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U.S. Waters Protected Under the Clean Water Act

Analyses of a Proposal

Caroline M. Ednie
Editor

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PREFACE

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposal would revise regulations that have been in place for more than 25 years. This book describes the proposed rule and includes a table comparing the existing regulatory language that defines "waters of the United States" with the proposal. In 2006, the Supreme Court decided Rapanos v. United States, the most recent and well-known of three Supreme Court decisions wrestling with the question of which wetlands are covered by the wetlands permitting program in the Clean Water Act. This book also provides background including the pre-Rapanos Supreme Court opinions, then moves on to Rapanos itself and the Corps/EPA guidance documents.

Chapter 1 - On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposal would revise regulations that have been in place for more than 25 years. Revisions are proposed in light of 2001 and 2006 Supreme Court rulings that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.

In 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings. The 2011 proposed guidance was extremely controversial, with some contending that it represented an overreach beyond the agencies' statutory authority. Most environmental groups welcomed the proposed guidance, although some would

have preferred a stronger document. The 2014 proposed rule would replace the existing 2003 and 2008 guidance, which remains in effect because the 2011 proposed guidance was not finalized.

According to the agencies, the proposed rule would revise the existing administrative definition of "waters of the United States" consistent with legal rulings and science concerning the interconnectedness of tributaries, wetlands, and other waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. Waters that are "jurisdictional" are subject to the multiple regulatory requirements of the CWA. Non-jurisdictional waters do not have the federal legal protection of those requirements.

This report describes the proposed rule and includes a table comparing the existing regulatory language that defines "waters of the United States" with the proposal. The proposed rule is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape. It does not modify some categories of waters that currently are jurisdictional by rule (traditional navigable waters, interstate waters and wetlands, the territorial seas, and impoundments). Proposed changes would increase the asserted scope of CWA jurisdiction, in part as a result of expressly declaring some types of waters categorically jurisdictional (such as all waters adjacent to a jurisdictional water), and also by application of new definitions, which give larger regulatory context to some types of waters, such as tributaries.

Beyond the categories of waters that would be categorically jurisdictional under the proposal is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters such as prairie potholes that are not considered traditionally navigable or meet other of the proposed rule's jurisdictional definitions. Much of the controversy since the Supreme Court rulings has focused on the degree to which "other waters" are jurisdictional. According to the agencies' analyses, 17% of these "other waters" would be categorically jurisdictional under changes in the proposal. It also lists waters and features that would not be jurisdictional, such as prior converted cropland and certain ditches. It makes no change to existing statutory and regulatory permit exclusions, such as exemptions for normal farming and ranching activities.

The agencies believe that the proposal does not exceed the CWA's coverage or protect new types of waters that have not been protected historically. While it would enlarge jurisdiction beyond that under the existing EPA-Corps guidance, they believe that it would not enlarge jurisdiction beyond what is consistent with the Supreme Court's narrow reading of

jurisdiction. Others may disagree. Overall, the agencies estimate that approximately 3% of U.S. waters will additionally be subject to CWA jurisdiction as a result of the proposed rule (including additional "other waters"), compared with current field practice. EPA and the Corps estimate that costs of the proposal, from additional permit application expenses, for example, range from $162 million to $279 million annually. Benefits, including the value of ecosystem services such as flood protection, are estimated to range from $318 million to $514 million per year. They acknowledge uncertainties and limitations in these estimates.

Chapter 2 - The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), collectively "the agencies", proposed a rule for public comment that that defines the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview, Rapanos v. United States,* and *Solid Waste Agency v. U.S. Army Corps of `Engineers (SWANCC).* The effect of the *SWANCC* decision is primarily on so-called "isolated" (other) waters. These waters do not meet the agencies' definition of "adjacent" and often include vernal pools, prairie potholes and playa lakes that lie entirely within a single state and lack a direct, surface water connection to the river network. In practice, the effect of the *Rapanos* decision has been primarily on some small streams, rivers that flow for part of the year, and nearby wetlands. The agencies believe this proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity on the scope of "waters of the United States" protected under the Act.

