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The Ebb and Flow of Federal Waters: Corps and EPA Jurisdiction Surges Once More

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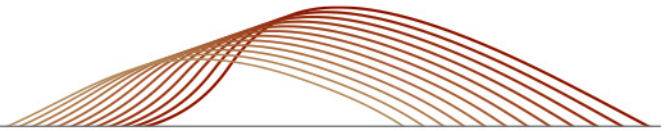
On May 27, 2015, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps" and together with EPA, the "Agencies") released a much-anticipated prepublication final rule that, compared to the draft rule, employs very different tactics to expand the Agencies' permitting and enforcement authority under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*. The final rule significantly scales back one of the preeminent changes in the draft rule (a new definition of jurisdictional "tributaries"). At the same time, the rule appears to appreciably expand Justice Kennedy's idea that the Agencies might have jurisdiction over "similarly situated lands,"[1] reasserting regulatory authority over features that were impliedly removed from the Corps' reach by recent Supreme Court decisions.[2] In light of these changes, some developers can breathe a sigh of relief. Others may be taken completely by surprise as the Agencies begin to assert jurisdiction over isolated wetlands and vast "complexes" of hydrological features, only a proportion of which might actually have a connection to navigable waters.

How Did We Get Here—And Where Are We Exactly?

The CWA requires authorization from the Corps, in the form of a section 404 dredge and fill permit, for the construction of any structure in or over any navigable water of the United States.[3] The CWA also requires a section 402 National Pollution Discharge Elimination System ("NPDES") permit issued by EPA, or an authorized state agency, to discharge any "pollutant" into navigable waters.[4] Despite the central importance of the term "navigable waters" in this permitting scheme, however, Congress only vaguely defined navigable waters by statute to mean "waters of the United States" ("WOTUS"), and entrusted the Corps and EPA with responsibility for "defining the precise bounds of regulable waters . . . ."[5] The Agencies undertook this task with great enthusiasm, as they repeatedly exercised their rulemaking authority to expand the reach of the CWA to fulfill its mandate: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6]

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Supreme Court held that federal regulatory authority over waters of the United States has limits (coinciding with the scope of the Commerce Clause of the U.S. Constitution) and that certain aspects of the Corps' regulations exceeded its authority.[7] More specifically, the Court held that the CWA does not give the federal government regulatory authority over non-navigable, isolated, intrastate waters.[8]

A few years after *SWANCC*, the Court held in *Rapanos v. United States* that the Corps again exceeded its authority when it asserted jurisdiction over "wetlands based on adjacency to non-navigable



tributaries."[9] The fragmented 4-4-1 *Rapanos* decision offered two competing tests for establishing the limits of the Corps' (and EPA's) jurisdiction. The first test, supported by four of the nine justices, gave the Corps jurisdiction over all navigable-in-fact waters (traditionally navigable waters, or "TNWs") and relatively permanent waters with a continuous surface connection to TNWs. The second test, conceived of by Justice Kennedy in his concurrence, extended the Corps' jurisdiction to all wetlands with a "significant nexus" to TNWs, meaning wetlands that, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[10]

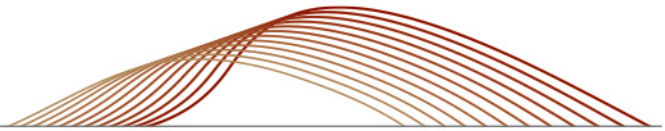
In the aftermath of *Rapanos*, the Agencies prepared a memorandum of understanding that described several types of waters over which they would automatically assert jurisdiction (TNWs, wetlands adjacent to TNWs, relatively permanent, non-navigable tributaries of TNWs and their abutting wetlands) and those over which they would assert jurisdiction after a case-by-case analysis of the significant nexus between a non-navigable water and a TNW.[11] Apparently, however, the case-by-case approach proved to be an unduly taxing experiment, and on April 21, 2014, the Agencies proposed a new rule to simplify jurisdictional determinations, primarily by creating sweeping categories of jurisdiction by rule.[12]

The draft rule was (and the final rule remains) highly controversial, having garnered over one million public comments and inspired multiple bills in Congress designed to block its implementation (*see*, *e.g.*, H.R. 1732, "The Regulatory Integrity Protection Act," which passed the U.S. House of Representatives on May 11 by a vote of 261-155). As explained in more detail below, the final rule may not be as oppressive as developers might have feared on many accounts. In some respects, however, it may be worse.

