The Environmental Protection Agency and the Army Corps of Engineers jointly published a final rule on May 27, 2015, defining the phrase “waters of the United States” under the federal Clean Water Act. This definition is critically important because it determines which water bodies are subject to federal permitting requirements and which waters are beyond federal authority. A clear definition has proved elusive in recent years, resulting in considerable confusion among regulators, landowners and developers. As a result of this confusion, jurisdictional determinations for small, isolated and ephemeral water bodies have often required intensive, fact-specific and time-consuming scientific analyses, without any definitive standards to guide the decision-making process.

The final rule seeks to resolve this uncertainty by providing clarity, consistency and predictability. However, the rule is very controversial and would impose increased permitting requirements on virtually every type of land development and resource utilization. The rule's impact will be felt particularly in the West, where there are numerous intermittent and seasonal water bodies that will fall under the rule's coverage.

The Final Rule’s Definition of “Waters of the United States”

The final rule contains three categories of water bodies: waters that are automatically subject to federal jurisdiction; waters that are not automatically jurisdictional but that may be subject to federal authority on a case-by-case basis; and waters that not subject to federal jurisdiction.

Automatically Jurisdictional Waters

Under the final rule, the following waters are automatically jurisdictional:

- Traditional navigable waters (such as rivers, lakes and bays), interstate waters, and the territorial seas;
- Impoundments of waters that otherwise qualify as jurisdictional;
- "Tributaries"; and
- "Adjacent" waters.

A large part of the controversy over the new rule is rooted in the definitions of "tributary" and "adjacent." The rule defines "tributary" as any water body that both (1) has a defined bed and banks and an ordinary high water mark and (2) contributes flow, either directly or through another water, to a traditional navigable water, an interstate water, or the territorial seas. A water that qualifies under this definition does not lose its status as a tributary "if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break."

There has been considerable debate and uncertainty over whether small streams with only intermittent or ephemeral flows are covered by the Clean Water Act. The new rule would resolve this issue by categorically asserting jurisdiction over such streams—regardless of the size or duration of the flow, regardless of whether the flow is natural or man-made, and regardless of whether the connection to a downstream water is distant or attenuated—if there is a bed and bank and a high water mark and any contribution of flow to a jurisdictional water. Many see this definition as a substantial broadening of federal jurisdiction, especially in western states such as Arizona where intermittent and ephemeral washes are a ubiquitous feature of the landscape.

Further, the new rule expands the definition of “adjacent” in two important ways. First, the prior rules and guidance envisioned that an “adjacent” water body must be in close physical proximity to a jurisdictional water body such as a river or a lake. Under the new rule, a water body is “adjacent” if any portion of the water body is within the 100-year floodplain of a jurisdictional water and within 1,500 feet of the ordinary high water mark of that jurisdictional water. A water body also is “adjacent” if any portion of the water body is within 100 feet of the high water mark of a jurisdictional water, regardless of the size or location of the 100-year floodplain. Further, a water body is “adjacent” if any portion of the water body is within 1,500 feet of the high tide line of a tidally influenced water.

Unlike the proposed rule that the agencies published in April 2014, which would have covered as “adjacent” virtually all water bodies located in the 100-year floodplain of a jurisdictional water, the final rule does impose a firm boundary on the definition of adjacency. But many still see the fixed distances established by the new rule as arbitrary and an unwarranted expansion of federal jurisdiction.
Second, the prior Clean Water Act regulations covered only adjacent wetlands, based on the theory that wetlands are special aquatic features meriting a higher level of protection than other types of adjacent waters. The new rule eliminates this distinction, subjecting all adjacent waters to federal jurisdiction regardless of whether they qualify as wetlands.

**Case-by-Case “Significant Nexus” Determination**

In addition to water bodies that are automatically jurisdictional, the new rule includes two sets of water bodies that may be subject to federal jurisdiction on a case-by-case basis. The first set includes all water bodies within the 100-year floodplain of a jurisdictional water, as well as all water bodies within 4,000 feet of the high tide line or ordinary high water mark of a jurisdictional water. The second set consists of specifically identified categories of waters, such as prairie pot holes, western vernal pools and Texas coastal prairie wetlands.

The case-by-case determination depends on whether there is a “significant nexus” to a jurisdictional water. A water body has a “significant nexus” if any one of a variety of functions performed by that water body (such as sediment trapping; filtering of pollutants; storage of runoff; export of organic matter; nutrient recycling; retention and attenuation of flood waters; etc.), either alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical or biological integrity of a jurisdictional water. A “significant” contribution is any effect that is “more than speculative or insubstantial.” This is a fairly broad and open-ended standard, which appears to give substantial discretion to the agencies in making jurisdictional determinations.

**Non-Jurisdictional Waters**

The rule also defines which waters are not subject to federal jurisdiction, including waste treatment ponds, artificially irrigated areas that would revert to dry land if the irrigation were to cease, artificial waters created in dry land, puddles, storm water control features created in dry land, and upland ditches that meet specified requirements.

**Impacts of the New Rule**

The U.S. Supreme Court's fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006) limited the Clean Water Act's coverage to those waters that have a “significant nexus” to a navigable waterway, but the Court did not provide a precise definition of this key term. As a result, since the *Rapanos* decision was issued, the boundaries of federal jurisdiction under the Act have been notoriously unclear. The EPA and Corps have tried to address this uncertainty through interpretive guidance documents, but these efforts did little to answer the oft-posed question of where “the water ends and land begins.”

In publishing the new rule, the EPA announced that the rule will help to provide greater clarity and consistency, in order to ensure that "waters protected under the Clean Water Act are more precisely defined and predictably determined, making permitting less costly, easier, and faster for businesses and industry." The EPA further announced that the rule does not expand the agencies’ authority and “only protects the types of waters that have historically been covered by the Clean Water Act.” But at the same time the EPA also seems to acknowledge that the new rule is not merely designed to provide greater certainty for the regulated community. Indeed, the EPA has declared that the rule “marks the beginning of a new era in the history of the Clean Water Act” and “completes another chapter” in that history by establishing essential protections for our nation's waters.

In reality, however, it is likely that this new chapter has not yet been completed. It is almost certain that the new rule will be challenged in court. Further, as we outlined in a recent update, there also are a number of ongoing efforts in Congress to derail the rule, although any law that Congress enacts could very well encounter a presidential veto.

The fundamental problem is the lack of any clear direction from Congress on what waters are covered by the Clean Water Act. The Act applies by its terms to "navigable waters," which are defined merely as "waters of the United States." As Justice Samuel Alito lamented in his concurring opinion in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), “the words themselves are hopelessly indeterminate” and since the Clean Water Act was enacted in 1972 “Congress has done nothing to resolve this critical ambiguity.” In the midst of this uncertainty, the agencies have now reasserted and expanded their permitting authority. Ultimately, the issue may very well land back at the Supreme Court to come up with a definitive answer for when the Clean Water Act applies and when it does not.

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