Specifically, the agencies propose to define the waters of the United States for all sections of the Clean Water Act to mean: traditional navigable waters (TNWs); interstate waters, including interstate wetlands; the territorial seas; impoundments of waters otherwise defined as waters of the United States; tributaries, as defined, to traditional navigable waters, interstate waters, or the territorial seas; adjacent waters, including wetlands; and, on a case-specific basis, other waters that have a significant nexus to a traditional navigable water, interstate water, or the territorial seas.

The agencies also propose to exclude specified waters from the definition of "waters of the United States." The agencies are not proposing changes to the existing exclusions for waste treatment systems designed consistent with the requirements of the Clean Water Act, nor are the agencies are proposing any changes for prior converted cropland. The agencies are, for the first time,

proposing to exclude by regulation certain waters and features over which the agencies have as a policy matter generally not asserted CWA jurisdiction.

The agencies propose for the first time to define the term "neighboring" as it is used as a component of the existing term "adjacent", and in turn define the terms "riparian area" and "floodplain" that appear in the new definition of "neighboring". The agencies also define the terms "tributary" and "significant nexus." The goal is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, to protect water quality, public health, and the environment.

Chapter 3 - In 1985 and 2001, the Supreme Court grappled with issues as to the geographic scope of the wetlands permitting program in the federal Clean Water Act (CWA). In 2006, the Supreme Court rendered a third decision, *Rapanos v. United State*s, on appeal from two Sixth Circuit rulings. The Sixth Circuit rulings offered the Court a chance to clarify the reach of CWA jurisdiction over wetlands adjacent only to *non*navigable tributaries of traditional navigable waters—including tributaries such as drainage ditches and canals that may flow intermittently. (Jurisdiction over wetlands adjacent to traditional navigable waters was established in the 1985 decision.)

The Court's decision provided little clarification, however, splitting 4-1-4. The four-Justice plurality decision, by Justice Scalia, said that the CWA covers only wetlands connected to relatively permanent bodies of water (streams, rivers, lakes) by a continuous surface connection. Justice Kennedy, writing alone, demanded a substantial nexus between the wetland and a traditional navigable water, using an ambiguous ecological test. Justice Stevens, for the four dissenters, would have upheld the existing broad reach of Corps of Engineers/EPA regulations.

Because no rationale commanded the support of a majority of the Justices, lower courts are extracting different rules of decision from *Rapanos* for resolving future cases. Corps/EPA guidance issued in December 2008 says that a wetland generally is jurisdictional if it satisfies either the plurality or Kennedy tests. In April 2011, the agencies proposed revised guidance intended to clarify whether waters are protected by the CWA, but this proposal was controversial. The ambiguity of the *Rapanos* decision and questions about the agencies' guidance have increased pressure on EPA and the Corps to initiate a rulemaking to promulgate new regulations. In September 2013, EPA and the Corps withdrew the controversial proposed guidance and submitted a draft rule to the Office of Management and Budget for review. The substance of the draft rule, and when it might be proposed, are unknown for now. There also has been pressure on Congress to provide legislative clarification. In the 111th

Congress, legislation intended to do so was approved by a Senate committee, but no further legislative action occurred. Similar legislation was not introduced in the 112th Congress or so far in the 113th Congress. Instead, proposals to bar issuance of the Corps/EPA revised guidance and to narrow the regulatory scope of the CWA have been introduced.

The legal and policy questions associated with *Rapanos*—regarding the outer geographic limit of CWA jurisdiction and the consequences of restricting that scope—have challenged regulators, landowners and developers, and policymakers for 40 years. The answer may determine the reach of CWA regulatory authority not only for the wetlands permitting program but also for other CWA programs, since the CWA uses but one jurisdiction-defining phrase ("navigable waters") throughout the statute.

While regulators and the regulated community debate the legal dimensions of federal jurisdiction under the CWA, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of wetlands to separate them into meaningful ecological or hydrological compartments. Wetland scientists believe that all such waters are critical for protecting the integrity of waters, habitat, and wildlife downstream. Changes in the limits of federal jurisdiction highlight the role of states in protecting waters not addressed by federal law. From the states' perspective, federal programs provide a baseline for consistent, minimum standards to regulate wetlands and other waters. Most states are either reluctant or unable to take steps to protect non-jurisdictional waters through legislative or administrative action.

