov/blog/2015/05/27/reasons-we-need-clean-water-rule (last visited June 5, 2015) (claiming that the agencies "reviewed over a million public comments").

3 Federal Register, Vol. 79, No. 76, p. 22188-22274 (Monday, April 21, 2014) (Proposed Rule), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf.

4 EPA and Corps, Fact Sheet: Clean Water Rule, *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf.

5 *See, e.g.,* Senator Joe Manchin (D-WV), "Manchin Statement on EPA's Final 'Waters of the U.S.' Rule," May 27, 2015 ("EPA is once again dangerously overreaching its boundaries by expanding the definition of water sources it can regulate"), *available at* http://www.manchin.senate.gov/public/index.cfm/2015/5/manchin-statement-on-final-waters-of-the-u-s-rule; U.S. Chamber of Commerce, "U.S. Chamber Statement on EPA's Final Clean Water Rule," May 27, 2015 ("EPA's proposed rule would significantly broaden federal regulatory jurisdiction over private activities"), *available at* https://www.uschamber.com/press-release/us-chamber-statement-epa-s-final-clean-water-rule.

6 *See* http://science.house.gov/epa-maps-state-2013.

7 See *Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County* (*SWANCC*) *v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that Congress did not authorize the agencies to regulate isolated, intrastate waters and that there must be a "significant nexus" to traditionally navigable waters, including a Commerce Clause connection far stronger than the Migratory Bird Rule invalidated by the decision); *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality holding that "navigable waters" regulated under the CWA are limited to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features,'" such as streams, oceans, rivers and lakes; wetlands with a "continuous surface connection" to such bodies of water, so that "there is no clear demarcation between them," are "adjacent to" such water bodies and also are covered) (Kennedy's concurring opinion relied on the "significant nexus" test that the Court articulated in *SWANCC* and the significant ecological functions that wetlands adjacent to tributaries can serve).

8 Proposed 33 C.F.R., § 328.3(a)(8) (Final Rule, Proposed Definition of Waters of the United States at p. 200-01 of 297). This section of proposed 33 C.F.R., Part 328, and all further citations in this *Client Alert* to proposed 33 C.F.R., Part 328, also appear in proposed 40 C.F.R., Part 110, proposed 40 C.F.R., Part 112, proposed 40 C.F.R., Part 116, proposed 40 C.F.R., Part 117, proposed 40 C.F.R., Part 122, proposed 40 C.F.R., Part 230, proposed 40 C.F.R., Part 232, proposed 40 C.F.R., Part 300, proposed 40 C.F.R., Part 302, and proposed 40 C.F.R., Part 401, as outlined in the Final Rule.

9 *See, e.g.*, Final Rule, Preamble at p. 8 of 297; EPA and Corps, Fact Sheet: The Clean Water Rule for Local Government, *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/fact_sheet_local_gov_final_0.pdf.

10 Final Rule, Preamble at p. 14-16 of 297.

11 *Id.* at p. 16 of 297.

12 *Id.*

13 *Id.* at p. 54 of 297.

14 *Id*. at p. 9 of 297.

15 *See* Endnote 7, *supra*.

16 *Rapanos*, 547 U.S. at 778.

[17] Latham & Watkins, LLP, *Client Alert: EPA, Army Corps Propose New Rule to Govern Federal Clean Water Act Jurisdiction*, April 8, 2014, *available at* http://www.lw.com/thoughtLeadership/LW-EPA-proposed-waters-rule.

[18] Final Rule, Preamble at p. 3 of 297.

[19] A May 2013 by the Environmental Law Institute was help up for this proposition. The claim was vigorously disputed by practitioners in key states. *See* Water Quality Coalition, November 13, 2014 Comment Letter, Ex. 4, *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-17921.

[20] EPA, Press Release, "Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy," May 27, 2015, *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97.

[21] A May 2013 study by the Environmental Law Institute was held up for this proposition. The claim was vigorously disputed by practitioners in key states. Waters Advocacy Coalition, November 13, 2014 Comment Letter, Ex. 4 (available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-17921.)

[22] 33 C.F.R., § 328.3(a).

[23] Under existing law, the current rule provides that tributaries of "waters of the United States" are "waters of the United States." (33 C.F.R. § 328.3(a)(5).) Following the Supreme Court's decision in Rapanos, supra, EPA issued new guidance that provided a more restrained application of "waters of the United States" to tributaries. (See generally 2008 Guidance.) The 2008 Guidance asserts EPA jurisdiction over non-navigable tributaries of traditional navigable waters if the tributary had at least seasonally continuous flow, including adjacent wetlands with a continuous surface flow with the tributary. For more intermittently flowing tributaries, the agency decides jurisdiction based on a significant-nexus determination.

[24] Proposed 33 C.F.R., § 328.3(c)(3) (Final Rule, Proposed Definition of Waters of the United States at p. 203-04 of 297).

[25] Proposed Rule at 22263; Proposed 33 C.F.R., § 328.3(c)(3) (Final Rule, Proposed Definition of Waters of the United States at p. 203-04 of 297).

[26] *Id.*; *see also* Final Rule, Preamble at p. 19 of 297.