Déjà Vu All Over Again: The Agencies' Attempt to Take Back What They Thought Was Theirs

Under the guise of creating "bright lines" for the regulated community to follow, the Agencies have developed a sweeping rule establishing a rebuttable presumption of jurisdiction based entirely on proximity to a TNW. Specifically, developers must consider whether waters, alone or in conjunction with other waters, that are located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark"[13] have a significant nexus to a traditional navigable water, interstate water, or territorial sea. This failsafe provision, designed to replace the Agencies' existing "other waters" rule, provides an expedient means for asserting jurisdiction over waters that are not quite adjacent/neighboring (addressed in more detail below), and then some.[14] In addition, five subcategories of waters[15] would be similarly situated by rule, and based on a significant nexus to one water, jurisdiction over these features could stretch to remote components of "complexes" of similarly situated waters that do not, by themselves, have any nexus, significant or otherwise, to a TNW.[16]

Notably, the Agencies have asserted in support of the rule that "a hydrologic connection is not necessary to establish a significant nexus" to similarly situated waters. Leveraging Justice Kennedy's musings in *Rapanos* to the fullest extent, the Agencies claim to have authority to regulate isolated wetland sinks "that trap materials and prevent their export to downstream waters" and isolated depressional wetlands that can reduce or attenuate flooding for a TNW. This conclusion is dubious and vulnerable to legal attack. As noted by the *Rapanos* plurality, "what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?"[17]



Sweeping Jurisdiction by Rule Implemented in the Name of Efficiency

Other surprises in the new rule include the establishment of jurisdiction by rule over waters "neighboring" other waters, meaning waters where even "a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain" of another jurisdictional water of the United States. The rule certainly is clear. However, establishing jurisdiction over all adjacent *waters* is inconsistent with prior precedents, including those upheld by the Ninth Circuit. As observed by the court in *San Francisco Baykeeper v. Cargill Salt Division*, "mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a 'wetland' . . . ."[18] In addition, EPA will likely face a barrage of complaints that this rule was promulgated without sufficient opportunity to comment on the details and whether ponds located over a quarter of a mile from other jurisdictional waters will have a sufficient connection to WOTUS *in every instance*.

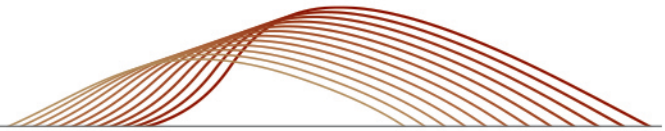
A Possible Reprieve for Desert Washes

The final rule did not promote more protective measures on every issue. In particular, the Agencies appear to have backed away from their original intent to assert jurisdiction over "ephemeral tributaries" that "flow infrequently," including "dry-land systems in the arid and semi-arid west."[19] In the preamble to the final rule, the Agencies explain that "[e]phemeral streams" included in the definition of jurisdictional tributary would have "flowing water . . . in response to precipitation events *in a typical year*."[20] As further explained in the definition of tributary itself, such jurisdictional features are "[c]haracterized by the presence of the physical indicators of a bed and banks *and* an ordinary high water mark"—*i.e.*, "physical indicators" of "volume, frequency, and duration of flow" that would not develop absent regular flow events.[21] Easily reformed desert wash systems accordingly should not qualify as tributaries under the new rule.[22]

