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VanNess Feldman

Clearer Picture Emerging on Proposed Rule Redefining Jurisdictional Waters of the United States

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A long-awaited rulemaking to redefine the scope of "waters of the United States" under the Clean Water Act (CWA) continues to move forward, with a proposed rulemaking in 2014 increasingly likely. It is anticipated that the proposed rule will significantly expand the universe of streams, wetlands, and other waters that would be considered jurisdictional waters of the United States for purposes of triggering the CWA's permitting, enforcement, and citizen suit regime. In mid-September 2013, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) first announced the transmittal of a draft proposed rule to the White House Office of Management and Budget (OMB). While the draft rule remains under review at OMB and its contents have not been officially announced, a version of the draft rule was obtained and published by news sources. Further, on December 16-18 the EPA's Science Advisory Board (SAB) held public sessions on a draft "connectivity report" that EPA and the USACE have publicly acknowledged is a key driver in their draft rule. For more information on the agencies' connectivity report, see a VNF Alert on the report here: http://www.vnf.com/news-alerts-876.html.

BACKGROUND

The current regulatory definition of "waters of the United States" includes seven categories of "waters." These seven categories are:

(1) all waters used in interstate or foreign commerce;

(2) all interstate waters;

(3) all other intrastate waters the use of which could affect interstate or foreign commerce;

(4) all impoundments of waters that fall into the definition of waters of the United States;

(5) tributaries of the waters in categories (1)-(4);

(6) territorial seas; and

(7) wetlands adjacent to "waters."

While there is little doubt that territorial oceans, large interstate rivers and lakes, and permanent interstate wetlands fall within the agencies' jurisdiction, heated controversies exist as to whether ephemeral streams, isolated wetlands, and other non-permanent or man-made waters can be regulated by the federal government.

In 2006, the U.S. Supreme Court decided *Rapanos v. United States* (*Rapanos*) (and the companion case *Carabell v. U.S. Army Corps of Engineers* (*Carabell*)). The 4-1-4 split *Rapanos* decision created two different tests for courts to use when determining federal jurisdiction under the CWA: (1) Justice Scalia's "continuous surface connection" standard and (2) Justice Kennedy's "significant nexus" test. Both tests involve an intensive case-specific analysis that has led to regulatory uncertainty and backlogged permits; both of which greatly affect regulated industries.

THE "LEAKED" DRAFT

On November 7, 2013, an early copy of what appears to be the EPA/USACE's draft proposed rule redefining jurisdictional waters of the United States under the CWA was obtained by news sources and published. In addition to the text and supporting information, the draft rule includes two appendices. Appendix A summarizes and applies the currently available scientific literature supporting the agencies' decision to redefine "waters of the United States." Appendix B includes the legal analysis that the agencies believe support the draft rule.

Amended Definition of "waters of the United States." The draft rule re-classifies and re-numbers the seven categories of "waters" that are currently in the regulatory definition of "waters of the United States." Under the draft rule the seven categories of waters would include:

(1) waters used in interstate or foreign commerce;

(2) all interstate waters;

(3) the territorial seas;

(4) all impoundments of waters otherwise defined as waters;

(5) **all** tributaries of waters in categories (1)-(3);

(6) **all** waters, including wetlands, adjacent to waters in categories (1)-(5); and

(7) on a **"case-specific basis, 'other waters,' including wetlands'"** that have a significant nexus to waters in categories (1)-(3).

Three Substantial Changes to Definition. The draft rule would make three substantial changes to the definition of "waters of the United States." First, the draft rule explains that the agencies have determined, based upon EPA's connectivity report, that there is a significant nexus between "all" tributaries and downstream traditional navigable waters and interstate waters so that all tributaries would be "jurisdictional by rule." According to the draft rule, this means that a case-specific significant nexus determination would not be conducted for tributaries. Second, the draft rule would expand the "adjacency" inquiry from "adjacent wetlands" to "adjacent waters." Third, the draft rule would make a preliminary finding that there is not enough scientific certainty to propose that all non-adjacent, "other waters" have a significant nexus such that they should be jurisdictional by rule; rather, under the draft rule,

determination of the jurisdictional status of a waterbody in the "other waters" category would continue to require a case-specific significant nexus analysis. However, in the draft rule, the agencies request comments on whether some subcategories of "other waters" could be determined to be jurisdictional by rule.

