Water, Water Everywhere: But Is a Drop Enough to Trigger Clean Water Act Jurisdiction?

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by Andy Rigel

Did you know that low-lying area on your property that occasionally holds water in the winter or after a rain storm could trigger Clean Water Act (CWA) jurisdiction? Did you know filling or modifying that low-lying area without a permit could result in substantial fines and penalties? These are the very issues the EPA and the US Army Corps of Engineers are grappling with in a rulemaking that will define the scope of their jurisdiction.

The federal Clean Water Act (CWA) governs the "waters of the United States," meaning that if a body of water is considered "waters of the United States," then the water—and the land associated with it—is subject to CWA jurisdiction. Landowners are not allowed to alter (e.g., dig, excavate, or fill) the land without obtaining a permit from either the EPA or the U.S. Army Corps of Engineers, and permits are often extremely expensive and time-consuming to obtain. In a recent press release, the EPA stated that determining whether CWA jurisdiction applied to a particular body of water became "confusing and complex" following two U.S. Supreme Court decisions in 2001 and 2006 and so the EPA and Corps proposed a new rule to clarify CWA jurisdiction. The proposed rule was published on April 21, 2014, and public comments were required to be submitted by late June. Due to the large number of comments received, the comment period has been extended until October 20, 2014.

The EPA and Corps maintain that the proposed rule does not expand CWA jurisdiction to any new waters. The EPA has even created a marketing campaign called "Ditch the Myth" to build support for the proposed rule and dispel beliefs that CWA jurisdiction is being expanded to water in ditches. The ditch issue highlights one of the agencies' goals for the proposed rule, which is to clarify how to apply the "significant nexus" test that was first articulated by Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). According to Justice Kennedy's opinion, CWA jurisdiction applies to any waters, even if intermittent, where there is a "significant nexus" to a navigable water, interstate water, or the territorial seas.

But according to those in the regulated community, the agencies broadly interpret the nexus analysis in their proposed rule. Some are concerned about how the rule would be applied to intermittent waters, including seasonally dry washes prevalent in the western states. Commentary from mining, forestry, agricultural, and development interests point to how the case-by-case scientific analysis required to implement the significant nexus test will increase the work necessary for permitting. This will cause a rise in project costs even if the waters are ultimately not jurisdictional, which is counter to the agencies' original objective for clarifying the rules.

One thing is clear, a large number of public comments for and against the rule will be submitted through late October. The EPA and Corps will be pressed hard to adopt revisions before the rule reaches its final form in April 2015.

Last week, the US House of Representatives approved H.R. 5078, the Waters of the United States Regulatory Overreach Protection Act, by a bipartisan vote of 262-152. This bill would prohibit the EPA and Corps from enacting the proposed rule. At this time, it is unclear whether the Senate will also act on this issue.

The full text of the proposed rule can be read here.

Please contact Andy Rigel for more information or assistance in preparing a public comment.

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