

December 21, 2018

EPA AND THE ARMY CORPS OF ENGINEERS PROPOSE TO REDEFINE “WATERS OF THE UNITED STATES” AS REGULATED UNDER THE CLEAN WATER ACT

To Our Clients and Friends:

On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) announced that they will be publishing for public comment a proposed rule to define the scope of waters federally regulated under the federal Clean Water Act (CWA or the Act).[i] This proposal, if finalized, would significantly narrow the scope of waters federally regulated under the CWA, as compared to both the existing Clean Water Rule promulgated by the agencies in 2015 and previous agency guidances addressing the scope of jurisdictional waters.

Upon publication in the *Federal Register*, there will be a 60-day period for the submission of public comments on the proposal. In addition, the agencies have announced a public hearing on the proposal in Kansas City, MO on January 23, 2019.

Background

The broad objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In order to meet that objective, the CWA generally makes unlawful the discharge of any pollutant into "navigable waters," which is further defined in the Act to mean the "waters of the United States." *Id.* at 1362(7). This phrase, "waters of the United States," is further defined by regulation, and it is this regulatory definition, and related ones, that the agencies now propose to amend. *See* 33 CFR Section 328.3.[ii]

Three key Supreme Court decisions have interpreted the phrase "waters of the United States." *U.S. v. Bayview Homes*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. U.S.*, 547 U.S. 715 (2006). Notably, the Court in *Rapanos* issued five separate opinions, none commanding a majority of the Justices. Justice Scalia authored the plurality opinion, which held that the term "waters of the United States" "include[d] only those relatively permanent, standing or continuously flowing bodies of water. . . ." and "wetlands with a continuous surface connection" to a relatively permanent water. 547 U.S. at 739 and 742. Justice Kennedy, in a concurring opinion, took a different approach, and wrote that the applicable test was whether a water or wetland possessed a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. 547 U.S. at 759.

In 2015, EPA and the Corps issued a joint rulemaking referred to as the Clean Water Rule, in which they adopted the jurisdictional test espoused by Justice Kennedy. 80 *Fed.Reg.* 37054 (July 27, 2015). In

GIBSON DUNN

connection with this rule, the agencies conducted a peer-reviewed scientific report on hydrologic connectivity to assist in determining the scope of jurisdictional waters using the "significant nexus" test. The 2015 Clean Water Rule is currently subject to litigation in multiple district courts, and its effect is preliminarily enjoined in twenty-eight states leaving only twenty-two states in which it remains in effect.

Shortly after President Trump's inauguration, the President issued Executive Order 13778, directing the agencies to review the 2015 Clean Water Rule, and to issue a proposed rule rescinding or revising it in a manner consistent with Justice Scalia's plurality opinion test in *Rapanos*, as opposed to Justice Kennedy's "significant nexus" test. This proposed rule is consistent with that directive.

The Proposed Definition of "Waters of the United States"

In the current proposal, the agencies interpret the term "waters of the United States" to encompass:

- traditional navigable waters;
- tributaries that contribute perennial or intermittent flow to traditional navigable waters;
- certain ditches;
- certain lakes and ponds;
- impoundments of otherwise jurisdictional waters; and
- wetlands adjacent to other jurisdictional waters.

The proposal excludes, or otherwise limits, several categories of waters or wetlands, from the jurisdictional scope of the CWA, as compared to the 2015 Clean Water Rule. For example, tributaries (regardless of local names, such as creek, bayou, branch, brook, run, etc.) are jurisdictional only if they contribute perennial or intermittent flow to a traditional navigable water in a typical year either directly or indirectly through other jurisdictional waters. However, the proposal does not define tributaries to include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos and similar features, which may have a significant impact on waters predominantly situated in western States. The proposal also newly defines jurisdictional wetlands as being only those "adjacent" to certain other jurisdictional waters, meaning wetlands that "abut or have a direct hydrologic surface connection to other 'waters of the United States' in a typical year."

Implications and Next Steps

The definition of the phrase "waters of the United States" has broad implications for water quality, public health, and the scope of private party actions for which certain federal permits or approvals are required under the CWA.^[iii] The scope of jurisdictional waters as defined in this proposal also implicates possible actions required under other federal statutes. For example, because the EPA may issue federal discharge permits for certain discharges of pollutants into "waters of the United States," EPA's proposed

issuance of a permit may trigger consultation obligations under the federal Endangered Species Act, or environmental review procedures under the federal National Environmental Policy Act.

Once the proposal is formally published in the *Federal Register*, the public will have sixty days to submit comments. After review and consideration of any such comments, it is reasonable to expect the agencies to finalize a version of the proposed regulatory definition in 2019, and it is further anticipated that a final rule will be challenged in one or more district courts.

[i] The proposal signed on December 11, 2018 by the EPA Acting Administrator, Andrew Wheeler, and the Assistant Secretary of the Army for Civil Works, R.D. James is a pre-publication version. The agencies submitted it for publication in the *Federal Register*, which will constitute the official version once published.

[ii] The phrase "waters of the United States" is referenced in other provisions in the CWA and additional implementing regulations, and the proposed definition would similarly be applied in those contexts. For example, provisions in the CWA addressing the discharge of oil, the designation of hazardous substances, and the determination of reportable quantities of hazardous substances all contain references to "waters of the United States" which are affected by this proposal.

[iii] This proposal only defines the scope of "waters of the United States" under the CWA. States may define jurisdictional waters subject to state and local regulation differently, which may trigger non-federal permitting or other requirements.



This client alert was prepared by Avi Garbow, a Co-Chair of Gibson Dunn's Environmental Litigation and Mass Tort practice group.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding issues raised in the EPA's and Corps' proposed action to define the scope of waters regulated under the Clean Water Act. For additional information about the proposed regulatory change, or related litigation, please contact the Gibson Dunn lawyer with whom you usually work or the following leaders of the firm's Environmental Litigation and Mass Tort practice group:

*Avi S. Garbow (+1 202-955-8558, agarbow@gibsondunn.com)
Daniel W. Nelson (+1 202-887-3687, dnelson@gibsondunn.com)
Peter E. Seley (+1 202-887-3689, pseley@gibsondunn.com)*

© 2018 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.