Unchanged Provisions of "waters of the United States" Definition. According to the draft rule, the following provisions of the current definition of "waters of the United States," would not be changed: traditional navigable waters, interstate waters, the territorial seas, and impoundments of waters of the United States. Additionally, the draft rule does not propose changes to either: (i) the exemptions in the CWA for agriculture, silviculture, ranching, etc., or (ii) existing regulatory exclusions for waste treatment systems; prior converted cropland; certain artificial lakes and ponds; water-filled depressions created from construction; ditches either dug wholly in uplands and draining only upland or non-jurisdictional waters; and ditches that do not contribute flow to another CWA waterbody.

Tributaries. One significant change is that under the draft rule, all tributaries—including perennial, intermittent, and ephemeral tributaries—would be considered jurisdictional. Further, the draft rule would define a "tributary" as a waterbody that is physically characterized by a bed and bank and ordinary high water mark that contributes flow to other waterbodies, regardless of whether the waterbody has one or more man-made or natural breaks in flow. Additionally, wetlands would be considered tributaries if they contribute flow, either directly or through other waterbodies, to jurisdictional waters in categories (1)-(3). In the draft rule, the agencies explain that this treatment of tributaries is appropriate under *Rapanos*, supported by the currently available science, and reflective of the agencies' ability to use their professional judgment and field expertise to classify all tributaries as jurisdictional.

Adjacent Waters. Under the draft rule, the agencies would apply a broader "adjacency" inquiry. Although the definition of "adjacent" would not change ("bordering, contiguous or neighboring"), a new definition of "neighboring" would be added, which would include all "waters located within the riparian area or floodplain." Additionally, whereas under existing regulations, the agencies have only examined wetlands for adjacency to jurisdictional waters, under the draft rule, all "waters"—not just wetlands—would be considered jurisdictional if they are adjacent to another jurisdictional waterbody.

Other Waters. The EPA and USACE currently classify certain waterbodies as "other waters" for purposes of the jurisdictional inquiry. These "other waters" include intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds. The draft rule would eliminate this list. According to the agencies, "these 'other waters' are not jurisdictional as a single category" but may be jurisdictional if found, on a case-specific basis, that they have a significant nexus to waterbody categories (1)-(3). The draft rule would largely adopt key elements of the significant nexus inquiry from the *Rapanos* decision. A significant nexus analysis is described as an analysis based on either the particular water alone or based on the effect that the water "has in combination with other similarly situated waters in the region." To determine if the water has a significant nexus to other similarly situated waters, the agencies propose that waters would be jurisdictional if either: (i) they are located sufficiently close so they can be evaluated as a "single landscape unit" with regard to their effect on the chemical, physical, or biological integrity of a waterbody category (1)-(3); or (ii) they are located sufficiently close to a "water of the United States."

Isolated Wetlands. Under the current definition of "waters of the United States," "isolated wetlands" are typically not considered jurisdictional because they are not thought to be connected to other jurisdictional waterbodies and thus would not affect their chemical, physical, or biological integrity. The draft rule would alter this view, and will likely lead to at least some isolated wetlands becoming jurisdictional under a significant nexus analysis. Specifically, the proposed definition of "significant nexus" contemplates that "wetlands, either alone (i.e. isolated wetlands) or in combination with other similarly situated waters in the region" would fall within the scope of a jurisdictional analysis.

SAB'S SUPPORT FOR AGENCIES' CONNECTIVITY REPORT

In connection with the proposed rule, EPA has drafted a report on the connectivity of streams and wetlands to downstream waters. The draft report concludes that streams are chemically, physically, and biologically connected to, and exert a strong influence on, downstream waters, and that wetlands likewise influence hydrologically connected downstream waters. On July 29, EPA appointed an SAB panel to review and comment on the draft report. On December 16-18, the SAB panel met for the first time to publicly discuss the EPA report. In its public session, the panel broadly supported the conclusions reached in the EPA report regarding the connectivity of streams and wetlands to downstream waters. The panel review, which includes opportunities for public comment, will continue and culminate in a final report to EPA by approximately June 2014.

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact Brent Carson, Joseph Nelson, or any member of the firm's Natural Resources or Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.