[27] 2008 Guidance at p. 6-7.

[28] Final Rule, Preamble at p. 19 of 297.

[29] *Id.* at p. 19-20 of 297.

[30] *Id.*

[31] 33 C.F.R., § 328.3(c).

[32] Proposed 33 C.F.R., § 328.3(c)(2) (Final Rule, Proposed Definition of Waters of the United States at p. 203 of 297).

[33] 2008 Guidance at p. 5-6.

[34] Proposed 33 C.F.R., § 328.3(c)(1) (Final Rule, Proposed Definition of Waters of the United States at p. 202-03 of 297).

[35] Final Rule, Preamble at p. 115 of 297.

[36] Proposed Rule at p. 22263.

[37] *Id.*

[38] 33 C.F.R., § 328.3(a)(3).

[39] Proposed 40 C.F.R., § 328.3(a)(7) (Final Rule, Proposed Definition of Waters of the United States at p. 199-200 of 297).

[40] *Id.*

[41] Final Rule, Preamble at p. 22-23 of 297.

[42] Proposed 40 C.F.R., § 328.3(c)(5) (Final Rule, Proposed Definition of Waters of the United States at p. 204-05 of 297).

[43] Proposed 40 C.F.R., § 328.3(a)(8) (Final Rule, Proposed Definition of Waters of the United States at p. 200-01 of 297).

[44] *See, e.g.*, Sen. James Inhofe (R-OK), "Why every property owner should fear the EPA's 'waters of the United States' rule," June 2, 2015 ("EPA claims that it now has the right to regulate any water in a 100-year floodplain of a navigable water, any water that is 4,000 feet from a tributary, and any prairie pothole, pool or wetland that EPA has declared a 'regional water treasure,' if it can identify a 'significant nexus' with a navigable water. EPA defines 'significant nexus' so broadly that this test can be met in almost every instance"), *available at* http://www.foxnews.com/opinion/2015/06/02/why-every-us-property-owner-should-be-afraid-very-afraid-epas-waters-united-states-rule.html; Gary Baise, "Inside EPA's Waters of the U.S. ruling: Part I," Farm Futures, June 1, 2015 ("According to FEMA, our nation has 3.5 million miles of rivers and streams and approximately 175 million acres located in flood plains. That's a lot to regulate!"), *available at* http://farmfutures.com/blogs-inside-epas-waters-ruling-part-i-9860.

[45] *Rapanos v. United States*, 547 U.S. 715, 759–787 (U.S. 2006) (Justice Kennedy's concurring opinion).

[46] See generally Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2008) (EPA's 2008 Guidance).

[47] Proposed 40 C.F.R., § 328.3(c)(5) (Final Rule, Proposed Definition of Waters of the United States at p. 204-05 of 297).

[48] *Id.*

[49] Proposed 33 C.F.R., § 328.3(c)(5) (Final Rule, Proposed Definition of Waters of the United States at p. 205 of 297).

[50] *See* Science Study; see also Final Rule, Preamble at p. 33-45 of 297.

[51] *Id.* at p. 6-10 – 6-12.

[52] Proposed 33 C.F.R. §§ 328.3(b)(3)(i) and (iii) (Final Rule, Proposed Definition of Waters of the United States at p. 201 of 297).

[53] Proposed 33 C.F.R. §§ 328.3(b)(3)(ii) Final Rule, Proposed Definition of Waters of the United States at p. 201 of 297).

[54] Final Rule, Preamble at p. 97-99 of 297.

[55] Proposed 40 C.F.R., § 328.3(b) (Final Rule, Proposed Definition of Waters of the United States at p. 201-02 of 297).

[56] *Id.*

[57] *Id.*

[58] Final Rule, Preamble at p. 79–81 of 297

[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] U.S. Chamber of Commerce, "U.S. Chamber Statement on Waters of the United States Proposed Rulemaking," March 25, 2014, *available at* https://www.uschamber.com/press-release/us-chamber-statement-waters-united-states-proposed-rulemaking.

[63] *Id*.

[64] Comment submitted by Winslow Sargeant, Ph.D. Chief Counsel for Advocacy, Kia Dennis, Assistant Chief Counsel, Stephanie Fekete, Legal Fellow, Office of Advocacy, Small Business Administration, p. 9 (Oct. 1, 2014).

[65] Comment submitted by Lee O. Fuller, Executive Vice President, Independent Petroleum Association of America (IPAA) et al. p. 3-6 (Nov. 14, 2014).

[66] *See e.g.*, Comment submitted by Frank Phelps, President, Ohio Cattlemen's Association, § 3 (Nov. 13, 2014).

[67] Regulatory Integrity Protection Act, H.R. 1732, 114th Cong. (2015) (pending before U.S. Senate).

[68] Defense of Environment and Property Act of 2015, S. 980, 114th Cong. (2015) (referred to Senate Committee on Environment and Public Works on April 16, 2015).

[69] Federal Water Quality Protection Act, S. 1140, 114th Cong. (2015) (on June 10, 2015, the Committee on Environment and Public Works will hold a meeting to consider S. 1140).