

Muddying the Waters
What you need to know about the proposed Rule on “Waters of the United States”
By
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The Environmental Protection Agency (EPA) and the Army Corps of Engineers (the Corps) recently proposed a Rule intended to clarify the term “waters of the United States”. This new rule could potentially impact regulation surrounding railroad development, railroad ditches and spill reporting.

Background

Water is an important resource that needs protection from depletion, pollution and misappropriation. The Clean Water Act (CWA) is the primary federal statute governing water quality. The CWA bases federal jurisdiction on the “waters of the United States.” It is up to the EPA and the Corps to define the statutory term “waters of the United States” by promulgating regulations. Courts have defined the term broadly to include not only water sources which are navigable-in-fact (that is, it can float your boat) but also streams that serve as tributaries and other non-traditional waterways.

After being prompted by the Supreme Court, the EPA and the Corps issued a proposed rule to clarify the term. Despite the new regulation, the interpretation continues to be controversial raising constitutional issues about state’s rights and affecting a variety of stakeholders, including railroads. The EPA has taken the position that it is not expanding its jurisdiction, assuring that the proposed rule only clarifies the meaning of the “waters of the United States” and does not broaden it. The EPA nonetheless admits that its jurisdictional reach will grow by three percent, though others argue that it will expand by much more.

What are the “waters of the United States” and how are they determined?

The CWA regulates the “waters of the United States.” The “waters of the United States” are those that have been determined to be navigable. There are no definitive maps that designate navigable waters, and the term is actually much broader than those waterways navigable-in-fact by shipping vessels. Traditional navigable waters like flowing rivers and streams may seem obviously “navigable,” but isolated wetlands, arroyos, intermittent streams and ditches are less so. To date, such classifications have called for site-specific determinations by experts, with concurrence by the EPA and the Corps.

The scope of federal jurisdiction over the “waters of the United States” has been to the Supreme Court several times. In the landmark *Rapanos*¹ case, the Supreme Court considered whether wetlands adjacent to non-navigable tributaries of traditional navigable waters came within the purview of the CWA. There, the federal government brought an enforcement action

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

alleging that developers and their wholly-owned companies illegally discharged fill material into protected wetlands, in violation of the Clean Water Act. In a separate action, property owners whose request for a permit to fill their property was denied brought an action against government entities, seeking judicial review under the Administrative Procedure Act. The appeals from these actions were consolidated for purposes of the appeal to the Supreme Court.

The Supreme Court struggled to find a consensus and issued a plurality of separate opinions. While recognizing that “navigable water” is defined broadly, the Court held that there must be a “significant nexus” between the wetlands and the traditional waterway. A simple hydrologic connection is insufficient.

The Proposed Rule

In response to the Supreme Court’s opinion, the EPA and the Corps offered further guidance on defining a “significant nexus” and came up with a proposed rule published in the Federal Register on April 21, 2014.² The proposed rule is intended to draw a bright line and reduce uncertainty. The EPA cited several scientific studies in support of the proposed rule. The EPA and the Corps propose to define the “waters of the United States” for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean:

- 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;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

² Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,188 (Apr. 21, 2014).

The proposed regulation excludes specified waters and features from the definition of “waters of the United States.” Those waters and features that would not be “waters of the United States” are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with the EPA.
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.
- Waters with the following features:
 - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
 - artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
 - small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
 - water-filled depressions created incidental to construction activity;
 - groundwater, including groundwater drained through subsurface drainage systems; and
 - gullies and rills and non-wetland swales.

Rail Development Projects

Development project sites must be assessed for wetlands and other water bodies to determine if they are jurisdictional. Railroad projects are no exception. If the wetlands are governed under the CWA and are impacted by the project, permits may be required. Section 404 requires entities to apply for a permit to discharge dredged or fill material into navigable waters. In some cases, nationwide permits may be assembled to address potential impacts from the development. However, the discretionary issuance of the CWA permit by a federal

agency triggers an environmental review under the National Environmental Policy Act (NEPA). NEPA requires the permitting agency to conduct an environmental assessment or environmental impact statement, which add time and significant cost to a development project. State laws that regulate other “non-jurisdictional” wetlands are generally preempted for rail projects. Some are concerned that an expanded federal reach will add delay and cost to development projects with an unquantified environmental benefit.