However, the fact that desert washes may not be jurisdictional by rule does not preclude jurisdiction under the catch-all provision in 33 C.F.R. § 328.3(a)(8), which, as discussed above, considers whether all features in a given area (*i.e.*, washes) are similarly situated and together have a significant impact on the integrity of a TNW and other waters jurisdictional by rule. Although this approach is better than a jurisdiction by rule classification (which would prevent developers from presenting a fact-based case to the Corps), it will be more onerous than the status quo, whereby each wash would have been evaluated on its own contributions, rather than the contributions of all similarly situated washes.[23]

Codified Categorical Exclusions

The Agencies' new bright lines do illuminate and clarify the Agencies' position on discrete types of waters. In particular, the rule categorically excludes from jurisdiction several types of waters that have been identified on a piecemeal basis for exclusion over the years. These exempt waters now officially include: (1) "Artificially irrigated areas that would revert to dry land should application of water to that area cease;" (2) "Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;" (3) "Artificial reflecting pools or swimming pools created in dry land;" (4) "Small ornamental waters created in dry land; (5) "Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;" (6) "Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways;" and (7) "Puddles" (meaning "very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event").[24] In addition, the Agencies have touted their clarifying provisions regarding jurisdiction over



ditches, which are not jurisdictional provided that they are not constructed in a stream and flow only in response to rain.[25]

How Demanding is the New Rule?

As indicated in this analysis, the new rule adopts an onerous and arguably illegal approach to some fact situations, while giving relief in others. In all fairness, the new rule is not the one-sided regulatory overreach that its opponents claim. Although its reach may be over-inclusive in some instances, as noted above, the bright lines that may unnecessarily bring water features within the Agencies' jurisdiction also provide certainty that, after a certain distance, other features simply are not jurisdictional.

That being said, critiques of the rule are not unwarranted. For example, notwithstanding the representation that the rule was based on experience, the Agencies do not address whether prior practices (individual analysis of the relationship between a particular stream or other water with some plausible connection to downstream waters) more often than not resulted in a determination that the waters were jurisdictional. Whether more jurisdiction by rule was necessary—and justified—is dubious. In addition, the legal analysis offered in support of the rule leverages sound bites from Supreme Court cases addressing the Agencies' jurisdiction over specific water bodies in particular contexts. The cited "authority" includes dicta and clips from the plurality decision in *Rapanos*. As with past rulemakings, courts may later find that the Agencies have again failed to provide the proper justifications consistent with their statutory authority.

Next Steps for Operating Under the New Jurisdictional Waters Scheme

The rule will take effect 60 days after it is officially published in the federal register. Existing and select pending jurisdictional determinations will be grandfathered into the current regulatory scheme, but generally potentially regulated parties should start taking the new rule into account. The blogosphere is already abuzz with intentions to file suits to challenge any number of aspects of the rule under the Administrative Procedure Act. In addition, several politicians have suggested that the Agencies colluded with environmental organizations in their development of the rule, raising the specter of a violation of the Federal Advisory Committee Act ("FACA"), Pub.L. 92-463 (Oct. 1972). However, facial challenges on the substance of the rule, as opposed to the procedures followed in its adoption, are notoriously difficult.[26] Relief for many might need to await an as-applied challenge to a specific jurisdictional determination—or an act of Congress, as has been contemplated, to reign in the Agencies.

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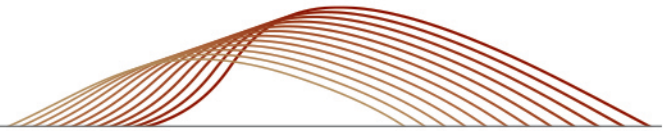
[1] *Rapanos v. United States*, 547 U.S. 715, 780 (2006).



[2] *See*, *e.g.*, *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

[3] 33 U.S.C. §§ 1342, 1344 (specifically regulating the "discharge of dredged or fill material" into "navigable waters").