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Chapter 1

EPA AND THE ARMY CORPS' PROPOSED RULE TO DEFINE "WATERS OF THE UNITED STATES"*

Claudia Copeland

SUMMARY

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposal would revise regulations that have been in place for more than 25 years. Revisions are proposed in light of 2001 and 2006 Supreme Court rulings that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.

In 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings. The 2011 proposed guidance was extremely controversial, with some contending that it represented an overreach beyond the agencies' statutory authority. Most environmental groups welcomed the proposed guidance, although some would

* This is an edited, reformatted and augmented version of a Congressional Research Service publication R43455, prepared for Members and Committees of Congress dated April 21, 2014.

have preferred a stronger document. The 2014 proposed rule would replace the existing 2003 and 2008 guidance, which remains in effect because the 2011 proposed guidance was not finalized.

According to the agencies, the proposed rule would revise the existing administrative definition of "waters of the United States" consistent with legal rulings and science concerning the interconnectedness of tributaries, wetlands, and other waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. Waters that are "jurisdictional" are subject to the multiple regulatory requirements of the CWA. Non-jurisdictional waters do not have the federal legal protection of those requirements.

This report describes the proposed rule and includes a table comparing the existing regulatory language that defines "waters of the United States" with the proposal. The proposed rule is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape. It does not modify some categories of waters that currently are jurisdictional by rule (traditional navigable waters, interstate waters and wetlands, the territorial seas, and impoundments). Proposed changes would increase the asserted scope of CWAjurisdiction, in part as a result of expressly declaring some types of waters categorically jurisdictional (such as all waters adjacent to a jurisdictional water), and also by application of new definitions, which give larger regulatory context to some types of waters, such as tributaries.

Beyond the categories of waters that would be categorically jurisdictional under the proposal is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters such as prairie potholes that are not considered traditionally navigable or meet other of the proposed rule's jurisdictional definitions. Much of the controversy since the Supreme Court rulings has focused on the degree to which "other waters" are jurisdictional. According to the agencies' analyses, 17% of these "other waters" would be categorically jurisdictional under changes in the proposal. It also lists waters and features that would not be jurisdictional, such as prior converted cropland and certain ditches. It makes no change to existing statutory and regulatory permit exclusions, such as exemptions for normal farming and ranching activities.

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jurisdiction. Others may disagree. Overall, the agencies estimate that approximately 3% of U.S. waters will additionally be subject to CWA jurisdiction as a result of the proposed rule (including additional "other waters"), compared with current field practice. EPA and the Corps estimate that costs of the proposal, from additional permit application expenses, for example, range from $162 million to $279 million annually. Benefits, including the value of ecosystem services such as flood protection, are estimated to range from $318 million to $514 million per year. They acknowledge uncertainties and limitations in these estimates.

INTRODUCTION

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly proposed a rule defining the scope of waters protected under the Clean Water Act (CWA). The proposed rule would revise regulations that have been in place for more than 25 years.[1] Revisions are proposed in light of Supreme Court rulings in 2001 and 2006 that interpreted the regulatory scope of the CWA more narrowly than previously, but created uncertainty about the precise effect of the Court's decisions.[2]

In April 2011, EPA and the Corps proposed guidance on policies for determining CWA jurisdiction to replace guidance previously issued in 2003 and 2008; all were intended to lessen confusion over the Court's rulings for the regulated community, regulators, and the general public. The guidance documents sought to identify, in light of the Court's 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 2011 proposed guidance identified similar categories as in the 2003 and 2008 documents, but it would have narrowed categories that require case-specific analysis in favor of asserting jurisdiction categorically for some types of waters. The 2014 proposed rule would replace the existing 2003 and 2008 guidance, which remains in effect because the 2011 proposed guidance was not finalized.[3]

The 2011 proposed guidance was extremely controversial, especially with groups representing property owners, land developers, and the agriculture sector, who contended that it represented a massive federal overreach beyond the agencies' statutory authority. Most state and local officials were supportive of clarifying the extent of CWA-regulated waters, but some were concerned

that expanding the CWA's scope could impose costs on states and localities as their own actions (e.g., transportation projects) become subject to new requirements. Most environmental advocacy groups welcomed the proposed guidance, which would more clearly define U.S. waters that are subject to CWA protections, but some in these groups favored even a stronger document. Still, both supporters and critics of the 2011 proposed guidance urged the agencies to replace guidance with revised regulations that define "waters of the United States." Three opinions in the 2006 Supreme Court *Rapanos* ruling similarly urged the agencies to initiate a rulemaking, as they now have done.

