

Blazing a Path Out of the Morass: Opportunities to Shape Clean Water Act Jurisdiction Rule

December 2013

Stung by court decisions curbing expansive jurisdictional claims over bodies of water pursuant to the Clean Water Act (CWA), the U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps) are undertaking rulemaking to clarify the still murky jurisdictional situation. Determining CWA jurisdiction is key to whether land developers must obtain “dredge and fill” discharge permits under Section 404 of the CWA. It is expected that EPA and the Corps will propose a broad approach to jurisdiction. In light of the high stakes, developers and other affected persons should consider participating in the rulemaking to help craft a reasonable approach. An important EPA public meeting will take place from December 16 to 18.

Draft EPA Report and Draft Rule

A critical ingredient in the rulemaking will be an EPA report on connectivity of water bodies, currently in draft form. Taking the draft report into account, EPA and the Corps have prepared a draft proposed rule on CWA jurisdiction, which they have submitted to the Office of Management and Budget (OMB) for review. Leaks indicate that the proposed rule takes a broad approach to CWA jurisdiction. There is an opportunity for interested parties to comment on the draft report, and there will be an opportunity to comment on the proposed rule when it is issued. The final rule will take into account public input, including input on the draft report.

Dueling Jurisdictional Approaches under *Rapanos*

The EPA and Corps activity stems from the Supreme Court of the United States' *Rapanos* decision—and widespread confusion in its wake. *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* contains dueling approaches to determining what are “waters of the United States” subject to the CWA. Five justices ruled in favor of the landowner but put forth two competing jurisdictional tests.

Justice Antonin Scalia, joined by three other justices, said that the CWA jurisdictional phrase “waters of the United States” includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams [,] . . . oceans, rivers, [and] lakes.’” *Id.* 739. Also, “those wetlands with a continuous surface connection to bodies that are ‘waters of the

United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* 742. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" lack the necessary connection to covered waters. *Id.*

Justice Anthony Kennedy concurred in the result, but put his own test. He said that, in order for wetlands to be subject to CWA jurisdiction, there must be a "significant nexus" between the wetlands and navigable waters in the traditional sense. *Id.* 779. The wetlands possess the requisite nexus if, either alone or in combination with similarly situated lands in the region, they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" He went on to say that wetlands are not subject to federal jurisdiction when their effects on water quality are "speculative or insubstantial." *Id.* 780.

The Murky Wake of *Rapanos*

The matter of CWA jurisdiction post-*Rapanos* remains problematic and cries out for clarification.

Chief Justice John Roberts accurately predicted that, because no opinion in *Rapanos* commands a majority of the Court on precisely how to read Congress' limits on the reach of the CWA, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* 758. He suggested the potential applicability, in such a situation, of *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the Supreme Court said, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgement on the narrowest grounds." 430 U.S. at 191 (internal quotation marks deleted). This could give the nod to Justice Kennedy. As predicted by the *Rapanos* dissent, under Justice Kennedy's "significant nexus" test, developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters have had "no certain way of knowing whether they need to get § 404 permits or not. And the Corps [has had] to make case-by-case (or category-by-category) jurisdictional determinations, which inevitably increase[s] the time and resources spent processing permit applications."

Lower courts and the agencies have indeed sought to sort out which of the *Rapanos* tests should be used and applied in particular circumstances. EPA and the Corps have published nonbinding guidance that incorporates both the Scalia and Kennedy tests.

New Clarifying Rulemaking and Opportunities for Participation

EPA and the Corps are seeking a way out of the morass by developing a rule intended to provide greater certainty and efficiency regarding CWA jurisdiction and permitting.

To that end, EPA has prepared a preliminary draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and a related draft rule that is now pending review at OMB. The report is to summarize the current understanding about connectivity or isolation of streams and wetlands relative to large water bodies, the factors that influence them, and the mechanisms

by which connected waters, singly or in aggregate, affect the function of downstream waters. *78 Fed. Reg. 58536* (Sept. 24, 2013). The draft report is being circulated for comment on its technical accuracy and policy implications.

EPA says that findings from its report will help inform EPA and the Corps in their efforts to clarify what waters are covered by the CWA. Any final regulatory action related to CWA jurisdiction is to be based on the final version of the scientific assessment, which will reflect EPA's consideration of all comments received from the public and the independent peer review. Thus, interested-party participation should be important in the development of the report and the rule.

The EPA Scientific Advisory Board (SAB) Panel will hold a public meeting in Washington, DC, from December 16 to 18 to review the draft report. EPA says that the docket will remain open to receive public comments throughout the panel process and in preparation for quality review of the panel's draft report by a chartered SAB before being finalized and transmitted to the EPA Administrator.

Rulemaking Procedure Runs Into Stormy Weather

The procedure being followed by EPA has engendered pushback. Concerns are particularly high in light of leaks indicating that the proposed rule—not surprisingly—takes a broad approach to CWA jurisdiction.

Critics argue that it is inappropriate for EPA to commit to have the report be a foundation for the final rule when critical review of the draft report has not been completed. They also argue that EPA improperly has not asked the SAB to review the draft rule.

In a letter to OMB, Rep. Lamar Smith (R-TX) and Rep. Chris Stewart (R-UT) argue that EPA is “[p]utting the regulatory cart before the scientific horse” and urge OMB not to complete the interagency review of the draft rule until both the draft Connectivity Report and the draft rule have been “fully and openly peer reviewed.” In a similar letter to OMB, Senator David Vitter (R-LA), Rep. Bob Goodlatte (R-VA), and Rep. Spencer Bachus (R-AL) urge that OMB “immediately return the draft rule to EPA” so that the Connectivity Report can be “properly and fully evaluated and the rulemaking may eventually proceed in a credible manner.” The National Association of Home Builders has expressed similar concerns in a letter to EPA.

As discussed above, EPA has defended its approach and is continuing to sail forward—into increasingly stormy weather