Railroad Ditches

Railroad ditches keep water from undermining the track infrastructure. They come in a great variety of settings. Under the new rule, ditches are specifically excluded from the definition of navigable water if they are built and drain upland and have less than a perennial flow. “Upland” is any area that is not a wetland, stream, lake or other water body that does not flow all year. The EPA interprets its proposed rule to exclude ditches that are constructed through dry lands. These ditches remain excluded from the definition even if they are in a floodplain, or they flow only after rainfall. The EPA stated that the proposed rule actually reduces the regulation of ditches because “for the first time it would exclude ditches that are constructed through dry lands and don’t have water year-round.” Some of us may have thought these were already excluded.

A ditch is a regulated waterway if it contributes to “flow, either directly or through another water, to a traditional navigable water.” These traditional waters include interstate waters, the territorial seas, or an impoundment (a water source formed by a dam) of a jurisdictional water. Where a ditch is constructed through a wetland or a stream and connects to a navigable waterway, it is jurisdictional.

Sometimes, if not regularly maintained, manmade ditches can take on the vegetative and habitat characteristics associated with wetlands. It is unclear whether ditches once classified as excluded may be reclassified under the CWA over time. The proposed rule provides that “[d]itches that are excluded from the definition of ‘waters of the United States’ ... cannot be recaptured and considered jurisdictional under any of the jurisdictional categories.” This suggests that once a ditch is excluded from regulation, then it cannot later be reclassified as navigable water. The rule does not address whether this is the case after erosion or the confluence of waterways linking it to a traditional water source. Nonetheless, EPA also provides that classifications will be made on a case-by-case basis, which may “recapture” a previously excluded waterway. The proposed rule provides additional incentive for railroads to maintain their ditches to avoid erosion and revegetation.

Spill Reporting

The CWA regulates other aspects of the “waters of the United States.” Because its definition has been expanded, issues may arise when there is a spill or other release of petroleum, coal or hazardous substance into a ditch or other non-traditional water body that feeds into a traditional navigable source.

Part 110 of the CWA requires immediate reporting of an oil spill into navigable water. Part 117 requires immediate reporting of any spill of hazardous substance. Additionally, Part 122 requires the reporting within 24 hours of any spill causing the endangerment of health and the environment. Since railroad ditches that link to navigable waterways are considered “waters of the United States,” any spill in such ditches would invoke immediate reporting requirements. Railroads may need to update spill reporting policies for spills into ditches that potentially flow year-round or link to traditional tributaries.

Recent Enforcement Trends

If the Corps issues a formal determination that wetlands or another body of water are jurisdictional, there are limited legal remedies. To challenge a federal agency decision, the Administrative Procedure Act requires the challenging party to first exhaust administrative remedies. Under the CWA, this requires the challenger (the entity that disagrees with the Corps’ finding that a waterway is “navigable”) to appeal within the Corps itself. Following the administrative agency appeal, the Corps issues its formal determination. Despite the appearance of being the Corps’ final decision, courts have held that this determination is not a “final agency action.”³ An agency action cannot be appealed in court unless it is a “final agency action.” Therefore, those who disagree with the Corps’ determinations have limited legal remedies, unable to directly appeal the Corps’ determinations in court. The lengthy administrative procedures also cause significant delays to construction schedules, in addition to providing limited relief.

Final Thoughts

The goal of the EPA and the Corps was to provide a bright line rule to minimize defining each water source on a case-by-case basis. Although the proposed rule purports to clarify the gray areas in the definition, railroads and the regulated community may need to continue evaluating each site and ditch on an individual case-by-case basis.

The comment period for the proposed rule will close on October 20, 2014. A number of industry and trade associations, including the Association of American Railroads, are preparing comments. State’s rights advocates also voice concerns with a broader assertion of federal jurisdiction over areas where States previously regulated or chose not to. On Sept. 9, 2014, the House of Representatives passed a bill to prevent the EPA from implementing the proposed rule, though the White House issued a veto threat against the bill, saying that it “would derail current efforts to clarify the scope of the CWA.” The proposed rule continues to be controversial and its impact uncertain.

³ See Belle Company, L.L.C., et al. v. U.S. Army Corps of Engineers, No. 13-30262 (5th Cir. filed July 30, 2014).



Any questions?

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