In Congress, a number of legislative proposals were introduced to bar EPA and the Corps from implementing the 2011 proposed guidance or developing regulations based on it; none of these proposals was enacted. Similar criticism followed almost immediately after release of the proposed rule on March 25, 2014, with some Members asserting that the proposed rule would result in job losses and would damage economic growth. Supporters of the Administration, on the other hand, defended the agencies' efforts to protect U.S. waters and reduce frustration that has resulted from the unclear jurisdiction of the act.[4] Support was expressed by environmental and conservation organizations, among others.[5]

THE CWA AND THE PROPOSED RULE

The proposed rule was published in the *Federal Register* on April 21, 2014. The deadline for public comments is July 21, 2014.[6] **Table 1** in this report provides a comparison of the current regulatory language that defines "waters of the United States" with language in the proposed rule.

The CWA protects "navigable waters," a term defined in the act to mean "the waters of the United States, including the territorial seas."[7] Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements. The act's single definition of "navigable waters" applies to the entire law. In particular, it applies to federal prohibition on discharges of pollutants except in compliance with the act's requirements (§301), requirements for point sources to obtain a permit prior to discharge (§§402 and 404), water quality standards and measures to attain them (§303), oil spill liability and oil spill prevention and control measures (§311), certification that federally permitted activities comply with state water quality standards (§401),

and enforcement (§309). It impacts the Oil Pollution Act and other environmental laws, as well.[8] The CWA leaves it to the agencies to define the term "waters of the United States," which EPA and the Corps have done several times, most recently in 1986.

According to the agencies, the proposed rule would revise the existing administrative definition of "waters of the United States" in regulations consistent with legal rulings—especially the recent Supreme Court cases—and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. It is particularly focused on clarifying the regulatory status of waters located in isolated places in a landscape, the types of waters with ambiguous jurisdictional status following the Supreme Court's 2001 ruling in *SWANCC,* and small streams, rivers that flow for part of the year, and nearby wetlands, the types of waters affected by the Court's 2006 ruling in *Rapanos*. In developing the proposed rule, EPA and the Corps relied on a draft synthesis of more than 1,000 published and peer-reviewed scientific reports; the synthesis discusses the current scientific understanding of the connections or isolation of streams and wetlands relative to large water bodies such as river, lakes, estuaries, and oceans. The purpose of the report is to summarize current understanding of these connections, the factors that influence them, and the mechanisms by which connected waters affect the function or condition of downstream waters.[9] This draft assessment document is under review by EPA's Science Advisory Board (SAB), which provides independent engineering and scientific advice to the agency. A number of EPA's critics have suggested that the agencies should have deferred developing or proposing a revised rule until a final scientific review document is complete. In the preamble to the proposed rule, the agencies state that the rule will not be finalized until the SAB's review and a final report are complete. However, some have expressed concern that the final report will not be available during the public comment period on the rule.

Under the first section of the March 25 proposal, the following waters would be jurisdictional by rule:

- Waters susceptible to interstate commerce, known as traditional navigable waters (no change from current rules);
- All interstate waters, including interstate wetlands (no change from current rules);
- The territorial seas (no change from current rules);

- Impoundments of the above waters or a tributary, as defined in the rule (no change from current rules);
- Tributaries of the above waters (more inclusive than current rules because "tributary" is newly and broadly defined); and
- All waters, including wetlands, that are adjacent to a water identified in the above categories (by including all adjacent waters—not simply adjacent wetlands—the proposal is more inclusive than current rules; these waters are considered jurisdictional under the proposed rule because they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

The concept of significant nexus is critical because courts have ruled that, to establish CWA jurisdiction between waters, there needs to be "some measure of the significance of the connection for downstream water quality," as Justice Kennedy found in the 2006 *Rapanos* case. He said, "Mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[10] However, as EPA and the Corps observe in the March 25 proposed rule, significant nexus is not itself a scientific term, but rather a determination of the agencies in light of the law and science. Functions that might demonstrate significant nexus include sediment trapping and retention of flood waters. In the proposed rule, the agencies note that a hydrologic connection is not necessary to demonstrate significant nexus, because the function may be demonstrated even in the absence of a connection (e.g., pollutant trapping is another such function).