[4] *Id*. § 1311. In select cases, EPA may also participate in the Corps decision-making process. *See* Memorandum of Agreement ("Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act") (Jan. 19, 1989, as amended Jan. 4, 1993) (recognizing that "the Administrator of EPA . . . has the ultimate authority under the CWA to determine the geographic jurisdictional scope of section 404 waters of the United States . . . .").

[5] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 134 (1985).

[6] *Id*. at 132-33; *United States v. RGM Corp.*, 222 F. Supp. 2d 780, 783 (E.D. Va. 2002); 33 U.S.C. § 1251(a).

[7] U.S. Const. Art. I, § 8; *see also Rapanos*, 531 U.S. at 168 n.3 (observing that while Congress may have intended "'that the term "navigable waters" be given the broadest possible constitutional interpretation,' neither this, nor anything else in the legislative history . . . signifie[d] that Congress intended to exert anything more than its commerce power over navigation." (citing S. Conf. Rep. No. 92-1236, p. 144 (1972))).

[8] 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986) (the "Migratory Bird Rule"). Specifically, SWANCC considered a 1986 regulation, promulgated by the Corps, asserting federal jurisdiction over isolated waters that were used or could be used by migratory birds or endangered species.

[9] 547 U.S. at 782 (Kennedy, J., concurring).

[10] *Id*. at 780 (Kennedy, J., concurring).

[11] EPA & Corps, *Joint Memorandum: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States and Carabell v. United States (June 5, 2007) ("2007 Joint Jurisdiction Policy"); *see also* EPA & Corps, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States and Carabell v. United States (Dec. 2, 2008) ("2008 Guidance") (providing additional interpretation of select terms).

[12] 79 Fed. Reg. 22,188 (Apr. 21, 2014).

[13] EPA & Corps, Docket No. EPA-HQ-OW-2011-0880 Prepublication Rule at 23 (May 26, 2015), *at* **Error! Hyperlink reference not valid.** ("Prepublication Rule").

[14] Prepublication Rule at 156 ("For practical administrative purposes, the rule does not require evaluation of all similarly situated waters under (a)(7) or (a)(8) when concluding that those waters have a significant nexus to a traditional navigable water, interstate water, or territorial sea. When a subset of similarly situated waters provides a sufficient science-based justification to conclude presence of a significant nexus, for efficiency purposes a significant nexus analysis need not unnecessarily require time and resources to locate and analyze all similarly situated waters in the entire point of entry watershed.").

[15] The subcategories that are similarly situated by rule include Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.

[16] *Id*. at 149 ("Unlike (a)(8), there is no distance threshold for waters evaluated under (a)(7) – that is, waters in the (a)(7) subcategories that are more than 4,000 feet from the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary or are beyond the 100-year floodplain of an traditional navigable water, interstate water, or the territorial seas are to be included in combination in a significant nexus analysis.").

[17] *See also Rapanos*, 547 U.S. at 155 (plurality).

[18] 481 F.3d 700, 702 (9th Cir. 2007).

[19] 79 Fed. Reg. at 22,202.

[20] Prepublication Rule at 89 (emphasis added).

[21] Proposed 33 C.F.R. § 328.3(c)(3) and 40 C.F.R. § 230.3(s)(3)(iii).

[22] *See also* Proposed (33 C.F.R. § 328.3(b)(4)(vi) and 40 C.F.R. § 230.3(s)(2)(iii)(F) (establishing that waters of the United States expressly do not include "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways . . . .").

[23] *See* Prepublication Rule at 148 (discussing "the 'region' [to be] used for conducting a significant nexus evaluation under (a)(7) or (a)(8)" when waters in "the arid West" are involved).

[24] Proposed 33 C.F.R. § 328.3(b); Prepublication Rule at 176.

[25] Proposed 33 C.F.R. § 328.3(b)(3).

[26] *Chemical Waste Mgmt. v. United States EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995).