"Other Waters"

Beyond the categories of waters that would be categorically jurisdictional under the proposed rule is a category sometimes referred to as "other waters." The regulatory term "other waters" applies to wetlands and non-wetland waters that do not fall into the category of waters susceptible to interstate commerce (traditional navigable waters), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of these four categories. Current rules contain a non-exclusive list of "other waters," such as intrastate lakes, mudflats, prairie potholes, and playa lakes (see **Table 1**). Headwaters, which constitute most "other waters," supply most of the water to downstream traditional navigable waters, interstate waters, and the territorial seas.

EPA and the Corps recognize that the Supreme Court decisions in *SWANCC* and *Rapanos* put limitations on the scope of "other waters" that may be determined to be jurisdictional under the CWA. Much of the controversy since the Court's rulings has focused on uncertainty as to what degree "other waters" are jurisdictional, either by definition/rule, or as determined on a case-by-case basis to evaluate significant nexus to a jurisdictional water. Under the 2008 guidance, which remains in effect today, all "other waters" require a case-by-case evaluation to determine if a significant nexus exists, thus providing a finding of CWA jurisdiction. There likewise has been uncertainty as to what degree "other waters" that are similarly situated may be aggregated or combined for a significant nexus determination.[11] In the proposed rule, "other waters," including wetlands, that are adjacent to a jurisdictional water are categorically jurisdictional. Non-adjacent "other waters" and wetlands will continue to require a case-by-case determination of significant nexus. Also, the proposed rule allows broader aggregation of "other waters" that are similarly situated than under the 2008 guidance, which could result in more "other waters" being found to be jurisdictional following a significant nexus evaluation.

Some in the regulated community have urged EPA and the Corps to provide metrics, such as quantifiable flow rates or minimum number of functions for "other waters," to establish a significant nexus to jurisdictional waters. The agencies declined to do so in the proposed rule, saying that absolute standards would not allow sufficient flexibility to account for variability of conditions and the varied functions that different waters provide.

The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as "other waters," and they are requesting comment on alternate approaches, combination of approaches, scientific and technical data, case law, and other information that would clarify which "other waters" should be considered categorically jurisdictional or following a case-specific significant nexus determination.

In addition, EPA and the Corps are asking for public comment on whether to conclude by rule that certain types of "other waters"—prairie potholes, western vernal pools, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, and perhaps other categories of waters—have a significant nexus and are *per se* jurisdictional. These waters would not require a case-by-case analysis. At the same time, the agencies are asking for comment on whether to determine by rule that playa lakes and perhaps other categories of waters do not have a significant nexus and are not jurisdictional. If so

determined, these waters would not be subject to a case-by-case analysis of significant nexus.

Exclusions and Definitions

The second section of the proposed rule excludes specified waters from the definition of "waters of the United States." The listed waters and features would not be jurisdictional even if they would otherwise be included within categories that are jurisdictional. The exclusions are:

- Waste treatment systems, including treatment ponds or lagoons, that are designed to meet CWA requirements;
- Prior converted cropland;
- A list of features that have been excluded by long-standing practice and guidance and would now be excluded by rule, such as artificially irrigated areas that would revert to upland should application of irrigation water to the area cease (see **Table 1** for the full list); and
- Two types of ditches: ditches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have less than perennial (i.e., permanent) flow; and ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, impoundment, or the territorial seas. Other ditches, if they meet the rule's definition of "tributary," would continue to be "waters of the United States"—a point of much controversy with some stakeholders.

The proposed rule makes no change to and does not affect existing statutory and regulatory exclusions, such as exemptions for normal farming, ranching, and silviculture activities (CWA §404(f)); exemptions for permitting of agricultural stormwater discharges and return flows from irrigated agriculture; or exemptions for water transfers that do not introduce pollutants into a waterbody. Nor would it change permitting processes.

In the third section of the proposed rule, the agencies define terms, including "floodplain," "riparian area," "tributary," "significant nexus," and "neighboring" as a component of the existing term "adjacent." The terms "adjacent" and "wetland" are not redefined. (See **Table 1**.)